



JANET T. MILLS  
GOVERNOR

6523  
STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

MEMORANDUM

To: Board of Environmental Protection

From: James R. Beyer, Director Eastern Maine Regional Office

Date: July 20, 2022 Board Meeting

Re: Appeals by Natural Resources Council of Maine, NextEra Energy Resources, LLC, and West Forks of the Department Order approving Central Maine Power Company's applications for the New England Clean Energy Connect project, #L-27625-26-A-N/ L-27625TG-B-N/ L-27625-2C-C-N/ L-27625-VP-E-N/ L-27625-IW-F-N; and

Appeal by Natural Resources Council of Maine of the Transfer Order approving partial transfer of the Department Order to NECEC Transmission, LLC, #L-27625-26-K-T

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Introduction. This is a consolidated appeal of three appeals of the Commissioner's decision approving Central Maine Power Company's (CMP) Site Location of Development Law and Natural Resources Protection Act permit to construct the New England Clean Energy Connect project (the project), and one appeal of the Commissioner's decision to grant a partial transfer of that underlying permit. Those who appealed the underlying permit decision are: the Natural Resources Council of Maine (NRCM), NextEra Energy Resources, LLC (NextEra), and a group of intervenors, West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrar, and Carrie Carpenter (collectively West Forks). All of these appellants were parties to the underlying licensing proceeding and participated in the public hearing.

Statutory and Regulatory References. The applicable statutes and rules governing the appeal of the permit issued to CMP are the Site Location of Development Law (Site Law), 38 M.R.S. §§ 481 through 489-E; the Natural Resources Protection Act (NRPA), 38 M.R.S. §§ 480-A through 480-JJ; Chapter 310, *Wetlands and Waterbodies Protection*; Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Uses*; Chapter 373, *Financial and Technical Capacity Standards of the Site Location of Development Act*; and Chapter 375, *No Adverse Environmental Effect Standard of the Site Location of Development Act*. Procedures governing appeals before the Board are found in *Rule Concerning the Processing of Applications and Other Administrative Matters*, Chapter 2, § 24.

The applicable rule governing the appeal of the Transfer Order is Chapter 2, § 21(C).

Project Location. See Attached

Memorandum to Board - Appeals of Department Order #L-27625-26-A-N/ L-27625TG-B-N/ L-27625-2C-C-N/ L-27625-VP-E-N/ L-27625-IW-F-N and Transfer Order #L-27625-26-K-T  
July 20, 2022

Procedural History. On September 27, 2017, CMP submitted Site Law and NRPA permit applications for the project. The Department accepted the applications on October 13, 2017. Following a 29-month review process and six days of public hearings, on May 11, 2020 the Commissioner issued the decision (# L-27625-26-A-N/ L-27625TG-B-N/ L-27625-2C-C-N/ L-27625-VP-E-N/ L-27625-IW-F-N) approving, with conditions, those applications (the Department Order). On June 8, 2020, NextEra and West Forks each filed appeals of the Department Order in Superior Court. On June 10, 2020, NRCM filed an appeal with the Board. The Superior Court consolidated the two judicial appeals and remanded them to the Board.

On September 25, 2020, CMP and NECEC Transmission LLC submitted an application for the partial transfer of the Site Law permit (#L-27625-26-K-T), which the Department accepted on October 6, 2020. On December 4, 2020, the Department approved that application (the Transfer Order). On January 4, 2021, NRCM appealed the Transfer Order. These appeals of the Department Order and appeal of the Transfer Order have been consolidated.

#### Issues Raised by the Appellants and Remedy Requested.

NRCM raises seven criteria or aspects of the project where it believes the Commissioner erred in the Department Order. NRCM argues:

1. The Board should have taken original jurisdiction,
2. The Licensees did not demonstrate sufficient title, right, or interest (TRI),
3. The impacts of the project on brook trout and brook trout habitat are unreasonable,
4. The compensation required in the Department Order for impacts to brook trout and brook trout habitat is inadequate,
5. The habitat fragmentation caused by the project and corresponding impacts to wildlife are unreasonable,
6. CMP failed to conduct an adequate alternatives analysis, and
7. The Commissioner erred in allowing evidence on greenhouse gas emissions only in writing and not as part of the public hearing.

With respect to its appeal of the Transfer Order, NRCM argues the Board should have taken original jurisdiction, the NECEC Transmission LLC does not have sufficient TRI, and that NECEC Transmission LLC has not demonstrated financial capacity for decommissioning.

In its appeal of the Department Order, NextEra argues the CMP failed to include an evaluation of the underground alternative, especially for Segment 1. NextEra also argues that the vegetation management required for Segment 1 is in violation of North American Electric Reliability Corporation (NERC) Standard FAC-003-4.

In their appeal of the Department Order, West Forks argues:

1. The forest fragmentation impacts of the project are unreasonable, even with the conditions required by the Department Order,

Memorandum to Board - Appeals of Department Order #L-27625-26-A-N/ L-27625TG-B-N/ L-27625-2C-C-N/ L-27625-VP-E-N/ L-27625-IW-F-N and Transfer Order #L-27625-26-K-T  
July 20, 2022

2. The Department Order improperly altered the project purpose and, in so doing, inappropriately considered the cost of the underground alternative as part of the alternatives analysis,
3. The Department did not consider the record evidence on forest fragmentation and the impacts to wildlife corridors and habitat,
4. There is a lack of evidence that tapering will minimize the visual impact of corridor,
5. There is insufficient evidence supporting mitigation of fragmentation impacts by conserving other land,
6. CMP failed to demonstrate sufficient TRI, and
7. There is no evidence supporting a feasible decommissioning plan or financial assurance of capacity to implement a decommissioning plan.

Each appeal also includes a request for a public hearing. NRCM request the Board allow the submission of supplemental evidence should it decide not to hold a public hearing and requests the Board deny the applications. West Forks request the Board require CMP produce a full visual impact assessment with leaf-off conditions, allow additional testimony on the 40,000 acre conservation condition, and the submission of a decommission plan.

Department Recommendation. Upon consideration of the arguments made in the appeals, the Department staff recommend the Board amend the Department Order to include several additional conditions related to vegetation management once the project construction is completed and decommissioning of the project. (Vegetation management is discussed in Section 10 of the Draft Board Order; decommissioning is discussed in Section 13.) The conditions concerning vegetation management will provide the Department with information to determine compliance with the various vegetation management requirements in the Department Order and ensure the Wildlife Areas function as intended. (See Conditions #2 - 8 in the Draft Board Order.) The condition concerning decommissioning adds an additional trigger for decommissioning if the contracts to supply electricity are terminated or if the project is partially constructed but not energized. (See Condition #9 in the Draft Board Order.) In sum, the Department staff recommend that the Board deny the appeals of the Department Order and affirm but amend the Commissioner's decision. Additionally, for the reasons discussed in Section 15 of the Draft Board Order, Department staff recommend that the Board deny the appeal of the Transfer Order and affirm the Commissioner's decision.

**Estimated Time for Agenda Item. 2 days**

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STATE OF MAINE

DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

PROPOSED BOARD ORDER

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY )  
NECEC TRANSMISSION LLC )  
See Appendix A for Location )  
NEW ENGLAND CLEAN )  
ENERGY CONNECT ) SITE LOCATION OF DEVELOPMENT ACT  
) NATURAL RESOURCES PROTECTION ACT  
APPEALS filed by )  
)  
NATURAL RESOURCES )  
COUNCIL OF MAINE )  
)  
NEXTERA ENERGY RESOURCES, LLC )  
)  
WEST FORKS PLANTATION, )  
TOWN OF CARATUNK, KENNEBEC )  
RIVER ANGLERS, MAINE GUIDE ) APPEALS  
SERVICE, HAWKS NEST LODGE, )  
EDWIN BUZZELL, KATHY BARKLEY, ) FINDINGS OF FACT AND ORDER  
KIM LYMAN, NOAH HALE, )  
ERIC SHERMAN, MATT WAGNER, )  
MIKE PILSBURY, MANDY FARRAR, AND) )  
CARRIE CARPENTER )  
)  
L-27625-26-F-Z )  
L-27625-TG-G-Z )  
L-27625-2C-H-Z )  
L-27625-VP-I-Z )  
L-27625-IW-J-Z )  
L-27625-26-AB-Z )  
APPEALS DENIED )

The Board of Environmental Protection (Board) has considered the appeals of the license decisions captioned above that were issued to Central Maine Power Company (CMP) and NECEC Transmission LLC (NECEC LLC).

The appellants are:

- Natural Resources Council of Maine (NRCM),
- NextEra Energy Resources, LLC (NextEra), and

- West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Edwin Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrar, and Carrie Carpenter (a group collectively referred to as West Forks).

These appeals are decided pursuant to the provisions of 38 M.R.S. §§ 480-A–480-JJ; 38 M.R.S. §§ 481-489-E; and the Department’s rules, including: Chapter 2, *Rule Concerning the Processing of Applications and Other Administrative Matters*; Chapter 310, *Wetlands and Waterbodies Protection*; Chapter 315, *Assessing and Mitigating Impacts to Existing Scenic and Aesthetic Resources*; Chapter 335, *Significant Habitat*, Chapter 373, *Financial and Technical Capacity Standards of the Site Location of Development Act*; and Chapter 375, *No Adverse Environmental Effect Standard of the Site Location of Development Act*.

The Board has considered the administrative record on appeal, including the supplemental evidence admitted into the record, and FINDS THE FOLLOWING FACTS:

## OVERVIEW

### 1. BACKGROUND

In Department Order # 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 (the Department Order or Order), dated May 11, 2020, the Commissioner of the Department approved an application submitted by CMP for the New England Clean Energy Connect (NECEC) project. This project consists of a 145-mile-long high voltage direct current (HVDC) transmission line from Beattie Township to Lewiston, a new converter station, a new substation, a new 345-kilovolt (kV) transmission line between the two, and upgrades to several existing transmission lines and substations. The approval was issued following a review process that lasted approximately two and a half years and included six days of public hearings. The project as approved, especially in the area where there is a new corridor, was significantly modified from the original proposal. A more complete project description is below in Section 6(A).

The Commissioner approved the partial transfer of the permit for the HVDC line and the converter station portions of the project from CMP to NECEC LLC (collectively Licensees) in Department Order # L-27625-26-K-T (the Transfer Order), dated December 4, 2020.

Both the Department Order and the Transfer Order are the subject of these consolidated appeals, as discussed below.

### 2. PROCEDURAL HISTORY

On June 8, 2020, the Department Order was appealed by two separate parties to two separate courts. NextEra appealed the Department Order to the Kennebec County Superior Court and West Forks appealed to the Somerset County Superior Court.

On June 10, 2020, NRCM filed an administrative appeal with the Board, requesting that the Board vacate the Department Order and exercise original jurisdiction over the license applications or, in the alternative, conduct a hearing on the appeal of the Department Order.

On August 11, 2020, in response to motions filed by the Department requesting the remand of the two judicial appeals to the Board, the Superior Court consolidated the NextEra and West Forks Rule 80C appeals and remanded the appeals to the Board to be considered alongside NRCM's administrative appeal. The Court directed the Board to provide NextEra and West Forks the opportunity to file with the Board more detailed written appeal statements of the arguments made in their judicial appeals.<sup>1</sup>

On September 25, 2020, NextEra, and West Forks each filed an appeal statement with the Board, and each requested a hearing.

On September 25, 2020, NECEC LLC submitted to the Department applications for partial transfer of the Department Order for the NECEC project. NECEC LLC included in its submission an application for partial transfer of the Site Location of Development (Site Law) permit that was issued as part of the Department Order, as well as a Permit by Rule notification form for partial transfer of the Natural Resources Protection Act (NRPA) permit that also was issued as part of the Department Order.

On October 7, 2020, NRCM requested by letter that the Board assume original jurisdiction over the transfer application, hold a public hearing, and consolidate the application for a partial transfer with the pending appeals of underlying Department Order. By letter dated October 27, 2020, the Board Chair declined the requests, explaining that the Board's rules do not provide for consolidation of these different types of proceedings.

On October 13, 2020, the Department accepted NECEC LLC's Permit by Rule notification for the transfer of the NRPA permit for the NECEC project. (The acceptance, which constitutes an approval decision of the Commissioner, was not appealed.)

On December 4, 2020, the Acting Commissioner issued the Transfer Order (# L-27625-26-K-T) approving the partial transfer of the Department Order related to the Site Law permit for the project.

On January 4, 2021, NRCM filed a request to vacate the December 4, 2020 Transfer Order and, in the alternative, appealed the Transfer Order to the Board. NRCM requested that the Board consolidate the appeal with the appeals of the Department Order and that the Board hold a hearing on the appeal.

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<sup>1</sup> After the Commissioner issued the Department Order and during the course of the pending appeals of this Order before the Board, NRCM and West Forks filed several requests for a stay of the Order with the Commissioner and Board. The requests for a stay were denied by the Commissioner by letters dated August 26, 2020, August 4, 2021, August 20, 2021, and Nov. 23, 2021, and by the Board Chair by letter dated January 19, 2021. NRCM also filed a request for stay with the Superior Court, which the court denied by order dated January 8, 2021.

On January 19, 2021, the Board Chair found that “[t]he Board’s authority to vacate a Commissioner licensing decision lies within the context of an appeal” and accepted NRCM’s January 4, 2021 filing as an appeal of the Transfer Order. The Board Chair consolidated NRCM’s appeal of the Transfer Order with the three appeals of the Department Order.

On February 18, 2021, CMP and NECEC LLC filed a response to NRCM’s appeal of the Transfer Order. On the same day, West Forks also filed a response to NRCM’s appeal of the Transfer Order.

On March 12, 2021, a number of entities, including the Licensees and Intervenors in the proceeding below, filed responses to the NRCM, NextEra, and West Forks appeals of the Department Order. Responses were filed by: CMP and NECEC LLC, jointly; Friends of the Boundary Mountains; the Maine State Chamber of Commerce, the Lewiston-Auburn Metro Chamber of Commerce, and the City of Lewiston, jointly; and the Industrial Energy Consumer Group.

Also, on March 12, 2021, West Forks filed a response to the NRCM and NextEra appeals and NRCM filed a response to the appeals by West Forks and NextEra. CMP and NECEC LLC objected to these two responses and, on September 30, 2021, the Chair found that while NRCM and West Forks may not re-argue or further support their own appeals, they are entitled to submit a response to the merits of each other’s appeals, and to provide a response to NextEra’s appeal.<sup>2</sup>

On November 23, 2021, based on a change of circumstances, the Commissioner issued a Decision and Order suspending the licenses issued pursuant to the Department Order (the Suspension Order). Pursuant to the terms of the Suspension Order, so long as the licenses are suspended all construction must stop. The suspension is to remain in place unless and until final disposition of the legal challenges in *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.* in favor of the Licensees. As of the date of this Board decision, the suspension remains in place.

The appeals of the Department Order are discussed in Sections 3 through 14 below. The appeal of the Transfer Order is discussed in Section 15 below.

### **APPEAL OF DEPARTMENT ORDER**

#### **3. BASES FOR APPEAL**

As discussed in more detail below, one or more appellants assert:

- A. Because CMP entered into a stipulation agreement as part of the Certificate of Public Convenience and Necessity proceeding before the Public Utilities Commission (PUC)

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<sup>2</sup> With respect to the record on appeal, by letters dated January 8, 2021, and February 12, 2021, the Board Chair ruled on proposed supplemental evidence contained in the appeals of the Department Order. A number of documents proposed as supplemental evidence were not admitted and certain statements made in the appeal documents were stricken. On September 30, 2021, the Board Chair ruled on objections to certain statements offered in the March 12, 2021 responses to the merits of the appeals and the Chair struck extra record statements from the responses.



which required CMP to partially transfer the project to NECEC LLC, the Department was barred from processing the application because CMP lacked sufficient title, right, or interest (TRI) in the property proposed for development. The Department also erred when it accepted the leases between CMP and the Bureau of Public Lands (BPL) as a showing of sufficient TRI. Department Rule Chapter 2.

- B. The Commissioner lacked authority to review the project because it meets at least three of the four criteria to be considered a project of statewide significance, and therefore the Board was required to make the original license decision. 38 M.R.S. § 341-D(2) and Department Rule Chapter 2.
- C. The permit requirement for tapered vegetation as mitigation for visual impacts is not supported by evidence in the record. NRPA Standards 38 M.R.S. § 480-D(1), Site Law Standards 38 M.R.S. § 484(3) and Department Rules, Chapters 315 and 375.
- D. The Commissioner erred in finding that the applicant conducted an adequate alternatives analysis. NRPA Standards 38 M.R.S. § 480-D(3), Site Law 38 M.R.S. § 487-A(4), and Department Rules, Chapters 310, 335, and 375.
- E. The Commissioner erred in finding that project would not unreasonably impact fish and wildlife habitat. NRPA Standard 38 M.R.S. § 480-D(3), Site Law Standard 38 M.R.S. § 484(3), and Department Rules, Chapters 310, 335, and 375.
- F. The proposed compensation, including measures imposed in the Conditions of Approval, does not adequately compensate for functions and values lost as a result of the project. NRPA Standards 38 M.R.S. § 480-D(3) and Department Rules, Chapters 310, 335, and 375.
- G. The Department Order is legally deficient because the vegetation management required by the Department Order conflicts with federally required safety standards.
- H. The Commissioner erred by disallowing testimony at the hearing and evidence on greenhouse gas emissions and failed to adequately consider greenhouse gas emissions.
- I. The decommissioning plan required by the Department Order contains financial capacity requirements that do not conform to standards set forth in 38 M.R.S. § 484(1) as interpreted by Department Rule, Chapter 373.

#### 4. REMEDIES REQUESTED

NRCM, NextEra, and West Forks all request that the Board hold a public hearing, allow supplemental evidence, and vacate the Department Order.

## 5. STANDING

The appellants were all Intervenors in the original licensing proceeding, and the Board finds they demonstrated in the proceeding below that they qualify as aggrieved persons, including for the purpose of this appeal, as defined in Chapter 2, § 1(B).

## 6. PROJECT DESCRIPTION AND ADMINISTRATIVE BACKGROUND

### A. Overview

The Department Order authorizes construction of a 145.3-mile-long, 320-kV HVDC transmission line from Beattie Township to Lewiston; a converter station on Merrill Road in Lewiston to convert the Direct Current (DC) electricity to Alternating Current (AC) electricity; a new substation on Fickett Road in Pownal; and a new 26.5-mile, 345-kV AC transmission line from the existing Coopers Mills Substation in Windsor to the existing Maine Yankee Substation in Wiscasset. The Order also authorizes the Licensees to rebuild several existing transmission lines and upgrade three substations. The HVDC portion of the transmission line will be placed on single steel poles that will average approximately 100 feet tall and will be spaced approximately 1,000 feet apart. The new 345-kV lines and the reconstructed 115-kV lines will be constructed on a variety of different structures, including 125-foot-tall steel structures, 80-foot-tall single pole structures, 75-foot-tall, wooden H-frames, and 45-foot-tall, wooden, single pole structures. The Licensees divided the project into five transmission line segments and construction or upgrades of substations.

Segment 1 is an approximately 53.1-mile-long, 320-kV DC transmission line that starts at the Maine/Quebec border in Beattie Township and continues to The Forks Plantation. During the course of the permit review process, CMP modified its original proposal to include: (a) tapered vegetation within the corridor near Rock Pond and Coburn Mountain, (b) full canopy height vegetation near Gold Brook, Mountain Brook, and the Upper Kennebec River, (c) 25- to 35-foot-tall vegetation managed for deer habitat in eight areas in the Upper Kennebec River Deer Wintering Area, and (d) 100-foot-wide riparian filter areas<sup>3</sup> on either side of all perennial streams in Segment 1.

On September 18, 2019, while the application was still pending before the Department, but after the record had been closed, CMP submitted a Petition to Reopen the Record to allow it to amend the pending application in response to certain concerns raised by the Intervenors. The Presiding Officer allowed the reopening and the amendment of the application. The amendment modified the route of a short section of the Segment 1 corridor in the area near Beattie Pond. This alternative, the Merrill Strip Alternative, initially was rejected by CMP due to the cost to obtain the land from the landowner. The Merrill Strip Alternative is approximately 0.4 miles shorter than the originally proposed route, reduced visual impacts from Beattie Pond, resulted in one less pole (also referred to as a transmission line structure or structure), reduced the wetland impact by

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<sup>3</sup> Department Order, Appendix C discusses riparian filter areas.

12,286 square feet, and eliminated impacts to one Significant Vernal Pool (SVP) and one stream that contains brook trout.<sup>4</sup>

Segment 2 extends from The Forks Plantation to the Wyman Substation in Moscow and is a 21.9-mile-long, 320-kV DC transmission line. This segment is co-located with the existing line that runs from Harris Dam to the Wyman Substation.

Segment 3 runs from the Wyman Substation in Moscow to the Merrill Road Converter Station in Lewiston. Construction of this converter station is authorized in the Order. This segment is 71.1 miles long and is co-located with transmission lines in an existing right of way (ROW). This segment also includes the rebuilding of 0.8 miles of 345-kV AC line outside the Larrabee Road Substation and constructing 1.2 miles of new 345-kV AC transmission line from the Merrill Road Converter Station to the Larrabee Road Substation. The utilized portion of the ROW will be widened by an average of 75 feet.

Segment 4 consists of: rebuilding 16.1 miles of 115-kV AC transmission line between the Larrabee Road Substation and the Surowiec Substation; rebuilding 9.3 miles of 115-kV AC transmission line between the Crowley's Substation and the Surowiec Substation; and constructing a new 345-kV AC transmission line from the Surowiec Substation to a substation on Fickett Road in Pownal. Segment 4 will not require any additional clearing.

Segment 5 consists of a 26.5-mile-long 345-kV AC transmission line from the existing Coopers Mills Substation in Windsor to the Maine Yankee Substation in Wiscasset within an existing corridor; partial rebuilding of 0.3 miles of 345-kV AC line near the Coopers Mills Substation; rebuilding a 0.8-mile section of 345-kV AC line near the Coopers Mills Substation; and rebuilding a 0.8-mile section of 115-kV AC line outside the Coopers Mills Substation. Segment 5 will not require any additional clearing.

The Merrill Road Converter Station will be a new facility and will convert DC electricity from Canada to AC electricity to be fed into the power grid. The converter station will be located immediately adjacent to the transmission corridor and, along with the access road, will occupy 13.4 acres of the site. The Fickett Road Substation will be constructed across Allen Road from the Surowiec Substation and will occupy 4.87 acres of the site. The site currently contains existing 345-kV and 115-kV transmission lines, which were previously permitted as part of the Maine Power Reliability Program. Additionally, there will be upgrades at the Coopers Mills, Crowley's, Larrabee Road, Maine Yankee, Surowiec, and the Raven Farm Substations.

Following issuance of the Department Order approving the project, the Licensees started construction of the project in January 2021. Construction stopped with issuance of the Suspension Order on November 23, 2021. During the period construction was underway, the Licensees completed most of the clearing on Segments 1, 2, 3, and 5; installed 92 structures on Segments 2 and 3; installed 38 structures on Segment 5; and constructed an access road, removed ledge, and placed aggregate at the Merrill Road Converter Station. No construction on Segment 4 or the substations has occurred.

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<sup>4</sup> The ROW obtained by CMP for the Merrill Strip Alternative is 150-foot wide. The remainder of the ROW within Segment 1 is 300-foot wide.

## B. Public Hearing

The Department accepted CMP's permit application for the NECEC project as complete for processing on October 13, 2017. On November 17, 2017, the Commissioner determined that a public hearing would be held on this project pursuant to Chapter 2, § 7(B). The Commissioner designated a Presiding Officer to conduct the hearing, but retained the ultimate decision-making authority.

On December 7, 2017, the Land Use Planning Commission (LUPC) voted to hold a public hearing related to its Certification process for the NECEC project. The LUPC and the Department Commissioner decided to hold a joint hearing in the interest of efficiency for public participation, the parties, and the two agencies.

The Department received 22 petitions for leave to intervene in the proceeding. Those granted intervenor status were consolidated into 10 groups, as follows:

Group 1: Friends of the Boundary Mountains, Maine Wilderness Guides Organization, and Old Canada Road National Scenic Byway. These intervenors were all opposed to the project and were intervenors for the Department proceeding only.

Group 2: West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Services, Peter Dostie (Hawk's Nest Lodge), and Mike Pilsbury. These intervenors were opposed to the project. With the exception of West Forks Plantation, all of the members of this group were intervenors in both the Department and Commission proceedings. West Forks Plantation was an intervenor in the Department proceeding only.

Group 3: International Energy Consumer Group; City of Lewiston; International Brotherhood of Electrical Workers; Maine Chamber of Commerce; and Lewiston/Auburn Chamber of Commerce. These intervenors were in support of the project. With the exception of the Lewiston/Auburn Chamber of Commerce, all of the members of this group were intervenors in both the Department and LUPC proceedings. The Lewiston/Auburn Chamber of Commerce was an intervenor in the LUPC proceeding only.

Group 4: NRCM, Appalachian Mountain Club, and Trout Unlimited. These intervenors were opposed to the project and were intervenors in both the Department and LUPC proceedings.

Group 5: Brookfield and Wagner Forest Management, Ltd. These intervenors were neither for nor against the project. Both were intervenors in the Department's proceeding, but Wagner was also an intervenor in the LUPC's proceeding.

Group 6: The Nature Conservancy (TNC) and Conservation Law Foundation. These intervenors were neither for nor against the project and were Department-only intervenors.

Group 7: Western Mountains and Rivers Corporation was in support of the project and was an intervenor in both the Department and LUPC proceedings.

Group 8: NextEra. NextEra was opposed to the project and was an intervenor in both the Department and LUPC proceedings.

Group 9: Office of the Public Advocate. The Office of the Public Advocate was neither for nor against the project, was granted intervenor status in the Department proceeding, and was granted status as a governmental entity in the LUPC proceeding.

Group 10: Edwin Buzzell, and “Local Residents and Recreational Users,” which included eleven individuals named in the LUPC’s Second Procedural Order. These intervenors were opposed to the project. Edwin Buzzell was an intervenor in both the Department and LUPC proceedings. The remaining individuals were intervenors in the LUPC proceeding only.

After consideration of input from the parties, the Department’s Second Procedural Order identified the licensing criteria that would be topics to be covered at the hearing. The remaining criteria would be addressed through written evidence and argument. The hearing topics included:

- A. Scenic Character and Existing Uses – 38 M.R.S. § 480-D(1), 38 M.R.S. § 484(3), Department Rules Chapters 315 and 375, § 14: The applicant must demonstrate that the proposed activity would not unreasonably interfere with the scenic character, or existing scenic, aesthetic, recreational, or navigational uses, and that the development fits harmoniously into the natural environment.
  - i. Visual Impact Assessment and Scenic/Aesthetic Uses
  - ii. Buffering for Visual Impacts
  - iii. Recreational and Navigational Uses
  
- B. Wildlife Habitat and Fisheries – 38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), and Department Rules Chapters 335 and 375, § 15: The applicant must demonstrate that the proposed activity would not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, or threatened or endangered plant habitat.
  - i. Endangered Species – Roaring Brook mayfly, Northern Spring Salamanders
  - ii. Brook Trout Habitat
  - iii. Habitat Fragmentation
  - iv. Buffer Strips around Coldwater Fisheries
  
- C. Alternatives Analysis – 38 M.R.S. § 480-D (1) & (3), 38 M.R.S. § 484(3), Department Rules Chapters 310, 315, and 335: The applicant must demonstrate that the proposed project would not unreasonably impact “protected natural resources” as defined by the NRPA, considering practicable alternatives to the proposal that would be less damaging to the environment. Topics for the hearing also included evidence addressing 38 M.R.S. § 480-D (8): The applicant must demonstrate that, with regard to the crossing of the outstanding river segment, no reasonable alternative exists that would have less adverse impact upon the recreational and natural features of the river segment.

- D. Compensation and Mitigation – 38 M.R.S. § 480-D, 38 M.R.S. § 484(3), Department Rules Chapters 310 and 375, § 15. The applicant must demonstrate compensation for impacts to certain resources.
- i. Coldwater Fisheries Habitats
  - ii. Outstanding River Segments
  - iii. Wetlands

On January 24, 2019, Intervenor Group 4 filed a written request to include greenhouse gas emissions as a hearing topic and Intervenor Groups 2 and 10 filed a letter in support of that request. In the February 5, 2019 Third Procedural Order, the Presiding Officer determined that greenhouse gas emissions would not be included as a hearing topic, however, intervenors and the general public would be allowed to submit written evidence and argument, including comments, data, and reports, on this topic until the close of the record.

The Department conducted five days of public hearing from April 1 through April 5, 2019, with the LUPC joining the hearing on April 2, 2019. Two evening sessions were devoted to receiving testimony from the general public. The testimony from both the parties and the public generally focused on the impacts of Segment 1. Many of the witnesses in opposition to the project testified that the applicant failed to meet the licensing criteria regarding impacts to scenic character, recreational impacts, impacts to brook trout habitat, and impacts to water quality from herbicide applications. Witnesses in support of the project testified that the proposed project meets the licensing criteria because it would not cause an unreasonable impact and the applicant has proposed adequate compensation for the wildlife, wetland and scenic impacts that will occur.

The hearing continued for a sixth day on May 9, 2019, with testimony largely focused on habitat fragmentation and the alternatives analysis, including the underground alternative. The Commissioner attended.

At the close of the hearing on May 9, 2019, the Presiding Officer allowed the record to remain open for specific evidence items to be entered into the record by May 17, 2019, and responses from parties to that evidence until May 24, 2019. On May 17, 2019, CMP provided cost estimates for several underground alternatives, a summary of structure height changes necessary to maintain 35-foot-tall vegetation along with a visual impact assessment, and typical cross section of waterbody with 35-foot-tall vegetation. The record also remained open for written comments from the general public until May 20, 2019, and then the parties' responses to those written comments from the general public until May 27, 2019.

On June 27, 2019, the Department and LUPC conducted separate site visits to areas of interest, some suggested by the parties, pertaining to the project.

On October 3, 2019, at CMP's request, the Presiding Officers issued the 15<sup>th</sup> Procedural Order reopening the record to allow CMP to amend its application to propose the Merrill Strip Alternative route around Beattie Pond. On October 7, 2019, the Presiding Officers issued the 16<sup>th</sup> Procedural Order outlining the process by which the agencies would gather evidence on the Merrill Strip Alternative and providing a deadline for the parties and the public to submit comments on the application amendment.

## 7. TITLE, RIGHT, OR INTEREST

Pursuant to Chapter 2, § 11(D), an applicant must “demonstrate to the Department’s satisfaction sufficient title, right, or interest in all of the property that is proposed for development or use.” This can be in the form of deeds, leases, or easements, among other forms. Sufficient TRI must be maintained throughout the entire application processing period. When TRI is based on a lease of the property, “[t]he lease . . . must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required.” Chapter 2, § 11(D)(2). While a demonstration of sufficient TRI is required for the Department to process an application, TRI is not a substantive licensing criterion.

Along with its application, CMP submitted deeds or leases for the land to be developed or used for the entire project. Included in the submissions was the December 2014 Transmission Line Lease (2014 Lease) between CMP and the State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of Public Lands for approximately 33 acres of public reserved land located in West Forks Plantation and Johnson Mountain Township. The 2014 Lease specifies that the land is leased for a 300-foot wide by 0.9-mile-long transmission line corridor. The 2014 Lease has a term of 25 years.

NRCM and West Forks argue in their appeals that the 2014 Lease did not provide CMP with sufficient title, right or interest. The Friends of the Boundary Mountains submitted a response supporting NRCM’s and West Forks’ arguments on TRI. In their response to the appeals, CMP and NECEC LLC argued that the Department was correct in its determination that CMP made a sufficient showing of TRI.

### A. Legality of 2014 Lease

NRCM argues that the 2014 Lease is illegal and therefore was insufficient evidence to demonstrate TRI in the public reserved lands that are the subject of this lease. First, NRCM argues that BPL issued the lease in 2014 before issuance of the Certificate of Public Convenience (CPCN) by the Maine PUC in 2019. According to NRCM, the 2014 Lease therefore violates 35-A M.R.S. § 3132(13), which requires that the State not sell or lease any interest in public land to any person for the purpose of constructing a transmission line (subject to the section) unless the person has received a Certificate of Public Convenience and Necessity from the PUC. Second, NRCM contends that construction of the NECEC would substantially alter the State public reserved land subject to the 2014 Lease and Article IX, Section 23 of the Maine Constitution requires that any substantial alteration of public reserved lands receive a 2/3 vote of approval by the Legislature, but BPL did not obtain such a vote. NRCM further argues that, at a minimum, the Commissioner should have conditioned the Department Order on CMP gaining legislative approval of the 2014 Lease.

The Board rejects the argument that the Department was required undertake an in-depth legal analysis of the validity of the 2014 Lease before finding sufficient TRI under Chapter 2, § 11(D). Determining the legality of the lease in light of the legal challenges to it made by NRCM in its

appeals of the decisions made by BPL, which are the same arguments raised by NRCM in this appeal, is the province of, first BPL, and then the courts. In accepting the lease as a sufficient demonstration of TRI and processing the application, the Department accorded to its sister agency the presumption that its decision was valid. The Board takes official notice of the Superior Court decision in *Black v. Cutko*, BCDWB-CV-2020-29 (Bus. & Consumer Ct., Aug. 10, 2021, Murphy, J.) (litigation challenging 2014 and 2020 leases) (among other things, reversing the Director of the Bureau of Parks and Lands' decision to enter into the 2020 Lease<sup>5</sup>), a decision which is currently on appeal to the Maine Law Court. The eventual outcome of the appeal is unknown, but in any event, even if a lease (or other property interest) may be invalidated as a result of litigation after a permit is issued, this does not affect whether CMP demonstrated to the Department's satisfaction sufficient TRI in the property to warrant processing the application. The Board finds that the Commissioner appropriately and reasonably accepted the decision of another State agency to enter into the 2014 Lease, and the evidence of the fully executed lease, consistent with Chapter 2, § 11(D)(2), which identifies provision of a lease as an acceptable means of demonstrating TRI, was adequate to show sufficient TRI for the processing of the application in that portion of the proposed corridor on public reserved lands.

#### B. Lease Term Duration

Additionally, NRCM argues, in its "Memorandum in Support of Appeals by NextEra and Groups 2 and 10" (dated March 12, 2021), that the 25-year term of the 2014 Lease was not of sufficient duration to be found to be sufficient TRI for this project pursuant to the requirements of Chapter 2, § 11(D)(2). NRCM contends that an adequate lease should be for a term of over 40 years to be sufficient for TRI for construction, reasonable use, and decommissioning of the project. NRCM did not raise this argument in its appeal. This argument appears only in NRCM's response to support the appeals of NextEra and West Forks, neither of which raised this issue. The argument, therefore, was not brought before the Board in a timely manner, in an appeal, and is waived.

Even if the argument was not waived, the Board rejects the contention that the 25-year lease was not of an adequate length for the Commissioner to find sufficient TRI. Pursuant to 12 M.R.S. § 1852(4), leases of public reserved land for utilities and rights-of-way, including for electric power transmission, may not legally exceed a term of 25 years. The Board, however, is aware of no statute that prohibits renewal of such leases, whether on the same or different terms.

Regarding NRCM's argument that some of the Transmission Service Agreements have terms up to 40 years, evidence in the record shows that CMP's obligations are to deliver energy to the Massachusetts utilities for 20 years. The Power Purchase Agreements between H.Q. Energy Services (U.S.) Inc. and the Massachusetts utilities are all for 20 years, and the three corresponding Transmission Service Agreements between CMP and the Massachusetts utilities are for 20 years. The remaining four Transmission Service Agreements that extend up to 40 years are between CMP and H.Q. Energy Services (U.S.) Inc., and the Massachusetts utilities are not parties. These Transmission Service Agreements are for available capacity on the transmission line, not for power that CMP is contractually obligated to deliver to Massachusetts.

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<sup>5</sup> On June 23, 2020, the Bureau of Parks and Lands and CMP entered into a revised lease which terminated and superseded the 2014 lease. Both the 2014 Lease and the 2020 Lease allows the assignment of the lease with the consent of the lessor, the Bureau of Parks and Lands, and "which consent shall not be unreasonably withheld."



While the life of the NECEC project may extend beyond the 20-year contractual commitments with the Massachusetts utilities, the 25-year term of the 2014 Lease was of sufficient duration for a showing of TRI given the terms of the contractual commitments with the Massachusetts utilities and given that nothing precludes lease renewal. While decommissioning required in the Department Order could possibly occur more than 25 years in the future, nothing prevents the State from renewing a lease to allow for decommissioning.

C. Stipulation for Transfer to NECEC LLC

Finally, NRCM and West Forks argue that the 2019 Stipulation entered in the Maine Public Utilities Commission (PUC) proceedings required that CMP transfer the NECEC to another entity (NECEC LLC) that is not a subsidiary of CMP and, therefore, CMP no longer had TRI in the project.

The Board finds that the requirement in the Stipulation, dated February 21, 2019 (admitted into evidence by ruling of the Board Chair dated February 12, 2021), for future transfer of part of the project to NECEC LLC did not remove TRI from CMP as the applicant. The Commissioner properly evaluated CMP's TRI because CMP was not required to transfer the property or property rights involved until at a point after the permit decision was made. Thus, CMP's TRI was not affected at the time the application was being processed. The issue of NECEC LLC's TRI would not arise until a transfer application was submitted to the Department pursuant to Chapter 2, § 21(C)(1) on September 25, 2020. (Appeal of the Transfer Order, including a claim associated with TRI, is addressed in Section 15, below.)

In sum, based on the findings and evidence described above, the Board finds there is sufficient evidence, including the 2014 Lease, in the administrative record to support the Commissioner's finding that CMP demonstrated sufficient TRI throughout the application processing period.

8. ORIGINAL JURISDICTION

A. Arguments of Parties

As one of the bases of their appeals, NRCM and West Forks argue that the Department Order should be vacated because the Board was required to exercise original jurisdiction over the license applications and make the decision on the applications in the first instance. NRCM contends that the Commissioner lacked authority to review the project because the project meets the criteria for "a project of statewide significance" in 38 M.R.S. § 341-D (2) and Chapter 2, § 17(C), and therefore the Board should have decided the applications. NRCM points to the statute language, in 38 M.R.S. § 341-D(2), stating that the Board "shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance." According to NRCM, use of the word "shall" here means that only the Board has jurisdiction to review the applications for this project and argues that the statute does not provide the Board or Commissioner with discretion. NRCM also points to the language in 38 M.R.S. § 344(2-A) that provides "the [C]ommissioner shall decide as expeditiously as possible if an application meets 3 of the 4 criteria set forth in section 341-D, subsection 2 and shall request that the [B]oard assume jurisdiction of that application." NRCM contends that the NECEC project

meets all four standards for a “project of statewide significance” and that the Commissioner was required to refer the project to the Board.

West Forks, in its response to the appeals, argues that the Board should review whether the Commissioner should have requested that the Board assume original jurisdiction over the NECEC applications.

In their response to the appeals, the Licensees contend that NRCM waived its argument that the Board should have taken jurisdiction over the NECEC applications because NRCM did not raise this issue until more than two and a half years after the deadline in Chapter 2, § 17(A) for a person to request that the Board assume original jurisdiction. The Licensees assert that if the Board were to vacate the Department Order and take original jurisdiction at this time, that would result in significant prejudice to the Licensees and other parties who participated in the permit proceedings. Further, the Licensees assert that NRCM explicitly requested that the Commissioner hold a hearing on the applications, in a Petition for a Public Hearing dated November 2, 2017. The Licensees argue that 38 M.R.S. § 341-D(2) “does not require the Board to make determinations that every project is or is not of statewide significance, nor does it establish that the Board is the only entity authorized to consider the permit applications, as NRCM claims.” The Licensees argue that the Board is required to assume jurisdiction in only two instances, neither of which occurred here: 1) when both the Commissioner and the applicant request Board jurisdiction, or 2) if the Board makes a finding that at least three of the four criteria are met following referral to the Board with the recommendation of the Commissioner or at the request of an interested person. Otherwise, the Licensees contend, “the Board need not assume jurisdiction over a project of statewide significance, though it may in its own discretion decide to exercise jurisdiction.” Finally, they argue that the Board may not now assume jurisdiction over the applications because the project was not of statewide significance at the outset of the license proceeding and, in any event, the project still does not meet three of the four factors for original Board jurisdiction.

The Maine State Chamber of Commerce, the Lewiston-Auburn Metro Chamber of Commerce, and the City of Lewiston assert that the respective roles of the Commissioner and the Board is not actually a jurisdiction question but is a question of which arm of the Department had the authority to decide the applications. These intervenors also argue in their response to the appeals that the issue of whether the Board was required to decide these applications in the first instance has been waived by NRCM, due to the timing of raising the issue and NRCM’s explicit request that the Commissioner hold the hearing. These intervenors note that the Superior Court found that this claim was waived.

#### B. Board Analysis and Findings

Upon review of the arguments made by the participants in these appeals, the applicable statute and the regulation, and the Court’s remand decision, the Board finds that the original jurisdiction issue raised by NRCM is waived. Chapter 2, § 17(A) provides that “[a]ny person may request that the Board assume jurisdiction over an application by submitting the request to the Department in writing no later than 20 days after the application is accepted as complete for processing.” The record reflects that no such request was made during that 20-day period.

Similarly, no party ever raised the issue in the two and a half years the applications were pending. NRCM and West Forks did not raise the jurisdiction issue until after the Commissioner issued the decision. The Superior Court, in its decision on a request by NRCM for a stay of the permit, found that due to the failure to request Board jurisdiction during the required 20-day period after the applications were filed, or at any time during the Commissioner's processing of the applications, this issue is waived, and that it would be prejudicial to allow it to be raised at this time.<sup>6</sup>

Even if the issue was not waived, in a proceeding where neither the Commissioner nor any party requests the Board to take jurisdiction, the Board has discretion as to whether to assume jurisdiction: it is not required to do so. The applicable statute provides that “[e]xcept as otherwise provided in this subsection, the [B]oard shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance” but it further states “[t]he [B]oard may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection have been met.” 38 M.R.S. § 341-D(2). The Board interprets these sections of the statute together, to mean that, when a matter has not been referred to it, the Board may of its own accord choose to consider whether to take jurisdiction over an application, but it is not mandatory. Chapter 2, § 17(B) also interprets the statute to give the Board discretion when no request or referral is made, saying: “The Board may assume jurisdiction over any application on its own initiative if it finds that at least 3 of the 4 criteria in section 17(C) are met.” Neither the statute nor the rule requires the Board to consider the issue of jurisdiction in the absence of a request or a referral. The Board's authority is discretionary, and the Board never exercised its discretion to consider taking jurisdiction of the NECEC applications and never determined whether the project met at least three of the four criteria for a project of statewide significance. Given that the Board never decided to take original jurisdiction, the Board finds that the Commissioner had authority to decide the applications.

Finally, NRCM, as part of its argument for the Board to vacate the Commissioner's decision and take original jurisdiction, seeks a *de novo* review by the Board. The Board notes that in an appeal, “[t]he [B]oard is not bound by the [C]ommissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the [C]ommissioner.” 38 M.R.S. § 341-D(4). The Board's review on an appeal, therefore, is a *de novo* review.

## 9. SCENIC CHARACTER

The Site Law, 38 M.R.S. § 484(3), and the NRPA, 38 M.R.S. § 480-D(1), both have standards pertaining to scenic impacts that must be satisfied in order to obtain a permit. Pursuant to Section 484(3), an applicant must make adequate provision for fitting the proposed project into the existing natural environment and the development may not adversely affect scenic character in the surrounding area. Pursuant to Section 480-D(1), an applicant must demonstrate that the proposed project will not unreasonably interfere with scenic or aesthetic uses of protected natural resources.

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<sup>6</sup> *NextEra Energy Resources, LLC v. Maine DEP, KEN-AP-20-27 & West Forks v. Maine, DEP, SOM-AP-20-04* (Jan. 8, 2021, Murphy, J.).

In the Order, the Department determined the NECEC project would satisfy the visual impact standards in both Site Law and NRPA, provided CMP took specified steps to mitigate the scenic impacts, including through planting and maintenance of roadside buffers, using shorter poles adjacent to Moxie Pond, maintaining a minimum vegetation height of 35 feet in one area adjacent to Moxie Stream, using non-specular conductors within several viewsheds, and tapering the vegetation along the corridor within the viewshed of Coburn Mountain and Rock Pond. Tapering is a form of vegetation management along the transmission line corridor where increasingly taller vegetation is allowed to grow as the distance from the wire zone increases. Along Segment 1 where tapering is required, the transmission line includes two conductors running parallel to each other and separated by 24 feet. The wire zone is the 54-foot-wide area that runs along the center of the 150-wide corridor and includes the 24-foot-wide area that runs along the center of the corridor (under and between the conductors), plus 15 feet on the outside of each conductor. (15 ft. + 24 ft. + 15 ft. = 54 ft.) In the wire zone, scrub-shrub vegetation with a height of up to 10 feet will be allowed to regenerate after initial clearing for construction. Outside the wire zone vegetation height will increase as the distance from the wire zone increases. In the first 16 feet (the first taper) vegetation up to 15 feet tall will be maintained; in the second 16 feet (the second taper) vegetation up to 25 feet will be retained; and in the third 16 feet (the third taper) vegetation up to 35 feet will be retained. The wire zone, plus the three tapers on each side of the corridor, cover the entire, 150-foot width of the corridor. (Tapering is more fully described in Department Order, Appendix C.)

NRCM did not appeal the Department's conclusions with respect to the visual impact of the project. West Forks did appeal this portion of the Order, focusing solely on the required tapering of vegetation near Coburn Mountain and Rock Pond, arguing that the tapering requirement "is not supported by the evidence and does not comply with Site Law." (West Forks Appeal at 12.) They contend that tapering will result in an increase in pole heights and request that the Board require a new, full visual impact assessment (VIA) in leaf-off conditions in order to evaluate tapering as a means of mitigating the visual impact of the project.

Although West Forks does not allege that the Department erred in its application of the NRPA visual impact standards, because of the close relationship between the visual impact standards within the Site Law and NRPA, the Board addresses West Forks' claim that tapering is unsupported by the record as a means for mitigating visual impacts when the project is viewed from Coburn Mountain and Rock Pond under both statutes.

#### A. Board Analysis and Findings

##### (1) Regulatory Framework

The Site Law, 38 M.R.S. § 484(3), and NRPA, 38 M.R.S. § 480-D(1), both have standards pertaining to scenic impacts that must be satisfied in order to obtain a permit. The Site Law prohibits development that will "adversely affect" scenic character, while NRPA prohibits activity that will "unreasonably interfere" with existing scenic and aesthetic uses. The criteria of the two laws reflect a similar intent in that they both allow development or activity that will result in a visual impact, but when this impact is too great the proposed project may fail to satisfy the review criteria. This is reflected in the corresponding NRPA and Site Law rules, both of

which specify that an applicant's burden is to demonstrate that there would be no "unreasonable adverse" impacts or effects and the Board's assessment is on that basis. Ch. 315, §§ 1 & 4 and Ch. 375, § 14(B) & (C).

When reviewing scenic impacts under NRPA and evaluating whether an impact is unreasonable, the Board is guided in part by Chapter 315, § 9. This section provides:

The Department's determination of impact is based on the following visual elements of the landscape:

- A. Landscape compatibility, which is a function of the sub-elements of color, form, line, and texture. Compatibility is determined by whether the proposed activity differs significantly from its existing surroundings and the context from which they are viewed such that it becomes an unreasonable adverse impact on the visual quality of a protected natural resource as viewed from a scenic resource;
- B. Scale contrast, which is determined by the size and scope of the proposed activity given its specific location within the viewshed of a scenic resource; and
- C. Spatial dominance, which is the degree to which an activity dominates the whole landscape composition or dominates landform, water, or sky backdrop as viewed from a scenic resource.

In making a determination within the context of this rule, the Department considers the type, area, and intransience of an activity related to a scenic resource that will be affected by the activity, the significance of the scenic resource, and the degree to which the use or viewer expectations of a scenic resource will be altered, including alteration beyond the physical boundaries of the activity. In addition to the scenic resource, the Department also considers the functions and values of the protected natural resource, any proposed mitigation, practicable alternatives to the proposed activity that will have less visual impact, and cumulative effects of frequent minor alterations on the scenic resource. An application may be denied if the activity will have an unreasonable impact on the visual quality of protected natural resources as viewed from a scenic resource even if the activity has no practicable alternative and the applicant has minimized the proposed alteration and its impacts as much as possible through mitigation. An 'unreasonable impact' means that the standards of the NRPA, 38 M.R.S. § 480-D, will not be met.

The Site Law similarly requires the Board to evaluate whether a scenic impact is unreasonable. The corresponding Site Law rules instruct the Board to consider all relevant evidence as part of its evaluation, including evidence on whether:

- (1) The design of the proposed development takes into account the scenic character of the surrounding area.
- (2) A development which is not in keeping with the surrounding scenic character will be located, designed, and landscaped to minimize its visual impact to the fullest extent possible.
- (3) Structures will be designed and landscaped to minimize their visual impact on the surrounding area.  
 . . . .
- (4) The plans for the proposed development provide for the preservation of existing elements of the development site which contribute to the maintenance of scenic character.

Chapter 375, § 14(B).

The Site Law rules do not contain a section similar to NRPA's Chapter 315, § 9, which identifies more specific elements to be considered that guide the Board in determining whether a scenic impact is unreasonable. Finding the guiding concepts in Chapter 315, § 9 instructive to the Board's charge under Site Law in evaluating visual impacts, the Board considers the elements for evaluating visual impacts set out in Chapter 315, § 9, as well as the more general language of Chapter 375, § 14(B), when evaluating the reasonableness of impacts to the scenic character of the surrounding area under Site Law.

As noted above, while similar, NRPA and Site Law are not identical. The Board's evaluation of visual impacts under NRPA focuses on impacts to existing scenic uses. As specifically set forth in Chapter 315, scenic impacts under NRPA are evaluated from those public resources and public lands used by the public, defined as "scenic resources." Ch. 315, §§ 5(H) and 10.

The Board's review of visual impacts under Site Law is broader. Under Site Law, the Department must consider whether an applicant has made adequate provision for fitting the proposed project harmoniously into the natural environment and whether the proposed project would adversely affect scenic character in the municipality or in neighboring municipalities. For the purpose of this Order, where the Board finds the project will not have an unreasonable adverse effect on scenic uses or character it finds the scenic impact standards in both NRPA and Site Law, where applicable, are satisfied.

## (2) Evaluation of Scenic Impacts

In evaluating the scenic impacts of the proposed project under the Site Law, 38 M.R.S. § 484(3), and NRPA, 38 M.R.S. § 480-D(1), the Board considered all relevant evidence in the record, including the application and supplementary filings by CMP, the information gathered during the public hearing, the written comments received, the comments of the independent scenic consultant, and the evidence gathered directly by Department staff. The Board first reviews the

evidence and Department findings with regard to the two specific viewsheds named in West Forks' appeal, Coburn Mountain and Rock Pond.

a. Coburn Mountain

The project corridor and numerous structures will be visible from the summit of Coburn Mountain, which is accessible via a multi-use trail maintained by the Bureau of Parks and Lands. The public comments and testimony received by the Department during its review of the application demonstrate that Coburn Mountain is a popular destination for snowmobilers. The summit area is not completely undeveloped, as a small building, some communication infrastructure, and a solar array are located and visible on the top of the mountain. From the summit, the corridor will be visible in the midground looking toward the west side of the mountain at distances of 1.2 to 3.0 miles and in the background (4+ miles) to the southeast. During the application review process, to address concerns and minimize the visual impact of the project, CMP proposed tapering the vegetation in the corridor within the viewshed of Coburn Mountain and using non-specular conductors in this same area. To show the effect of tapering, CMP submitted photosimulations of the project from the top of Coburn Mountain, both with and without this form of vegetation management, including during wintertime, leaf-off conditions.

The Board has reviewed the snow-cover, leaf-off photosimulations from the top of Coburn Mountain that depict the project, as initially proposed and without tapering, as well as the photosimulations that show the project with non-specular conductors and a tapered corridor. The most visible part of the project from the mountain is the cleared corridor, as opposed to the poles and conductors. The Board finds that tapering helps mitigate the visual impact of the project. Tapering softens the edge of the corridor and makes the corridor less visible overall. The addition of tapered vegetation reduces the spatial dominance of the project and improves its compatibility within the landscape. The tapered corridor will not be dominant and will be visible as one of a few, non-natural features of the landscape seen from the summit of Coburn Mountain along with, for example, an existing land management road.

The Board finds that tapering significantly reduces the visual impact on the view from Coburn Mountain and that tapered vegetation will minimize scenic impacts to an extent that they would not be unreasonable given the surroundings, and finds that the project will not have an unreasonable impact on the scenic uses or character of Coburn Mountain, provided the Licensees comply with the tapering and the use of non-specular conductor requirements in the Department Order.

b. Rock Pond

Rock Pond is a 124-acre pond with a boat launch, one seasonal camp, and approximately six campsites on the northern end of the pond. The pond is rated as a significant scenic resource by the Maine Wildlands Lake Assessment. Project structures and the corridor will be visible approximately 3,100 feet away from the pond. A portion of the corridor visible from Rock Pond crosses Gold Brook, which contains Roaring Brook mayflies.

At the request of the Maine Department of Inland Fisheries and Wildlife (MDIFW), the Department required the several poles near Gold Brook to be taller allow for full canopy vegetation within 250 feet of the brook. This will increase the visibility of those structures from Rock Pond. To minimize the visual impacts overall, CMP proposed to taper vegetation in this portion of the corridor and to use non-specular conductors in the areas where they would be visible from Rock Pond. CMP prepared photosimulations depicting the views from Rock Pond with taller poles and tapered vegetation as part of the permitting process. These photosimulations did not include wintertime, leaf-off conditions due to limited recreational use of Rock Pond in the winter. CMP made this decision following discussions with Department staff in which it was noted that Rock Pond is closed to ice fishing and the ITS<sup>7</sup> snowmobile trails is not located on or near the pond.

A portion of the project that is particularly visible from Rock Pond is the area where the corridor is perpendicular to the view from the pond, when an individual is looking northwest and up the corridor. CMP revised its original proposal to incorporate tapered vegetation along this section of the corridor, narrowing its width and softening its edge. CMP also revised its proposal to incorporate the use non-specular conductors in this area where the project is visible from the pond. Both forms of mitigation are required as conditions of the Order. Up to six structures would be visible from the Pond, with three of these being taller to allow for full canopy vegetation at the Gold Brook crossing. From most viewpoints on the pond all of the visible poles would be seen against a forested backdrop due to the surrounding topography. Vegetation would screen visibility of the project from the campsites on the northwestern end of the pond. The Department staff, the Commissioner, an Assistant Attorney General, and the Presiding Officer visited Rock Pond during their June 29, 2019 site visit. During that visit the existing conditions were compared with the photosimulations contained in the record.

The Board reviewed the visual simulations of this portion of the project in the VIA, both with and without tapering, when viewed from Rock Pond, and considered other relevant record information. As noted in the Department Order, in contrast to Coburn Mountain, the Department received very few comments from users of Rock Pond or individuals concerned about the view from the pond. The photosimulations show that tapering minimizes the visibility of the corridor from Rock Pond, making it much less prominent and improving compatibility with the landscape. The structures that would be visible, depending on an individual's vantage point, would be seen against a forested backdrop from most locations, reducing their visual prominence in the landscape. Based on the VIA and evidence concerning potential impacts to uses of Rock Pond, the Board finds the project will not have an unreasonable adverse effect on scenic uses or character of Rock Pond, provided the Licensees comply with the tapering and the use of non-specular conductor requirements in the Department Order.

c. Complete Record

Looking beyond Coburn Mountain and Rock Pond, West Forks argues that tapered vegetation as mitigation of visual impacts is not supported by evidence in record and asks for the record to be reopened to allow for submission of more information. West Forks states that "in requiring tapering, pole heights will be increased. At a minimum, a full VIA with narrowed corridor,

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<sup>7</sup> Interconnected Trail System



tapered vegetation in full leaf-off conditions would begin to show how this approach might impact the scenic resources and should be required as additional evidence.” (West Forks Appeal at 12.)

The Board finds the premise of West Forks’ argument is faulty. Tapering does not require the installation of taller poles.<sup>8</sup> Rather, tapering allows for the maximum amount of vegetation at the tallest height to be retained within the corridor without having to use taller poles. Where the corridor itself, as opposed to just the poles and conductors, is a visible project feature, tapering narrows the cleared portion of the corridor. As a result, tapering will reduce visual impacts, not increase them.

The Board finds that the benefit of tapering as a visual impact mitigation technique is evident from the evidence in the record, including the photosimulations. Where the Department Order required tapering in two locations specifically to minimize scenic impacts, Coburn Mountain and Rock Pond the Board finds that the visual simulations of both locations show the scenic benefit of tapering. With respect to West Forks’ contention that wintertime, leaf-off visual simulations should be required, the Board agrees that where scenic resources are actively used in the winter months and tapering is proposed in order to minimize visual impacts, visual simulations showing the views during the winter months are important. Such wintertime visual simulations aid the Board in its evaluation of scenic impacts. These visual simulations were prepared here. CMP provided wintertime, leaf-off visual simulations from the top of Coburn Mountain, a vantage point frequently visited by snowmobilers. The applicant reasonably did not prepare wintertime visual simulations for Rock Pond, which is closed to ice fishing and not located near the ITS trail network. Given that tapering does not require installation of taller poles, and that it significantly

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<sup>8</sup> The Department Order requires multiple types of vegetation management; they are discussed throughout the Order and collectively in Appendix C of the Department Order. In addition to tapering, the Department Order requires three other types of vegetation management along Segment 1: full canopy height vegetation, vegetation with a 35-foot minimum height, and deer travel corridors. Full canopy height vegetation requires the installation of taller poles (i.e., taller than the typical poles used along Segment 1); maintenance of vegetation with a 35-foot minimum height requires taller poles in some locations. Where these two forms of vegetation management are required, they are within locations designated as Wildlife Areas in the Department Order. (Department Order, Appendix C (identifying the location of Wildlife Areas).) Tapering is not required where full canopy height vegetation and vegetation with a minimum 35-foot height must be maintained. West Forks focuses solely on tapering and the impact on scenic character of this form vegetation management. West Forks does not present any arguments regarding the installation of taller poles in Wildlife Areas and the potential scenic impacts associated with the conditions requiring full canopy height vegetation or vegetation with a 35-foot minimum height in these areas. Any such argument is therefore waived. Nevertheless, whether taller poles would be needed to allow for the maintenance of taller vegetation within Wildlife Areas (e.g., full canopy height vegetation and vegetation with a 35-foot minimum height) was evaluated by the Commissioner, as was the potential visual impact. (See, e.g., Department Order at 41.) The Board notes that the record includes the VIA prepared by CMP, which includes visual simulations prepared in advance of the public hearing showing taller poles associated with full canopy vegetation at the Gold Brook crossing. Additionally, at the hearing, in response to questions from the Department staff, CMP agreed that vegetation at specified stream crossings could be maintained at taller heights and CMP submitted information in response that included necessary taller pole heights at some individual crossings. CMP also identified where taller poles would be needed in the vicinity of priority areas for habitat connectivity that were identified by The Nature Conservancy. These areas were incorporated, in part, into the Wildlife Areas designated in the Department Order and the analysis of scenic impacts in the Department Order reflects consideration of taller poles in Wildlife Areas. The Board finds that the Commissioner reasonably and appropriately considered the relationship between the required vegetation management and pole height when evaluating the impacts of the project. No additional record evidence is needed.

reduces visual impacts, the Board finds creation of additional visual simulations showing a tapered corridor is unnecessary. The record is fully developed to allow the evaluation of the scenic impacts of the project. West Forks' request to reopen the record for the purpose of submission of more information on tapering and scenic impacts is denied.

## 10. NATURAL RESOURCE IMPACTS

The Site Law, 38 M.R.S. § 484(3), requires applicants to demonstrate that a project will not adversely affect any natural resources. Chapter 375, § 15 of the Board's rules interprets this provision of the Site Law in part as protecting wildlife and fisheries by maintaining suitable and sufficient habitat, including travel lanes between areas of available habitat – particularly for species susceptible to disruption and interference of lifecycles by proposed alterations and activities. In addition, 38 M.R.S. § 487-A(4) requires the Board to consider whether any alternatives to the proposed location and character of the transmission line may lessen its impact without unreasonably increasing its cost.

NRPA, 38 M.R.S. § 480-D(3), requires applicants to demonstrate that a project will not unreasonably harm significant wildlife habitat; freshwater wetland plant habitat; threatened or endangered plant habitat; aquatic or adjacent upland habitat; travel corridors; freshwater, estuarine, or marine fisheries; or other aquatic life. The *Wetland and Waterbodies Protection Rules*, Chapter 310, and the *Significant Wildlife Habitat Rules*, Chapter 335, interpret and elaborate on the NRPA criteria for obtaining a permit. These rules guide the Board in its determination of whether a project's impacts would be unreasonable. Each application for a NRPA permit that involves a wetland alteration or an alteration to a river, stream, or brook; Inland Waterfowl and Wading Bird Habitat (IWWH); a Significant Vernal Pool;<sup>9</sup> or Tidal Waterfowl and Wading Bird Habitat, must provide an analysis of alternatives, which is a part of the Board's analysis of whether a proposed project's environmental impacts are unreasonable.

With respect to the evaluation of natural resource impacts under the Site Law and NRPA, the appellants argue that the Licensees' alternative analysis was inadequate. Additionally, NRCM and West Forks argue that the wildlife and wildlife habitat impacts resulting from the project would be unreasonable. More specifically, NRCM states the impact of the project on brook trout and brook trout habitat would be unreasonable, and both NRCM and West Forks argue that habitat fragmentation caused by the project would be unreasonable.

### A. Alternatives Analysis

The Board reviewed CMP's September 27, 2017 alternatives analysis for the proposed project, which was completed by Burns and McDonnell, along with the other evidence in the record and the testimony from the public hearing, including evidence pertaining to the undergrounding alternative.

#### (1) Evidence of Alternatives Considered by Licensees

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<sup>9</sup> As used in this Board order, unless context clearly indicates otherwise, the term Significant Vernal Pool or SVP is used to refer to significant vernal pool habitat, which includes the significant vernal pool depression and that portion of the critical terrestrial habitat within 250 feet of the depression. See Ch. 335, § 9.

CMP states that the purpose of the project is to deliver up to 1,200 MW of clean energy generation from Quebec to the New England control area via an HVDC transmission line. CMP evaluated the No-Action alternative but determined that it would not meet its project goals.

CMP provided evidence as follows describing its evaluation of five potential transmission corridor routes at the landscape scale as part of its initial analysis. The alternative evaluation process included a list of assessment criteria for priorities. The evaluation sought to avoid or minimize the following (in order of importance): conserved lands; undeveloped right-of-way; amount of clearing required; number of stream crossings; transmission line length; wetland impacts based on National Wetland Inventory mapping; Deer Wintering Area (DWA) impacts; IWWH impacts; public water supplies impacted; sand and gravel aquifers impacted; and number of parcels crossed.

Alternative Route 1 was based on a similar project CMP proposed in the late 1980's. At that time, CMP had acquired title, right, or interest in a corridor that ran from western Maine to Lewiston and was 119.3 miles long. However, the options that CMP previously held that would have enabled it to acquire much of that ROW have expired. Additionally, portions of the area are now subject to conservation easements. A new crossing of the Appalachian Trail (AT), where no transmission line currently crosses the trail, also would be required. CMP concluded the existence of these conservation easements makes acquiring new ROW easements along this route nearly impossible. AT crossing rights also would be difficult to obtain and a new crossing of the AT would be less desirable than the proposed co-located crossing under the Preferred Alternative.

When compared to the Preferred Alternative, this Alternative Route 1 would have resulted in: crossing two more conserved parcels with an increase in the impacts on conserved land of 233.3 acres; an increase of 39.6 miles of undeveloped ROW; an increase in the amount of cleared area of 111 acres; a decrease of 27 stream crossings; a decrease of 25 wetland crossings, but an increase of 42 acres of wetland impact; the same number of DWA crossings, but an increase of 27 acres of impact; a reduction of 3 IWWH crossings, but a 0.4 acre increase in impact.

Alternative Route 2 would cross into Maine in Beattie Township and follow the proposed route for several miles, then turn south until it reached the existing Kibby Wind Farm generator lead line. The corridor would parallel the Kibby Wind Farm generator lead line to the Bigelow Substation in the Town of Carrabassett Valley. From the Bigelow Substation, Alternative Route 2 would proceed east to the Wyman Hydro Substation in Moscow and continue to Lewiston in the same corridor as is proposed. This route would cross the AT near the Wyman/Carrabassett Valley town line. A crossing of the AT in this area by a utility corridor does not presently exist. The U.S. Department of Interior refused to grant the Kibby Wind Farm generator lead line the right to cross the AT, either overhead or below ground, in this same general area. CMP concluded it was unlikely it could obtain an easement for this portion of the project, making this alternative not practicable. Alternative Route 2 would be 138.5 miles long. When compared to the Preferred Alternative, this route would have resulted in: crossing three more conserved parcels with an increase in the impacts on conserved land of 11.2 acres; a decrease of 36.2 miles of undeveloped ROW; a decrease in the amount of cleared area of 153 acres; an increase of 8

stream crossings; an increase of 20 wetland crossings, with an increase of 37 acres of wetland impact; the same number of DWA crossings, but a decrease of 0.3 acres of impact; the same number of IWWH crossings, but a 6.2-acre decrease of impact.

Along the Preferred Alternative Route, CMP examined two alternative locations and horizontal directional drilling (HDD) for the crossing of the Upper Kennebec River. The two alternative locations considered for the crossing of the Upper Kennebec River consisted of one at Harris Station (referred to as the Brookfield Alternative, or the third route alternative), and one just below Harris Station, (referred to as the CMP Land Alternative, or the fourth route alternative). These alternatives would have resulted in an extra 14.5 miles and 13.3 miles of transmission line construction, respectively. The Brookfield Alternative would have required Brookfield to agree to reopen its Federal Energy Regulatory Commission license for its hydroelectric dam to allow the additional transmission line within the project boundary. Both the Brookfield Alternative and the CMP Land Alternative would require additional ROW easements within the Moosehead Region Conservation Easement.

The fifth alternative considered by CMP involved running the transmission line under the Upper Kennebec River using HDD technology. CMP initially stated this alternative was too expensive and potentially not technically feasible. However, following requests by the intervenors and members of the public to avoid an overhead crossing of the river to reduce scenic impacts, and the Department's expression of concerns with the overhead crossing, CMP further examined locating the transmission line under the Upper Kennebec River. CMP subsequently proposed running the transmission line underground in this location as part of its Preferred Alternative.

The Preferred Alternative described more fully in Section 6(A), does not contain the least amount of new corridor clearing; however, CMP concluded in its analysis that the Preferred Alternative is the shortest practicable route from the Canadian Border to an existing transmission line corridor. CMP states that in siting the project on the Preferred Alternative, it chose a route that would avoid crossing conserved lands or ridgelines and would avoid natural resources and scenic resources to the greatest practical extent.

CMP's initial alternatives analysis did not include examination of locating the transmission line underground, except for the proposed underground crossing of the Upper Kennebec River described above. A more widespread underground alternative, however, was examined through written and oral hearing testimony. This includes the feasibility of locating the line underground, in general, as well as underground along the Spencer Road or Route 201. The hearing testimony and Board's consideration of the underground alternative is summarized below in the following subsections.

Finally, during the application review process CMP also proposed modifying the original preferred route with the Merrill Strip Alternative to address scenic impact concerns. This alternative is a slight modification of the original preferred route. It is approximately 0.4 miles shorter, eliminates impacts to one SVP (0.02-acre reduction) and one stream crossing, and reduces the wetland impacts by 32,037 square feet. CMP stated that this route was initially ruled out because the landowner was asking 50 times the market value for the land. Ultimately, CMP and this landowner reached an agreement and CMP obtained an easement for approximately 20

acres of land to enable it to propose using the Merrill Strip Alternative as part of its Preferred Alternative. This strip is 1.0 mile long and 150 feet wide.

In addition to its landscape scale analysis of possible routes, CMP submitted evidence describing its site-specific means to minimize impacts. These included proposing to use 100-foot-tall, single, steel poles that can be placed farther apart than typical H-Frame structures, site-specific adjustments to structure locations, use and location of temporary roads, and substation design. The proposed use of taller structures reduces the number of poles that need to be placed, the amount of temporary construction road that would need to be created, and the number of poles located in wetlands. Other measures CMP proposed to minimize impacts included implementation of CMP's Environmental Guidelines, which include erosion and sedimentation control measures, pre-construction wildlife surveys, time of year restrictions on certain construction activities, and the use of third-party inspectors.

(2) Public Hearing Evidence and Comments on Alternatives Analysis

a. CMP Testimony and Evidence on Alternatives

In its application, supporting documents, and witnesses' pre-filed and oral testimony for the first segment of the public hearing, CMP provided evidence on its methods to avoid and minimize the impacts from the project. This evidence described the evaluation of the alternative routes described above, as well as the efforts involved in siting the line and the structures once a general location was chosen. On April 1, 2019, CMP's witnesses provided oral testimony on its alternatives analysis. The witnesses' written direct testimony for this first day of the hearing did not substantially address the feasibility of locating the transmission line, or sections of the line, such as all or part of Segment 1, underground.

In response to the pre-filed direct testimony of witnesses for Intervenor Groups 2, 6, and 8 highlighting the absence of evidence from CMP on the option to bury the line (the underground alternative), CMP provided pre-filed rebuttal testimony on the issue, including from new witnesses. Following this pre-filed rebuttal testimony, discussion at the first day of the hearing, and further pre-filed sur-rebuttal and supplemental testimony, which was filed prior to the May 9, 2019 hearing, the underground alternative was a focus of the second segment of that hearing.

On May 9, CMP's witnesses Justin Tribbet, Justin Bardwell, Thorn Dickinson, and Kenneth Freye provided testimony on the underground alternative for Segment 1 and the entire corridor, as well as along Route 201 and Spencer Road. These CMP witnesses provided testimony concerning the constructability of an underground line, the feasibility of burying the line along the Preferred Alternative corridor, along Route 201, and along the Spencer Road, and the cost of different underground alternatives. For example, Bardwell testified that for each overhead conductor two underground cables would be needed, meaning that for the two overhead conductors proposed, four underground cables would be needed. Bardwell testified that a spare underground cable also would be required, bringing the total number of cables to five. He explained that while other proposed projects with a similar voltage involved fewer underground cables, this was because these other projects did not have the same power transfer capacity. The power transfer capacity of the NECEC project required the additional cables. Bardwell provided

an overview of the construction process, including trenching and other techniques for underground installation, and described the need to splice together cable sections approximately every 2,200 feet, and the necessary use of concrete enclosures to protect the splices. He also testified to the environmental impacts of underground construction. Tribbet and Bardwell both testified to the cost of different underground alternatives. They estimated, for example, that locating Segment 1 underground in the Preferred Alternative corridor would result in a total project cost of \$1.6 billion, adding approximately \$640 million to the overall cost of the NECEC project, or roughly an increase of 67 percent. Tribbet also addressed other transmission line projects with undergrounding technology, noting that each involved project-specific considerations. He listed projects such as Connect New York, Northern Pass, TDI Vermont, and Vermont Greenline and testified that none of these projects had demonstrated economic feasibility or secured a long-term transmission service agreement as of the date of his testimony.

CMP witness Kenneth Freye testified that at the time CMP was evaluating route alternatives it discussed options with the landowner of Spencer Road, Plum Creek Maine Timberlands, LLC. Plum Creek was opposed to having a transmission line along its road. Freye also testified that locating the line underground along Route 201 was not practicable for several reasons, principally because the Maine Department of Transportation would not allow the underground transmission line within the travel way of the road.<sup>10</sup> He testified that the remainder of the Department of Transportation right-of-way (to either side of the paved road) was not wide enough to accommodate an underground alternative. As a result, running the line underground along Route 201 would require acquiring land rights from residential, recreational, and small commercial landowners, which Freye testified likely would prove difficult.

#### b. Intervenor Testimony and Evidence on Alternatives

Intervenor Group 1 witnesses testified that a similar project in Vermont has been permitted that could provide the power for the Massachusetts request for proposal, that the Vermont project would have no impacts in Maine, and therefore, Intervenor Group 1 argued, the no action alternative is practicable. Friends of the Boundary Mountains also made this argument in its letter supporting NRCM's appeal.

Witnesses for Intervenor Groups 2, 4, and 10 argued that CMP failed to meet its burden by not adequately evaluating the underground alternative and that the project should be located either under Spencer Road or adjacent to Route 201.

Intervenor Group 8 witness Christopher Russo also testified concerning the undergrounding alternative. He testified that HVDC lines of the length proposed by CMP are located underground or underwater in the 13 of 14 instances worldwide. Russo also reiterated the point other intervenors made that the Vermont route and the Northern Pass route were proposed to be located at least partially underground.

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<sup>10</sup> Bardwell stated in his pre-filed supplemental testimony that splice vaults, which would be a required component for underground construction, are prohibited within the travel lanes by Maine Department of Transportation rule, 17-229 C.M.R. Ch. 210, § 10(5), Pt. D.

Intervenor Group 6 witnesses also argued the lack of an analysis of the underground alternative was a flaw in the CMP application.

Intervenor Group 3 witness Gil Paquette testified that locating the transmission line underground was not a practicable alternative. Among the factors he discussed in support of his overall conclusion were cost, cable splicing and associated vaults, and the need for thermal sand. With regard to thermal sand Paquette testified that in his experience the need for, logistics concerning, and cost of thermal sand is the single most overlooked aspect of undergrounding an HVDC transmission line. He cited his experience with a project where the need for thermal sand was not appreciated until late in the planning process and that based on his familiarity with the geology in western Maine it is highly likely the majority of Segment 1 would require thermal sand to prevent the cables from overheating causing a fault.

c. Public Testimony and Comments on the Alternatives

Members of the public submitted written comments and testified at the hearing on CMP's alternatives analysis and the choice of the proposed route. Several members of the public opposed to the project testified that an underground alternative would have less visual impact, be safer, and require a narrower cleared corridor. Many interested persons testified that they believed the line should be buried under Spencer Road or Route 201. One person in favor of the project testified that undergrounding would be too costly and, therefore, is not a practicable alternative.

d. Department Staff Questions on Underground Alternative

During the sixth day of public hearings, Department staff stated that they had conducted their own research into placing the lines underground and had questions on this topic for the witnesses with expertise on the topic. Staff stated that some published reports seem to indicate that some HVDC lines could be placed in a trench one and half feet wide and four feet deep and asked the witnesses about that technique. When questioned on this alternative, Intervenor Group 3 witness Paquette and CMP witness Bardwell testified that due to the amount of power transfer capacity required for this project, that technique is not possible for the proposed project.

(3) Summary of Department Findings and Conclusion in the Order

The evaluation of the reasonableness of the natural resource impacts of the NECEC project must include a review of the evidence presented by CMP on alternatives and any other evidence of alternatives that is in the record. Chapters 310 and 335 require an applicant to submit an analysis of whether there is a practicable alternative to the project that would be less damaging to the environment and this analysis is considered in the assessment of the reasonableness of any impacts.

The Commissioner determined the basic methodology CMP used in its analysis of alternative routes was sound. CMP's evaluation of alternative routes began with evaluating alternatives at a landscape scale and used a list of factors to assist with comparison. The Commissioner found that the factors used by CMP at the site selection stage of the project served as reasonable

proxies for likely environmental impacts, as well as the practicability of a project. For example, the Commissioner noted in the Department Order that the National Wetland Inventory data are not accurate enough to use at the permitting phase but are appropriate for a prospective developer to use when selecting between alternative sites or routes and attempting to minimize wetland impacts. The Commissioner found that consideration of the location of conserved lands was reasonable and appropriate for several reasons. The Commissioner noted, conserved lands often are conserved because of their environmental value and are more likely to be areas used by the public for recreational purposes. Additionally, locating a corridor within conserved lands may not be legally possible depending on the nature of the conservation. The Commissioner found that the length of undeveloped right-of-way also was a valuable site selection factor. While a shorter corridor could contain more significant natural resources than a longer corridor, the length of corridor to be cleared was a reasonable proxy for environmental impact, especially when considered in conjunction with other environmental screening factors (e.g., presence of IWWH and DWAs), as was done by CMP. In sum, the Commissioner found the factors considered in the alternative analysis were appropriate and sufficient in number and scope.

With respect to specific alternative routes, the Commissioner found in the Department Order that Alternative Route 1 was not a less environmentally damaging alternative in light of the added length of undeveloped right-of-way, extent of conservation lands impacts, and new Appalachian Trail crossing. The route also did not appear practicable given the easement areas it would have to cross, parcel count, and AT crossing rights that would be needed. The Commissioner found that Alternative Route 2 was slightly shorter than the Preferred Alternative and would involve considerably less new right-of-way, and that the identified resource impacts within Alternative Route 2 and the Preferred Alternative were comparable. However, the new AT crossing and challenge and cost of navigating through or around the Bigelow Preserve did not make Alternative Route 2 a practicable alternative. The Commissioner also found that neither the Brookfield Alternative nor the CMP Land Alternative was a less environmentally damaging practicable alternative in light of having to run the corridor through an area subject to a conservation easement that does not allow the project development, the added new right-of way needed, and environmental impacts when compared to running the transmission line under the Upper Kennebec River. The Commissioner determined that CMP appropriately modified its proposal during the course of the permitting process to reduce impacts by using HDD technology to locate the line under the Upper Kennebec River and shifting the location of the corridor in the vicinity of Beattie Pond to run along the Merrill Strip Alternative.

In the Department Order, the Commissioner found that within the corridor and project area for the Preferred Alternative, on the site-specific scale, CMP sited structures, including buildings and equipment for the substations and the poles for the transmission line, outside of protected natural resources and valuable habitat to the extent practicable. In addition, the Commissioner found that CMP's special design accommodations proposed for individual resources in specific locations and proposed utilization of construction best management practices would minimize impacts to resources adjacent to the structures and roads being built. The Order notes the example in Greene (Segment 3), where CMP proposed to rebuild two existing lines and redesign and relocate a 1.5-mile portion of the proposed transmission line to avoid tree clearing and the associated impacts to nearby whorled pogonia, a rare plant occurrence in Maine (and a federally listed rare plant). The Order also points to minimization of impacts in Appleton Twp. and



Johnson Mountain Twp. (both in Segment 1), where CMP proposed taller poles at the crossings of Gold Brook and Mountain Brook to allow for taller vegetation to help conserve Roaring Brook mayflies and Northern Spring Salamanders. In Parlin Pond Twp. (in Segment 1) maintenance of 10- to 15-foot-tall spruce/fir within the corridor was proposed to protect Rusty Black Bird habitat. The Commissioner also found CMP had minimized impacts to other rare plant habitats.

With respect to undergrounding portions of Segment 1 in addition to the Upper Kennebec River crossing, the Commissioner found that consideration of the underground alternative was both a relevant and important component of an evaluation of the project. The Order notes that originally this alternative was not meaningfully addressed by CMP in its application materials, but as part of the application review and public hearing process, CMP subsequently submitted testimony and exhibits on the underground alternative in response to evidence submitted and arguments made by intervenors. Upon evaluating the evidence, the Commissioner found that typical underground construction would result in greater environmental impacts than the proposed overhead alternative. The Commissioner noted the considerable logistical challenges of underground construction and concluded that when the environmental impacts of undergrounding is considered along-side the logistical challenges, locating Segment 1 (or the entire project) underground within the corridor would not be a less environmentally damaging practicable alternative. The Commissioner also concluded that colocation of an underground transmission line along Route 201 or the Spencer Road would reduce some environmental impacts, but neither was practicable, in part because of the infeasibility of acquiring the legal right to run the transmission line in either location and the associated cost.

The Commissioner determined that the selected above ground alternative was the least environmental damaging practicable alternative and that no further project modification or conditions regarding the transmission line's location, character, width, or appearance, beyond what was required in the Department Order, were warranted under 38 M.R.S. § 487-A(4) or otherwise, to lessen the transmission line's impact.

#### (4) Appeal Issues Concerning Alternatives

##### a. Summary of Arguments Presented by Appellants

All three appellants challenge the sufficiency of CMP's alternatives analysis. NRCM and NextEra argue that in its application CMP did not address locating the transmission line underground and that the lack of consideration of this option in CMP's application requires denial of the project.

On the substance of the issue of undergrounding as an alternative, all three appellants argue that running the transmission line underground is a practical alternative, or at least a potential alternative that was not adequately explored by CMP. NRCM argues the alternatives analysis done by CMP does not meet the requirements of Chapters 310, 315, or 335 of the Department's Rules. NRCM contends that CMP "never looked at" alternatives along disturbed corridors such as the Spencer Road or Route 201 (NRCM appeal at 29), and that building the line underground would be financially feasible because the additional cost could be absorbed by CMP's

contingency funds. NRCM notes that the Northern Pass route should be considered as an example of a feasible underground line as it was initially selected as the winning bid in the Massachusetts RFP Process.

NextEra's argument stems from the requirement in 38 M.R.S. § 487-A(4) and Chapter 310 of the Department Rules that interpret NRPA. It argues that the Department Order is based on insufficient evidence and inadequately addresses alternative locations of the line as required by the Site Law. NextEra argues the Department Order fails to adequately address alternatives in accordance with Site Law, Section 487-A(4). In their appeal, NextEra states that CMP only made conclusory assertions in their post hearing brief that the project met this standard and there is no evidence in the record to support it. West Forks argues that if the Commissioner had not considered cost, then undergrounding all or portions of Segment 1 becomes practicable. They contend that Maine ratepayers will not bear any cost of the project and therefore additional costs for undergrounding should not be considered. NextEra further argues that the alternatives analysis provided by CMP, and the Department Order's discussion of the alternatives, did not address the relative impacts of the underground alternatives to protected natural resources as required under NRPA.

West Forks contends the Commissioner improperly altered the project purpose and mis-applied the Chapter 310, § 3(R) definition of "practicable alternative" by including the consideration of cost in the evaluation. West Forks contends that given that the purpose of the project as stated by CMP includes the goal to provide power at the lowest cost to ratepayers and that, due to CMP's fixed cost bid, no additional costs of the project would be passed on to the ratepayers, the Commissioner inappropriately considered the cost of alternatives when evaluating whether an alternative was practicable.

b. The Licensees' Response

The Licensees, in their response to the appeals, state that CMP was not obliged to analyze alternatives "that are too remote, speculative, or impractical to pass the threshold test of reasonableness." (Licensees Response at 44.) They contend that it was obvious that undergrounding the Project would not be practicable and for that reason CMP did not initially include it as an alternative. They argue that ultimately the underground alternative was thoroughly considered during the licensing process. In terms of the cost and the practicability of undergrounding, the Licensees argue that had CMP included the cost of undergrounding the entirety of Segment 1 in its bid in response to the Massachusetts request for proposals, the project never would have been selected; the cost would have been too high and the purpose of the project defeated. The Licensees point to evidence in the record they contend supports their arguments that undergrounding any of Segment 1, beyond the HDD installation at the Kennebec River, is not practicable, and argue that the evidence demonstrates constructing the project overhead is the only practicable alternative.

c. Other Responses to the Appeals

Friends of the Boundary Mountains asserts, in its response in support of the appellants, that the Commissioner erred in concluding the no-build alternative was not a practicable alternative. In

its response in support of the appellants, Friends of the Boundary Mountains raises the argument that the project purpose is to supply power to Massachusetts, that an already permitted project in Vermont could serve that purpose, and that therefore, the NECEC project is unnecessary and not building the project is a practicable alternative.<sup>11</sup>

(5) Board Analysis, Findings, and Conclusions

Review of the project under both NRPA and the Site Law includes consideration of possible alternatives. Under NRPA, the Board's rules interpret the statute as requiring an analysis of whether there is a practicable alternative to a project that would be less damaging to the environment, an important factor in the Board's assessment of the reasonableness of the impacts of the project in light of the statutory standards in Section 480-D. Ch. 310, § 5(A); Ch. 335, § 3(A). "Practicable" is defined as: "Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project." Ch. 310, § 3(R); Ch. 335, § 2(D).

Under the Site Law, with respect to transmission lines like the NECEC, consideration of alternatives is required in the statute, specifically 38 M.R.S. § 487-A(4). This section provides in relevant part:

The [D]epartment shall receive evidence regarding the location, character and impact on the environment of the proposed transmission line or pipeline. In addition to finding that the [licensing criteria] of [the Site Law] have been met, the [D]epartment, in the case of the transmission line or pipeline, shall consider whether any proposed alternatives to the proposed location and character of the transmission line or pipeline may lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost. The [D]epartment may approve or disapprove all or portions of the proposed transmission line or pipeline and shall make such orders regarding its location, character, width, and appearance as will lessen its impact on the environment, having regard for any increased costs to the applicant.

a. Underground Alternative

A primary focus of the appeals is on the underground alternative.<sup>12</sup> As explained in the Department Order and evident from review of the record, CMP did not address in its application

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<sup>11</sup> FBM did not appeal the Department Order. Instead, it elected to participate in the present appeal through the filing of a response to the appeals filed. This issue raised by Friends of the Boundary Mountains was not raised in the appeals filed and a new issue may not be introduced in the form of a response. Therefore, it is unnecessary for the Board to address this issue. Nevertheless, the Board notes this issue was raised in the underlying permitting matter and addressed by the Commissioner, who determined it was inappropriate to evaluate a Vermont-approved project in that state as an alternative to the NECEC project in Maine because the Vermont project did not meet CMP's project needs. The Commissioner declined to interpret an alternatives analysis as requiring an assessment of whether third party commercial competitors in other states may be able to fulfill the stated project purpose by some other means. The Board concurs with the Commissioner's determination.

<sup>12</sup> The underground alternative generally refers to running Segment 1 or the entire transmission line underground, as well as possible alternative underground routes, principally along Route 201 or the Spencer Road. The underground

the possibility of running the transmission line, either in its entirety or just Segment 1, underground. CMP argues locating the transmission line underground is so obviously unviable that there was no reason to discuss this in its application. The record shows some transmission lines elsewhere in the world are run underground and a short portion of the Licensees' line, where it would cross the Kennebec River, is permitted to be underground, as well. Evaluation of whether running other portions of the project underground is practicable, along with consideration of the potential associated environmental impacts, are important components of the overall review of the project and evaluation of whether it meets the permitting standards set in NRPA and Site Law.

The Board finds that CMP should have included evidence pertaining to the possibility of an underground alternative in its original application as part of its alternatives analysis; however, the initial absence of such evidence is not grounds for denying the NRPA and Site Law applications. The statutes and rules governing the processing of applications provide that the acceptance of an application as complete for review is not a determination that the information submitted is sufficient and does not preclude the Department from requesting additional information during the processing of the application. During the course of the processing of most applications, after review by the Department staff or comments from sister agencies or interested persons, the Department requests additional evidence from the applicant. Here, after the addition of time for written submissions on the topic of undergrounding and the extra day of the hearing, the record contained considerable evidence on the topic, consistent with what is required in Chapters 310, § 5(A); Ch. 335, § 3(A); and Section 487-A(4) of Site Law.

The Board has reviewed the evidence on a range of alternatives, including those initially considered by CMP and discussed its initial application submission, as well as the evidence developed through the hearing process. Specific to the underground alternative, the record contains evidence from CMP, intervenors in opposition to the project, and an intervenor in support of the project, concerning the cost, construction, and general feasibility of locating the project underground, as well as information on the types of environmental impacts generally associated with underground construction. This information is sufficient to allow evaluation of the practicability of the underground alternative, consistent with NRPA and the Site Law. In sum, the Board finds the absence of discussion of an underground alternative in CMP's initial alternatives analysis is not a fatal deficiency. The record on this issue was sufficiently developed through the course of the review of the Site Law and NRPA applications.

Turning to its evaluation of the underground alternative, the Board considers the potential environmental impacts associated with underground construction and operation of the project, along with the logistics and associated costs, in comparison to the Preferred Alternative. The record contains evidence, including testimony from Bardwell and Paquette, regarding how a project like the NECEC would be built underground. In summary form, their testimony was as follows. To locate a transmission line underground, in most areas the most affordable and common construction technique would be direct burial. This involves laying sections of cable within an open trench. For the NECEC, because of its power transfer capacity, four cables, plus a spare for reliability, would be located in the trench. This is different than other transmission lines

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alternative also includes alternating between underground and overhead construction, sometimes referred to as porpoising.

with underground components discussed at the hearing that would not need as many cables or as large a trench. For a project with the NECEC's power transfer capacity, the trench would be a minimum of six feet deep and five feet wide at the base and have a minimum surface width of 12 feet. Paquette testified that depending on soil types a surface width opening of up to 23 feet could be required in some areas in order to meet worker safety standards. A work area approximately 75 feet wide would be needed during installation.

The trench would be opened to accommodate a length of cable, which typically would be delivered in segments up to 2,500 feet long. Segments would be spliced together approximately every 2,200 feet. Each splice would be protected by pre-cast concrete components measuring approximately 12 feet long by four feet wide. At each jointing location an excavation approximately 60 feet long, 20 feet wide, and seven feet deep would be opened.

A concrete pad would be poured in the bottom of the opening and the spliced cables, each with its pre-cast concrete protection, would be located on top of this pad and backfilled. Beyond the splice vault, cables would be located on a sand bedding and covered with a protective concrete layer. The trench would be backfilled above the concrete. Paquette testified that thermal sand likely would be needed for much of the Segment 1 corridor due to the cable that would have to be used for this project and the properties of the soils in western Maine. While the volume of thermal sand that would have to be used is not clear from the record, the record evidence indicates that thermal sand would have to be imported to enable running the transmission line underground.

To facilitate construction and ongoing inspection and maintenance, permanent access to each splice vault would be required. Additionally, after installation of the underground transmission line, the 75-foot-wide work area that had been cleared during construction would be maintained. The 75-foot-wide cleared area would be allowed to regenerate, but only with scrub-shrub species, to keep root systems from larger trees out of the cables.

Bardwell also testified about trenchless methods of underground transmission line construction: horizontal directional drilling, microtunneling, and pipe-jacking. Along with explaining the basics of these techniques he noted that HDD may be used for underground crossings between 4,000 and 7,000 feet, microtunneling allows for underground crossings up to 1,000 feet with no minimum distance, and pipe-jacking typically is limited to distances of 250 to 500 feet. Where a transmission line transitions from overhead to underground, and vice-versa, a termination station is required to make this connection. CMP described these stations in its application materials – they are required at both ends of the HDD crossing of the Upper Kennebec River – as did Bardwell in his testimony. A termination station measures 135 feet by 135 feet, is fenced in, and finished with a crushed stone surface typical of CMP substation yards. These stations include electrical equipment and associated foundations. Structure height within these stations would range from 95 to 170 feet depending on pole or transmission structure height in that area. Permanent access to each termination station would have to be maintained.

Based on the evidence outlined above, including the impacts of the construction, the width of the cleared area which must remain as scrub-shrub, and the additional structures needed, the Board finds that typical underground construction for a project with the power transfer capacity of the

NECEC, which would be accomplished by direct burial, would result in a greater environmental impact than the proposed overhead alternative. In order to install cables underground in Segment 1, the cables would need to be buried under the streams, wetlands, vernal pools, and other natural resources. While some impacts from trenching might be temporary, such as trenching through a wetland, this impact is avoided with the overhead alternative. The nature and extent of required site access during construction and the permanent access that would be maintained post-construction is more extensive with the underground alternative and would result in greater impact. For example, construction access along the entire length of the corridor would be needed to lay the cables within the trench. With overhead construction, access to pole locations can be designed to avoid natural resources, steep slopes, and highly erodible soils. Furthermore, with the underground alternative, after construction the original 75-foot-wide work area would remain cleared and managed as scrub-shrub habitat. This is wider than the 54-foot wire zone area cleared and maintained as scrub-shrub within a tapered corridor with an overhead line and comparable to a tapered corridor to the extent vegetation in the first taper, which grows up to 15 feet in height, is more scrub-shrub in nature than forested. A significant difference between a cleared corridor with an underground line and the Preferred Alternative as permitted in the Department Order is that taller vegetation across the width of the corridor, as required within Wildlife Areas,<sup>13</sup> would not be an option with maintenance of a 75-foot cleared area, maintained as scrub-shrub, over a buried transmission line. The Board finds that a corridor associated with the underground alternative would be more of a fragmenting feature, due to the extent and maintenance of cleared and scrub-shrub areas and permanent access, than the overhead alternative permitted in the Department Order.

The Board also finds the logistical challenges, a factor in the practicability analysis, of constructing the transmission line underground greater than overhead construction. The logistical challenges of underground construction of the NECEC would include: the need for splicing boxes approximately every 2,200 feet, the need for permanent access roads to these splicing boxes, hauling in thermal sand, additional truck trips to carry the heavy spools of underground cable, hauling out or otherwise disposing of material that cannot be backfilled, and the infrastructure upgrades needed to the road network.

Using trenchless technology could eliminate some of the impacts associated with direct burial, but would not eliminate the need for splicing the line and maintenance of permanent access to the transmission line splice boxes, and a 75-foot-wide cleared corridor maintained as scrub-shrub. To the extent trenchless installation could be used to cross under specific resources and then transition to overhead construction, the Board notes that termination stations would be needed on each end of the transition. There would be significant impacts associated with trenchless installation, as well as many of the same logistical challenges.

The cost of the underground alternative is another factor the Board must consider when evaluating the practicability. The definition of practicable in Chapter 310, § 3(R) requires the consideration of whether an alternative is “available and feasible considering cost, existing technology and logistics based on the purpose of the project.” Notwithstanding the language in rule, West Forks contends cost is not a relevant consideration in this case. This contention is based on the following. West Forks points to CMP’s statement of the project’s purpose: “to

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<sup>13</sup> Wildlife Areas are discussed in Section 10(B) below.

deliver up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Area via a High Voltage Direct Current (HVDC) transmission line, at the lowest cost to ratepayers.” West Forks then notes that CMP submitted a fixed cost bid to Massachusetts for the project and any changes to the project cost after Massachusetts selected CMP’s bid will be absorbed by the Licensees and not by ratepayers. Thus, West Forks argues, any added cost is acceptable and consistent with the project purpose because ratepayers will not pay. West Forks contends the Commissioner impermissibly excluded the clause – “at the lowest cost to ratepayers” – when describing the project purpose and erred in considering costs when evaluating the practicability of the underground alternative.

The Board finds West Forks’ argument unpersuasive. The Commissioner did not act improperly when describing the project purpose in the Department Order without including the final clause, “at the lowest cost to ratepayers.” While an applicant must explain the purpose of its project and it is important for the Department to recognize this stated purpose, neither the Commissioner nor Board has to accept an applicant’s statement of project purpose verbatim. For example, a project purpose cannot be tailored by the applicant to make any cost increase impracticable or by an individual opposed to a project to preclude the consideration of cost to an applicant altogether. The NRPA rules underscore that cost is among the relevant considerations when evaluating the practicability of alternatives. West Forks’ argument, which hinges on a reading of the statement of purpose as precluding consideration of the cost of alternatives to the applicant, is clearly at odds with rule.

With respect to the cost of undergrounding, Bardwell and Tribbet provided uncontradicted evidence that locating Segment 1 underground using direct installation would add approximately \$640 million to the overall project cost, a roughly 67 percent increase. They further testified that trenchless installation technology is two to 10 times more expensive than trenching. In light of these costs and the logistical challenges of underground construction, along with the environmental impacts associated with running a line like the NECEC underground, the Board finds locating Segment 1 of the project (or the entire project) underground is not a practicable alternative to the Preferred Alternative that would be less damaging to the environment.

Appellants suggest running less than all of Segment underground also could be a viable alternative, for example, using trenchless technology to avoid specific resources and then transitioning to overhead construction. This is what is required in the Department Order at the crossing of the Upper Kennebec River, with the Commissioner making clear in the Order that the visual impact of an overhead crossing in this location likely could not have been approved. Following thorough environmental review of the project, with particular scrutiny on Segment 1, neither the Commissioner previously, nor the Board now, has identified another specific resource where transitioning to underground construction would be a practicable alternative less damaging to the environment. Underground construction, even using trenchless HDD, involves corridor clearing, permanent access, and termination stations to transition to and from overhead lines. Environmental impacts, such as habitat fragmentation, are not eliminated and costs increase. In sum, the Board finds the underground alternative along all or parts of Segment 1, other than the Upper Kennebec River crossing, is not a practicable alternative less damaging to the environment.

## b. Alternative Routes and Alternative Design Within Segment 1

The appellants also argue that alternative routes – specifically along Route 201 or the Spencer Road – were not adequately explored and could be practicable alternatives. The Board, however, finds the record supports the opposite conclusion. With respect to the Spencer Road alternative, CMP witness Freye testified that CMP discussed the possibility of locating the transmission line there with the owner of much of the Spencer Road and surrounding timberland. The landowner did not want the transmission line to run along or even near the Spencer Road where possible, in order to maintain flexibility to relocate the road, construct new log landing areas, open new gravel pits and access abutting land without potential interference from a transmission line. Although CMP was able to acquire timberland property for the corridor from this landowner, the landowner was not interested in conveying rights to CMP for locating the NECEC along the Spencer Road. This landowner eventually conveyed its lands to a new corporation, but that occurred after CMP had acquired rights for the Preferred Route corridor. Given the owner of the Spencer Road was not willing to convey rights to construct the project along the Spencer Road, the Board finds running the transmission line along that private road, whether underground or overhead, was not a practicable alternative.

With respect to running the transmission line underground along Route 201, witnesses for CMP testified about the logistical challenges of underground construction within the right of way for a public road. This included testimony about challenges of constructing a linear transmission project, that is built in a series of straight lines or tangents, along a road that curves. Beyond concerns about logistics, Bardwell and Freye testified that the existing Route 201 right of way was not wide enough to accommodate running the transmission line underground without requiring opening of the travel lanes to accommodate the splice boxes. Evidence in the record indicates that this is prohibited by Maine Department of Transportation rules. Freye noted that acquiring land adjacent to Route 201 to enable the line to be run underground across the front of the properties of many individual property owners would involve negotiations with each of those property owners and would be extremely difficult. The Board agrees with this assessment regarding the challenge of acquiring property along Route 201. Based on this, combined with the restrictions on construction within the travel lanes and logistics of building a transmission along a public road, the Board finds running the project underground along Route 201 is not a practicable alternative.

With respect to running the transmission line overhead along Route 201, the roughly 42 feet of right of way on either side of the travel lanes is not wide enough to accommodate the project, acquisition of additional land along this road likely would be extremely difficult to negotiate, and placing the line along the portion of Route 201 that is a scenic byway would increase scenic impacts of the project. The record contains evidence from Intervenor Group 1 about the scenic value and public use of the scenic byway. For these reasons the Board finds running the project overhead along Route 201 is not a practicable alternative to the Preferred Route.

Finally, with respect to alternative designs within Segment 1, the Board notes considerable efforts were made by CMP in designing the project to avoid impacts, for example, through pole location, location of access ways, construction timing, use of erosion control best management practices, and the use of third-party inspectors. The requirements of the Department Order



further minimize impacts through design requirements. Notably, concerns about impacts to threatened or endangered species, significant vernal pools, rare plant communities, or wetlands are not among those presented on appeal. The Board finds there are no practicable design alternatives that would be less damaging to the environment than the design approved in the Department Order.

c. Consideration of Alternatives Pursuant to Section 487-A(4) of the Site Law

NextEra argues that the Department Order reflects that the Commissioner failed to properly evaluate alternatives under Section 487-A(4) of Site Law, a provision specifically focused on transmission lines. This section requires the Department “to receive evidence regarding the location, character and impact on the environment of the proposed transmission line” and establishes that the Department “shall consider whether any proposed alternatives to the proposed location and character of the transmission line . . . may lessen its impact on the environment or risks it would engender to the public health or safety, without unreasonable in increasing cost.” Finally, it authorizes the Department to approve or disapprove all or part of a proposed transmission line and to “make such orders regarding its location, character, width and appearances as will lessen its impact on the environment, having regard for any increased costs to the applicant.”

With regard to the requirement to receive evidence on the location, character, and environmental impacts of a proposed transmission line, this clearly was done through multiple days of public hearing, written and oral testimony, and other agency and public comments received over many months. This Site Law provision also requires the consideration of “any proposed alternatives.” As discussed above, CMP prepared an alternative analysis and through the course of this process other alternatives were proposed by parties to the process and members of the public. The underground alternative and the possibility of locating the project along the Spencer Road or Route 201 are examples of other proposed alternative that received considerable attention. Specific questions were posed by the Department about these alternatives, and they were addressed through the hearing process.

NextEra argues Section 487-A(4) was not satisfied because alternative routes to Segments 4 and 5 were not evaluated. This argument was not raised during the application review process and it is therefore waived. However, the Board notes that both Segment 4 and Segment 5 are located within existing corridors and will not involve any additional clearing. Co-location of a new or upgraded transmission line in a way that avoids new clearing is generally considered to be the environmental ideal.

Finally, Section 487-A(4) authorizes the Department as part of any final order to address the location, character, width, and appearance of a proposed transmission line and to lessen the project’s impacts. In the Department Order the Commissioner did this through a range of conditions, including through vegetation management requirements that apply to Segment 1 and mitigate both wildlife and visual impacts.

The Board finds the Department Order satisfies Section 487-A(4) of Site Law. Further, with the benefit of the full record developed by the Commissioner through the licensing process, including the discussion of alternatives initially provided by CMP in its application filing and those later proposed and evaluated through the hearing process, the Board finds no further project modification or conditions regarding the transmission's line's location, character, width, or appearance, beyond what is required in the modifications imposed by this order, are warranted under Section 487-A(4) to lessen the transmission line's impact on the environment or risk to public health or safety.

## B. Impacts to Wildlife, Fisheries, and Other Natural Resources

Appellants NRCM and West Forks argue that the natural resource impacts of the project as approved are unreasonable, specifically the impacts to brook trout and brook trout habitat and, more broadly, the impact of habitat fragmentation. The evolution of CMP's original proposal through the application process and the imposition of conditions by the Department Order are informative in this analysis, and the Board outlines aspects of that process in summary form here. The hearing testimony and written comments received on the wildlife and wildlife habitat issues are also summarized. This parallels the summary provided in the Department Order.

### (1) Department Review and Agency Review Comments

After an initial review of the application for impacts to wildlife, fisheries, and other natural resources, Department staff requested from CMP more information and further proposed protection for certain habitats. On December 11, 2017, Department staff stated in a letter to CMP that the Department had concerns about the proposed project's impacts to brook trout habitat and requested additional mitigation.

MDIFW reviewed the application in its role as a commenting sister agency and similarly requested additional information and further protections. MDIFW provided comments on the proposed project's wildlife and fisheries impacts on March 15, 2018; June 29, 2018; December 7, 2018; February 1, 2019; and March 18, 2019. In its March 15, 2018 comments, MDIFW raised concerns about the lack of data on the presence or absence of a number of species on the threatened or endangered species list. MDIFW also expressed concern that the 25-foot-wide vegetative buffers CMP had proposed for streams crossed by the project were too narrow, particularly for streams in Segment 1 and other coldwater fisheries streams.

Between March and December 2018, CMP and MDIFW continued to meet and discuss the proposed project's various impacts to fish and wildlife and CMP conducted field surveys for several wildlife species.

In its December 7, 2018, comments, MDIFW memorialized a commitment by CMP to incorporate into its proposal:

- Ten wildlife travel corridors in Upper Kennebec River DWA. Eight of these travel corridors would be created by selectively cutting the NECEC corridor in these areas to promote softwood growth necessary to provide winter habitat for deer (Department

Order, Appendix C describes the vegetation management for deer travel corridors); two of these corridors would be adjacent to the Upper Kennebec River in the area where the transmission line would be underground, allowing maintenance of full height vegetation;

- The utilization of taller poles near Gold Brook and Mountain Brook, which would allow full canopy height vegetation over these streams to minimize the impact to Roaring Brook mayflies and Northern Spring Salamanders; and
- The preservation of 717 acres of land in the Upper Kennebec River DWA.

Additionally, in response to the Department's December 11, 2017 letter, as well the Department's and MDIFW's concerns about project impacts to coldwater fisheries, CMP modified its proposal in several ways. CMP agreed to incorporate into its proposal 100-foot riparian filter areas around all perennial streams in Segment 1 and all coldwater fisheries streams in the other segments. Within these filter areas, instead of removing all vegetation at ground height during construction, only vegetation over 10 feet in height is cut at ground level and only if it is within the 54-foot-wide area centered under the two conductors referred to as the wire zone. Within riparian filter areas but outside of the wire zone, noncapable species (i.e., those species not capable of growing tall enough to encroach into the conductor safety zone) may exceed 10 feet in height. Further, vegetation removal within riparian filter areas is accomplished by hand tools or reach in techniques in order to preserve non-capable vegetation and vegetation under 10 feet to the greatest extent practicable. (Department Order, Appendix C describes these filter areas, referred to as buffers<sup>14</sup> by the Licensees; Department Order, Appendix E identifies waterbodies crossed by the project).

CMP also agreed to incorporate into its proposal compensation for impacts to coldwater fisheries in the form of:

- Land preservation (Grand Falls Tract, Basin Tract, and Lower Enchanted Tract);
- Funding to improve fish passage by providing \$200,000 for replacement of poorly functioning or improperly sized culverts; and
- Providing \$180,000 for compensation for the conversion of forested riparian habitat.

## (2) Licensees Testimony and Evidence on Impacts

In its application and its hearing testimony, CMP and its witnesses described the methods used to locate and design the project in the least environmentally damaging manner. CMP's witnesses at the hearing testified that the project would not cause unreasonable fragmentation of the forest habitat because the project is located in working forest that already is fragmented by clear cuts, partial-cuts, log yards, skid trails, and logging roads. They contend that the project will provide improved habitat for certain species of wildlife that prefer early successional forest, such as deer, moose, bear, fox, rabbits, and other wildlife species. CMP's witnesses provided testimony that the proposed project would not unreasonably impact coldwater fisheries or rare or threatened species and that sufficient compensation had been proposed for the impacts that would occur.

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<sup>14</sup> The Department Order uses the term "riparian filter areas," as opposed to the term "buffers" used by CMP, in recognition that some vegetation within these areas will be cut and that the primary function of these areas will be to filter sediments and pollutants from the runoff entering streams.

During the public hearing process CMP also committed to not using herbicides within Segment 1; this was stated by CMP witness Gerry Mirabile in his pre-filed supplemental testimony and reaffirmed orally at the hearing on May 9th.

CMP's witnesses also provided testimony, in response to questions from the Department, on the possibility of tapering the vegetation in the corridor in additional areas along Segment 1 beyond that proposed or allowing for taller vegetation in the corridor through the use of taller poles. Mark Goodwin testified that the Licensees did not believe additional tapering or taller poles/vegetation were necessary, but of those two mitigation measures, he expressed CMP's preference for tapering.

### (3) Intervenor Evidence on Impacts

Several witnesses for intervenor groups in opposition testified on the issue of impacts of the project on wildlife and fisheries. Intervenor Group 1 witness Janet S. McMahon; Intervenor Group 2 witnesses, Chris Russell, Greg Caruso, and Roger Merchant; and Intervenor Group 4 witnesses Dr. David Publicover, Dr. Aram Calhoun, Ronald Joseph, Todd Towle, and Jeffrey Reardon, testified that the project as proposed would have an adverse impact on wildlife and fisheries. Witnesses McMahon, Merchant, Publicover, Calhoun, and Joseph testified on the impacts the project would have due to forest fragmentation. Witnesses Russell, Caruso, Towle, and Reardon testified on the impacts to coldwater fisheries, particularly brook trout.

McMahon and Merchant testified on the importance of unfragmented habitat to so-called "umbrella" species such as pine marten.<sup>15</sup> They stated that even though the forest may be somewhat fragmented due to logging practices, these cut areas are temporary in nature, and the transmission corridor would represent a permanent fragmenting feature in the landscape. Publicover also testified that the fragmentation of the forest would be permanent, and he asserted that the western Maine mountains region has global importance in terms of ecological diversity.

Reardon testified that many of the streams impacted by the project in Segment 1 are exceptionally valuable, such as Gold Brook and Tomhegan Stream, which provide brook trout spawning and rearing habitat, and Cold Stream, in which brook trout seek thermal refuge during warm temperature months. He explained that streams crossed by a 150-foot-wide, cleared corridor without taller trees or a full canopy would not have the input of large woody debris from dead trees necessary for healthy habitat. He stated that the proposed compensation parcels offered by CMP as mitigation for these impacts do not contain the same quality habitat as the area being impacted by the project. Finally, he stated that based on his experience with stream-crossing replacements, CMP's statement that 20 to 30 culverts could be replaced with the \$200,000 proposed in the compensation fund was not realistic. He testified that in his experience, a single crossing could cost in the range of \$50,000 to \$100,000.

Ronald Joseph, as part of Intervenor Group 4, testified concerning the impacts to deer wintering areas and witness Calhoun testified that the project would adversely impact vernal pools and in

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<sup>15</sup> As described at the hearing, protecting for an umbrella species will also provide protection for a wide range of other wildlife with overlapping or similar habitat needs, including the need for unfragmented habitat.

particular pools that are in proximity to one another (referred to as poolscape). (The impacts to deer wintering areas and vernal pools are not a focus of the appeals.)

Intervenor Group 6, a neutral intervenor group, provided testimony concerning forest fragmentation from Dr. Malcolm Hunter, Jr., Rob Wood, Andy Cutko, Bryan Emerson, and Dr. Erin Simons-Legaard. Hunter testified on the types of impacts associated with fragmentation, including habitat loss and alteration, such as increased edge and reduced interior, and the potential long-term consequences of fragmentation. He asserted: “The proposed mitigation and compensation does not adequately address the cumulative impacts to the full array of Maine’s wildlife.” Group 6 witnesses Wood, Cutko, and Emerson jointly testified that the adverse effect of the proposed corridor would be greater than traditional sustainable forestry. They suggested in their testimony methods to minimize the forest fragmentation impacts of the project. They submitted as an exhibit a map showing nine areas where taller poles could be utilized to allow 35-foot-tall vegetation to remain under the wire zone in order to provide passage for umbrella species such as pine marten. They testified that the taller vegetation also would minimize impacts to any coldwater fisheries located within those nine areas. They suggested that the corridor could be narrowed or built using what they referred to as “V-shaped vegetation management,” to further reduce impacts to wildlife habitat. They emphasized the need for mitigating or compensating for remaining habitat fragmentation impacts by reducing or preventing fragmentation elsewhere in the affected region through land conservation. They offered testimony, similar to that of Reardon, explaining why the funding for culvert replacements proposed by CMP was unlikely to be sufficient to support the number of replacements described by the Licensees. Finally, Simons-Legaard testified that the proposed corridor would have significant adverse impacts on pine marten and other species; she also testified on the value of mitigation alternatives, including tapering, taller vegetation, and conservation.

#### (4) Public Testimony and Written Comments

Members of the public submitted written comments and testified at the hearing on the issues of impacts to wildlife, fisheries, and other natural resources, as well as impacts to the public’s many uses of those resources. Some members of the public commented that herbicide use and an increase in water temperatures from less shading would result in an unreasonable impact to brook trout. Other members of the public commented that the fragmentation impacts were also unreasonable. Although it was not always clear from the testimony and comments which portion of the 145-mile-long project members of the public were discussing, generally the focus was the 53.1-mile-long Segment 1.

Public comments and testimony in support of the project acknowledged the impacts to wildlife and fisheries, but stated that the benefits of the project, in particular environmental benefits with respect to a reduction in greenhouse gas emissions, outweigh the impacts; therefore, they argued the Department should find that the impacts on natural resources would be reasonable.

#### (5) Summary of Department Findings and Conclusion in the Order with Respect to Wildlife and Fisheries

In the Department Order, the Commissioner specifically evaluated the potential habitat fragmentation caused by the corridor, as well as the potential impacts of the project on brook trout habitat and brook trout and concluded that the project would not have unreasonable natural resource impacts. The Commissioner's determination that the project satisfies the permitting standards under both Site Law and NRPA was premised in part on the placement of numerous conditions designed to be protective of fisheries, wildlife and wildlife habitat.

a. Wildlife Habitat and Habitat Fragmentation

With respect to habitat fragmentation, the Commissioner determined that although the western Maine area where much of the project would be located is not completely undeveloped and is subject to active timber management, a traditionally-styled transmission line corridor in the area where Segment 1 is located could contribute to habitat fragmentation and could have unreasonable adverse impacts on wildlife as a result of the effects on wildlife travel lanes and lifecycles and accessibility to suitable and sufficient habitat.

More specifically, the Commissioner found that as Segment 1 initially was originally proposed, CMP had not made adequate provision for the protection of wildlife. Through modifications CMP made to its proposal in response to feedback from the Department and comments from MDIFW, Intervenors and the public during the permitting process, these potential wildlife impacts were reduced. The Board notes the project improvements to which CMP committed to through written submissions filed with the Department during the permitting process, which included:

- Maintaining taller, softwood vegetation in the Upper Kennebec River DWA to provide travel corridors for deer.
- Maintaining full canopy height vegetation at the Gold Brook and Mountain Brook crossings.
- Maintaining tapered vegetation in the area visible from Coburn Mountain and another area visible from Rock Pond.
- Expanding the riparian filter areas from 25 feet to 100 feet on coldwater fisheries streams, and on all other streams to 75 feet.

The Commissioner found that while these measures were expected to reduce the impacts of the Segment 1 corridor, they were not – by themselves – sufficient reduction in the fragmenting of habitat. The Commissioner determined that to ensure adequate provision for the protection of wildlife, CMP must minimize and mitigate habitat impacts by tapering most of the Segment 1 corridor and maintaining taller vegetation across the width of the corridor in the rest of Segment 1 and, additionally, must compensate for remaining impacts through habitat conservation.

1. Tapering

The tapered corridor required in the Department Order includes an approximately 54-foot-wide area under the conductors (the wire zone) that is cleared during construction and maintained as scrub-shrub habitat during operation of the project. Outside the wire zone, which is located at the center of the 150-foot-wide corridor, on both sides, taller vegetation is maintained. This taller

vegetation increases from 15 to 35 feet in height in three steps (or tapers) as the distance from the wire zone towards the outside of the corridor increases. The Order requires the Licensees to maintain tapered vegetation along the entire Segment 1 corridor, except for the areas where the Licensees must maintain full height canopy vegetation, vegetation with a minimum height of 35 feet, or taller vegetation managed for deer travel corridors. The Commissioner determined that tapering along Segment 1 would provide improved habitat and improved passage between areas of suitable habitat where they exist adjacent to the corridor, would avoid creation of the hard forest edge that testimony established is detrimental to certain species of wildlife, and help mitigate the edge effect. It would result in a narrower scrub-shrub opening and allow a greater opportunity for wildlife to cross the corridor and reduce the time/distance crossing wildlife would be out in the more open scrub-scrub habitat.

## 2. Taller Vegetation in Wildlife Areas

The Commissioner determined that while a tapered corridor helps minimize impacts to habitat and wildlife movement, tapering alone would not adequately provide for the protection of wildlife throughout Segment 1 of the corridor. Based on testimony from witnesses such as Publicover and Simons-Legaard, the Commissioner found that vegetation in the 30- to 40-foot height range was the minimum necessary to meet the preference of pine marten, an umbrella species, and that taller vegetation more generally aided wildlife movement.

Focusing on riparian areas and areas adjacent to conservation land, and informed by TNC witness testimony identifying nine areas where they suggested taller vegetation within the corridor would significantly benefit wildlife, the Commissioner identified 12 Wildlife Areas where taller vegetation within the corridor must be maintained. Within Wildlife Areas 1 through 5 and 7 through 10, a minimum vegetation height of 35 feet is required, and within Wildlife Area 4 where it crosses Gold Brook full canopy height vegetation must be maintained. In these Wildlife Areas, only areas necessary to access pole locations or install poles would be cleared during construction. These access roads and structure preparation and installation areas would be maintained as scrub-shrub habitat. In the remainder of the width of the corridor in these Wildlife Areas, only trees taller than 35 feet, or trees that may grow taller than 35 feet prior to the next scheduled maintenance would be removed. (See Department Order, Appendix C.)

Within Wildlife Areas 6 and 11, the Department Order requires that full canopy height vegetation must be maintained. Within Wildlife Area 12 vegetation must be managed to promote deer movement across the transmission line corridor during the winter months when snow depths have the potential to inhibit deer travel. This involves the maintenance of softwood trees, generally in the range of 25 to 35 feet in height. (See Department Order, Appendix C for further explanation of vegetation management, including full canopy height vegetation, vegetation with a 35-foot minimum height, deer travel corridors, and tapered vegetation.)

Together, the 12 Wildlife Areas along Segment 1 with full canopy height vegetation, vegetation with a 35-foot minimum height, and softwood vegetation managed for deer travel total approximately 14.08 linear miles along the 53.1-mile-long Segment 1 corridor. The Commissioner found these areas would provide improved passage and connectivity across Segment 1, helping to protect wildlife, provide travel lanes between areas of habitat, and mitigate

wildlife habitat impacts overall. The majority of these travel lanes would exceed 400 feet in width and benefit multiple species that prefer interior forest habitats, including pine marten.

### 3. Conservation

While the Commissioner determined tapering and maintaining taller vegetation, as required in the Order, would help mitigate the impact of Segment 1 of the corridor on wildlife and wildlife habitat, the Commissioner also recognized that even with these measures this 53.1-mile section of corridor still would have a fragmenting effect on the landscape of this unique forested region, affecting wildlife. The Order notes, for example, that the center of the Segment 1 corridor would be maintained as scrub-shrub habitat and the edge effect and reduction in interior forest habitat impacts testified to by Hunter would remain, although taller vegetation would reduce the edge effect. Additionally, even within areas with taller vegetation, the Order notes that access ways would be required during construction and maintained as scrub-shrub habitat. Where the minimum vegetation height is 35 feet, some taller vegetation may need to be selectively cut if it would encroach into the conductor safety zone.

Because of the impacts to wildlife, even with on-site mitigation, the Commissioner found additional, off-site, mitigation in the form of land conservation was required to ensure the Licensees made adequate provision for the protection of wildlife in the region affected by the project.

The Department Order required that within 18 months of the date of the Order, CMP must develop and submit to the Department for review and approval a plan (the Conservation Plan) to permanently conserve 40,000 acres in the vicinity of Segment 1. The Order requires that the Conservation Plan must:

- Establish as its primary goal the compensation for the fragmenting effect of the transmission line on habitat in the region of Segment 1 and the related edge effect by promoting habitat connectivity and conservation of mature forest areas;
- Identify the area(s), with a focus on large habitat blocks, to be conserved and explain the conservation value of this land; any conservation area must be at least 5,000 acres in size unless the area is adjacent to existing conserved land or the Licensees demonstrates that the conservation of any smaller block, based on its location and other characteristics, is uniquely appropriate to further the goals of the Conservation Plan;
- Include a draft forest management plan establishing how, consistent with the primary goal of the Conservation Plan, the conservation area(s) will be managed, including to provide blocks of habitat for species preferring mature forest habitat and wildlife travel corridors along riparian areas and between mature forest habitat;
- Explain the legal interest, such as fee ownership or a working forest conservation easement, that will be acquired in each area; the proposed owner or holder of this interest; and the qualifications of each proposed owner or holder;
- Include preliminary consent from any proposed owner or holder;



- Explain how the Licensees will ensure the availability of stewardship funding (e.g., funding for monitoring and enforcement) needed to support achievement of the goals of the Conservation Plan; and
- Ensure the Department will have third-party enforcement rights.

b. Coldwater Fisheries – Brook Trout and Brook Trout Habitat

- The Order reflects how the project evolved through the permit review regarding reduction of the impacts on brook trout and coldwater fisheries. During the process CMP committed to maintaining 100-foot riparian filter areas, as described above, and conserving the Grand Falls Tract, Basin Tract, and Lower Enchanted Tract, which together contain 12.02 miles of streams. These conserved tracts also contain frontage on the Dead River, an Outstanding River Segment.

As explained in the Order and noted above, where a 100-foot riparian filter area would be maintained along streams, capable species (vegetation capable of growing tall enough to reach into the conductor safety zone) would be removed using hand tools or reach-in techniques. No herbicides would be used within these riparian filter areas.<sup>16</sup> Inside the wire zone (the 54-foot-wide are centered under the conductors), all woody vegetation, whether capable or non-capable, would be removed down to ground level. Outside the wire zone non-capable species would be allowed to exceed ten feet in height and would be maintained in the same manner as in the other tapered areas.

In addition to the expanded riparian filter areas and conservation, the Order requires full canopy vegetation at Gold and Mountain Brooks and taller vegetation with a minimum height of 35 feet within nine Wildlife Areas, which include numerous coldwater stream crossings. Finally, the Order requires the Licensees to contribute \$1,875,000, instead of the \$200,000 proposed by CMP, for culvert replacements to improve fishery habitat in order to compensate for coldwater fisheries habitat impacts.

(6) Arguments on Appeal Concerning Impacts to Wildlife, Fisheries, and Other Natural Resources

With respect to the potential impact of the project on wildlife, fisheries, and other natural resources, appellants NRCM and West Forks focus on the impacts to brook trout and brook trout habitat, as well as on habitat fragmentation.

NRCM argues the project will cause unreasonable adverse impacts to brook trout habitat even with the mitigation and compensation required in the Order. It contends that significant cutting will occur in riparian filter areas in order to construct the project. NRCM states the expansion of the riparian filter areas (also referred to as buffers) from 25 feet to 100 feet wide for perennial streams in Segment 1 and coldwater fisheries streams in other segments will not result in sufficient overhead cover, large woody debris inputs, leaf fall, or insect inputs into the streams. It states that the vegetation management along the route will result in a change of vegetation type from intact forest to a less valuable 150-foot-wide swath of short, scrubby vegetation. NRCM

<sup>16</sup> Additionally, no herbicide use would be allowed anywhere in the Segment 1 corridor under the Department Order.

argues that in two areas where full canopy height vegetation is required the primary purpose is to reduce the impacts to Roaring Brook mayfly, not to protect brook trout habitat NRCM further states that the full height canopy requirement is insufficient because it only applies to three stream crossings and five tributaries to Gold Brook are not covered by this full canopy height requirement. NRCM also notes that only 21 stream crossings are included in the Wildlife Areas with taller vegetation. NRCM argues that the requirement for vegetation to be a minimum of 35 feet tall in the Wildlife Areas will result in the vegetation being a maximum of 35 feet tall. And it contends that 35-foot-tall vegetation is not tall enough to provide shade or large woody debris into the streams that cross the corridor in these areas. NRCM argues that the benefits to brook trout habitat from tapering are unproven and not supported by evidence in the record.

In critiquing the required compensation, NRCM, makes two arguments. First, it argues that that the Grand Falls, Basin and Lower Enchanted tracts do not contain comparable brook trout habitat to the areas impacted by the project. It contends these tracts do not contain the cold, high-elevation streams that are highly productive. Second, NRCM argues that there is no nexus between the impacts from the project and the requirement in the Order that the Licensees provide \$1,875,000 for culvert replacements. It also argues that many of the culvert replacements will be on private land management roads and will likely cost more than \$50,000-\$100,000, and that many private landowners will not be willing to utilize the funds because of associated restrictions on use of their property and the maintenance requirements.

In its appeal, NRCM also contends the habitat fragmentation caused by the project is unreasonable. It argues that tapering is a scenic mitigation measure and will not mitigate the adverse impact to wildlife habitat, especially for species that utilize mature forest. It states that tapering will not provide adequate connections between mature forest habitats. NRCM states, “reliance on tapering conditions to offset what the Department concedes are unreasonable fragmentation impacts is impermissible under NRPA and Site Law.” (NRCM Appeal at 21.) It expresses concerns with the implementation of the tapering condition and the Department’s ability to monitor and enforce this condition for the life of the project. NRCM argues that the maximum tree heights in the tapered areas and the Wildlife Areas will be 15, 25 and 35 feet in the corresponding locations, as opposed to this being the minimum height as specified in the Order. In the Wildlife Areas, NRCM contends that the stand of trees left will not meet the minimum requirements for species such as pine marten. It also states that there is no provision for long term monitoring. Finally, in terms of habitat impacts, NRCM argues the land conservation required by the Order does not adequately compensate for lost functions and values caused by the project.

In its appeal, West Forks argues the project will cause unreasonable environmental and ecological impacts due to forest fragmentation. They argue the Department did not adequately address the habitat fragmentation concerns raised by several witnesses and that the mitigation measures and compensation required in the order are still inadequate. West Forks contends that the Department disregarded clear testimony and evidence concerning the environmental impact of the project and that the conditions imposed by the Order will not alleviate the permanent negative impacts to wildlife and wildlife habitat.

(7) Licensees’ Response

On March 12, 2021, the Licensees responded to NRCM's arguments concerning potential impacts to brook trout and brook trout habitat by stating that NRCM did not cite any evidence in the record that demonstrates the riparian filter areas are not adequate to protect brook trout habitat. They also point to the fact that there are no direct impacts to brook trout habitat proposed, with the exception of the culvert replacements, which are a benefit to habitat and water quality. The Licensees also point to the various review comments prepared by both the Department staff and MDIFW and the changes to the design of the project that resulted from those comments, with MDIFW ultimately indicating all its concerns had been addressed.

(8) Board Analysis, Findings, and Conclusions

The Site Law, in 38 M.R.S. § 484(3), requires applicants to demonstrate that a project will not adversely affect natural resources. Chapter 375, § 15, of the Department's rules implementing Site Law, recognizes the need to protect wildlife and fisheries by maintaining suitable and sufficient habitat, including travel lanes between areas of available habitat, considering the susceptibility of certain species to disruption and interference of lifecycles by proposed alterations and activities.

NRPA, 38 M.R.S. § 480-D(3), requires applicants to demonstrate that the proposed project will not unreasonably harm: aquatic or adjacent upland habitat; travel corridors; freshwater, estuarine, or marine fisheries; or other aquatic life. NRPA and the pertinent regulations promulgated under it, Chapters 310 and 335, recognize the importance of rivers, streams, and brooks; wetlands; and Significant Wildlife Habitat, including SVPs and IWWHs. The rules support a goal of no net loss of function and values, establish the criteria for avoidance and minimization of project impacts and state that some projects, even if the impacts have been avoided and minimized to the greatest practical extent, still may result in unreasonable impacts to protected natural resources.

a. The Project Does Not Unreasonably Impact Brook Trout or Brook Trout Habitat

The project corridor crosses 471 rivers, streams, or brooks that contain brook trout habitat, 351 of which will have some clearing impacts, and five Outstanding River Segments. The evidence in the record establishes that Maine is one of the last places where native brook trout habitat is still intact and wild brook trout still thrive. Evidence in the record from Intervenors and members of the public demonstrates that this fishery and the related use of the resource by fishing guides, owners of sporting camps, and Maine residents and tourists are important uses of the resource involving many communities in the area near the project. While brook trout habitat is not among the habitats protected in NRPA as Significant Wildlife Habitat, the impacts of a proposed project on the functions and values of rivers, streams, and brooks, as set forth in Chapter 310, § 5(D)(b), is a factor in the determination of whether the proposal would have an unreasonable impact on the protected resource. 38 M.R.S. § 480-D(3). Fisheries, aquatic habitat, and wildlife habitat are listed in Chapter 310, § 3(J) as among the functions to be considered. NRPA also protects recreational uses of protected natural resources, pursuant to 38 M.R.S. § 480-D(1). In addition, impacts to brook trout from activities that may adversely affect fisheries lifecycles and general impacts to waterbodies that serve as brook trout habitat are considered by the Board under Site

Law, 38 M.R.S. § 484(3), and Chapter 375, § 15. As a result, pursuant to NRPA and Site Law the Licensees must make adequate provision for the protection of fisheries and avoid, minimize, and compensate for impacts to fish habitat.

NRCM argues the Licensees have failed to do so, pointing to the impact on brook trout habitat associated with clearing the corridor, particularly in Segment 1. Forested riparian areas along rivers, streams, and brooks inhabited by brook trout provide several identified benefits. These areas filter sediment and pollutants, stabilize the bank, regulate water temperature by providing shade in the summer and insulation in the winter, attenuate peak flows and help maintain base flows, and provide input of woody debris and other organic matter. (See, e.g., J. Reardon Pre-filed Direct Testimony, Ex. 7 at 8.) These functions provided by vegetated riparian areas are recognized by MDIFW and reflected throughout their comments on the project. The Licensees acknowledge the importance of forested riparian areas on coldwater fisheries habitat, although their position is that the clearing of transmission line corridors have a limited effect on these riparian areas and the brook trout habitat in the adjacent rivers, streams, and brooks. In its Compensation Plan, for example, CMP refers to two studies in support of this position – neither of which, the Board observes, were conducted in Maine – in support of its position:

[A] study by Gleason on the impacts of powerline rights-of-way (“ROW”) on forest stream habitat found that despite the open canopy condition, water temperatures were slightly lower than in off-ROW areas and that none of the water quality parameters were significantly different between the on-ROW areas and off-ROW study areas. Gleason’s study also found no correlation between percent canopy cover and mean percentage of fines and found no significant difference in the Benthic Index of Biotic Integrity scores between on-ROW and upstream areas. Similarly, a study conducted by Peterson on the effect of electric transmission ROWs on trout in forested headwater streams in upstate New York found that stream reaches in electric transmission ROWs were exposed to more light, had denser stream bank vegetation, were deeper and narrower, and had a greater area composed of pools. Peterson’s study found that trout were more abundant in stream reaches within ROWs and concluded that the increase in incident sunshine resulted in a denser forb and shrub root mass which further stabilized stream banks, resulting in less stream bank erosion, deeper channels, and higher populations of trout. Peterson concluded that electric transmission ROWs need not constitute an adverse effect on headwater trout population densities in forested basins.

(CMP’s Compensation Plan (revised Jan. 30, 2019) at 21.)

NRCM argues that the measures the Department Order requires the Licensees to implement to mitigate potential impacts to brook trout and brook trout habitat associated with clearing the corridor are insufficient, individually and collectively. NRCM argues that the compensation required for those remaining impacts that are not mitigated is insufficient, as well.

With respect to the range of mitigation requirements included in the Order, NRCM points to each and, in support of its claim of insufficiency, notes the difference between the benefits of the

mitigation and benefits of a mature, full-canopy, forested buffer that could exist in the absence of a transmission corridor, and the existing commercial forestry, as well. NRCM's focus on what the mitigation lacks overlooks and undervalues the benefit of the impact minimization measures required by the Department Order.

For example, CMP originally proposed a 25-foot buffer where the corridor crosses streams. MDIFW commented that "this minimal buffer will not be adequate to protect coldwater resources," and recommended a 100-foot buffer consistent with its 2012 Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects. (MDIFW Comments, March 15, 2018 at 11.) The Department Order requires a 100-foot buffer on all perennial streams that contain coldwater fisheries. The Order refers to these buffer areas as "riparian filter areas" in recognition that some vegetation within these areas will be cut and that the primary function of these areas will be to filter sediments and pollutants from the runoff entering streams. (The Board adopts this terminology, as well.)

While these riparian filter areas will not contain mature forest canopy to provide temperature regulation across the entire stream in many cases, or contain vegetation most suitable for contributing woody debris to streams, which NRCM accurately points out, these filter areas will provide some shading, and a valuable filter function and will help attenuate runoff flows. The benefit of these filter areas is reflected in MDIFW's recommendation, informed by its review of many development proposals, including other transmission projects. The Board finds these 100-foot riparian filter areas, as required in the Order, are a valuable and an important measure for mitigating impacts of the project on brook trout.

As articulated in its appeal and noted above, and as presented through witness testimony, NRCM is concerned that even with the 100-foot riparian filter areas the removal of taller, more mature vegetation within these areas will result in the loss of "shading, recruitment of organic matter and large woody debris, and bank stabilization." (Pre-filed Direct Testimony of J. Reardon at 21.) In addition to the maintenance of riparian filter areas, the Department Order requires other vegetation management that further mitigates the impact of the project on brook trout and brook trout habitat. Along Segment 1, the Order identifies 12 Wildlife Areas within which taller vegetation is required to be maintained within the corridor. Eleven of these Wildlife Areas contain one or more stream crossings and within these areas either a full height canopy or a minimum of 35-foot-tall vegetation is required.

While NRCM correctly notes that the primary reason for maintenance of this full height vegetation is not the protection of brook trout habitat (but rather the protection of other resources) the Board finds that maintenance of this vegetation in these areas also will help minimize the impact of the project on brook trout and brook trout habitat even if these full canopy height areas are not extensive throughout the corridor.

The Board finds that in addition to the full height vegetation areas, those Wildlife Areas where a minimum vegetation height of 35 feet must be maintained also will benefit brook trout and brook trout habitat by mitigating the impact of the project. NRCM argues that the minimum 35-foot minimum vegetation height should be called the maximum height, however, the use of the word minimum reflects only that vegetation shorter than the 35-foot minimum height or anticipated to

be shorter than that height by the next vegetation maintenance cycle may not be cut. This terminology reflects that vegetation taller than 35 feet may be allowed. Depending on factors such as topography and conductor sag between structures, vegetation taller than 35 feet may be maintained.

Beyond terminology, in the Wildlife Areas where a 35-foot minimum vegetation height is required, this taller vegetation will provide better shading and better recruitment of organic matter than either a fully cleared corridor or a corridor managed with only riparian filter areas. While NRCM argues that taller and more mature trees would provide a better canopy, the Board notes the required 35-foot minimum height is not significantly different than the average vegetation height of 40 feet that is assumed throughout this forested region of Maine when evaluating visual impacts and screening provided by the forest. To put this in context, during the review of the applicant's Visual Impacts Analysis for the Department, James Palmer wrote, "40 feet is a reasonable estimation of the height of the opaque screen created by deciduous, evergreen, and mixed forest land cover in northern New England, however a quarter of the forested cover was less than 30 feet high." (Palmer Peer Review Comments, August 24, 2018, at 48.)

The Board finds that the Wildlife Areas are well located to mitigate impacts to brook trout waters. Of four priority areas pointed to by NRCM's witness in his hearing testimony, three have considerable overlap with Wildlife Areas with a 35-foot minimum height vegetation requirement. For example, the crossing of the South Branch of the Moose River is in Wildlife Area 2; the Cold Stream crossing is in Wildlife Area 7; and the Tomhegan Stream crossing is in Wildlife Area 9. (Compare J. Reardon pre-filed direct testimony at 11-12, identifying priority waters, with the Order, Appendix C, Table C-1, identifying streams within the Wildlife Areas.) Further, 66 streams<sup>17</sup> and not just 21, as stated by NRCM in its appeal, are within the Wildlife Areas where vegetation with a minimum height of 35-feet or taller is required. The Board finds the requirement in the Order to maintain 35-foot-tall vegetation within the select Wildlife Areas will meaningfully help minimize the impact of the project on brook trout and brook trout habitat.

Within the portions of Segment 1 that are outside the Wildlife Areas the Order requires tapering. This will result in taller vegetation along the edges of the corridor, including at stream crossings. NRCM argues that tapering will not "counteract" the impacts of the project. (NRCM Appeal at 18.) As with the other mitigation measures discussed above, this form of vegetation management will not eliminate potential impacts on brook trout or brook trout habitat, but will help minimize impacts. Many of the streams crossed by Segment 1 are less than 10 feet wide and trees shorter than would be found in a mature forest will provide adequate shade in the tapered zones and some woody debris inputs. Tapering also narrows the fully cleared width of the corridor. The Board finds tapering is another valuable form of impact mitigation or minimization.

Even with the measures discussed above that will minimize the impacts of the project on brook trout and brook trout habitat, impacts from the project will remain. Pursuant to the Site Law and NRPA, CMP proposed, and the Order requires, compensation for these impacts. The CMP-proposed compensation included placing covenants and deed restrictions on three conservation parcels, the Dead River Tract, the Grand Falls Tract, and the Basin Tract. These tracts are located

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<sup>17</sup> This count is based on a review of the Natural Resource Maps for Segment 1, dated January 30, 2019.

along the Dead River, total 1,053.5 acres, and include 12.02 miles of rivers and streams known to function as brook trout habitat. A considerable portion of the stream frontage provided by these tracts is along the Dead River, but the tracts also contain perennial and intermittent streams. The 12 miles of streams in these conservation tracts exceed by one linear mile the cumulative length of stream impacted by the project, including both coldwater and non-coldwater streams.

In addition to these three conservation tracts, CMP proposed to contribute \$200,000 to fund culvert replacements, with the goal of improving stream connectivity and improving access to and between brook trout habitat. CMP represented this amount could fund the replacement of 20 to 25 culverts, but based on the Department's experience with a culvert replacement grant program and testimony of an NRCM witness, the Commissioner determined significantly more funding would be required to replace this number of crossings. As a condition of the Order, the Licensees must contribute \$1,875,000 for culvert replacement in the vicinity of Segment 1. Finally, to compensate for impacts to Roaring Brook Mayfly and Northern Spring Salamander habitat CMP proposed to contribute \$180,000 to the Maine Endangered and Nongame Wildlife Fund to improve or protect such habitat elsewhere. These habitats typically also contain brook trout.

NRCM asserts that this compensation is inadequate because the brook trout habitat in the conservation parcels is not of the same type as the majority of impacted habitat and NRCM critiques the culvert replacement requirement, among other reasons, for having "no nexus" to the project's impact on brook trout habitat. (NRCM Appeal at 19.)

The adequacy of any compensation depends on the extent of the impact. Here, the Board begins by noting that throughout the permitting process MDIFW reviewed and commented on the project and paid particular attention to the potential impact to brook trout and brook trout habitat. MDIFW has considerable experience and expertise evaluating development impacts, including from transmission lines, on brook trout. With the expansion of riparian filter areas to 100 feet on all crossings along Segment 1 and on all coldwater stream crossings on the remainder of the project, along with the three proposed conservation tracts and the \$200,000 funding CMP initially proposed for culvert replacement, MDIFW's assessment was that potential impacts to brook trout and brook trout habitat were appropriately minimized and compensated. The Board finds that the vegetation management required through conditions of the Order minimize, but do not eliminate, project impacts. With respect to the conservation value of the three tracts, the Board finds that, despite being not identical quality to the 11 miles impacted by the Project, the 12 miles of streams protected by the three identified conservation tracts are brook trout waters and conservation of these parcels will provide a meaningful benefit to the species.

Finally, and significantly, the Board finds that the Department Order's requirement that the Licensees dedicate \$1,875,000 to culvert replacement in the vicinity of Segment 1 will add an extra layer of meaningful compensation for the impacts to coldwater fisheries and fishery habitat. Culvert replacement is an important and proven means of improving and restoring brook trout habitat, particularly benefiting this important native species. This is reflected in the culvert replacement grant program administered by the Department. Providing passage where it is blocked or limited allows greater access to and connectivity between habitat areas, improving

habitat quality overall and resilience. With improved connectivity, brook trout have greater access to a wider range of habitat and are better able to avoid localized habitat impacts.

The Board finds this amount of quality culvert replacement directly improves brook trout habitat and benefits this native species and is a reasonable form of compensation for the impacts to brook trout and their habitat as a result of constructing a transmission corridor that involves some clearing at stream crossings. The Board finds the \$1,8750,000, together with the other brook trout mitigation and conservation, adequately compensates for the project impacts.<sup>18</sup> The Board acknowledges that individual crossings to be replaced have not yet been identified and that with this comes some risk; however, establishing the fund without earmarking its use for specific projects also allows for strategic deployment of these resources in the future in alignment with other crossing improvement projects to maximize the overall benefit to brook trout in the vicinity of Segment 1.

The Board finds that with the conditions required in the Order, the project makes adequate provision for the protection of brook trout and will not unreasonably harm brook trout or brook trout habitat, satisfying the applicable criteria in NRPA, 38 M.R.S. § 480-D(3) and the Site Law, 38 M.R.S. § 484(3).

b. Habitat Fragmentation and Wildlife Travel Corridors

The Board has reviewed the testimony and recognizes the uniqueness and significance of the western Maine region where much of the project would be located, including the Segment 1. Much hearing testimony focused on the degree to which the Segment 1 area is part of a largely unfragmented forest block of more than 500,000 acres, which itself is part of an even larger area that is one of the world's last remaining contiguous temperate broadleaf-mixed forests. The Board agrees with the testimony and the Commissioner's finding that the western Maine region supports exceptional biodiversity, is expected to be especially effective at maintaining biodiversity as the climate changes, and that these qualities make the area unique and important for wildlife. But the Board also finds the record shows that within this western Maine region there is timber harvesting, an extensive network of land management roads, some residential camps, and other development. Forest management is the predominant activity, resulting in a landscape that is a mosaic of various-aged forest, ranging from mature to recently harvested. The mosaic changes over time as harvested areas mature and mature areas are harvested.

The potential for Segment 1 of the project to fragment the habitat in this region is one area of general agreement. For example, CMP recognized in its application, as quoted in the Order, that transmission line corridors may affect species movement, density, and survival, and create new linear edges. These edges – the border between forest and opening – reduce interior habitat, affect movement, and may contribute to biodiversity decline. Among others, witnesses for Appalachian Mountain Club testified about the impact of habitat fragmentation and the edge

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<sup>18</sup> NRCM and Licensees dispute whether the culvert replacement funding required in the Order would be sufficient to fund approximately 25 crossings. The Board recognizes that the exact number of crossings that can be replaced with the funding will depend on the crossings ultimately selected, as will the final number of stream miles to which brook trout access will be improved. The Board finds, however, that the average culvert replacement cost estimated in the Order is reasonable and supported, as noted in the Order, by the Department's experience and testimony of NRCM's witness, Mr. Reardon.



effect (*see, e.g.*, Publicover pre-filed direct testimony at 10-12), as did witnesses for Friends of the Boundary Mountains (*see, e.g.*, McMahon pre-filed direct at 7-18), and TNC (*see, e.g.*, Hunter pre-filed direct testimony at 3-8).

While the potential for habitat fragmentation, in general, appears to be agreed upon, the record includes conflicting testimony on the significance and degree of this impact. The breadth and extent of testimony and record evidence on this issue is considerable. For example, witness testimony on habitat impacts and those related to fragmentation were provided by: Calhoun, Emerson, Goodwin, Hunter, Joseph, McMahon, Merchant, Mirabile, Publicover, Simmons-Legaard, and Wood. The Board finds that this testimony demonstrates that different species would be affected differently by the creation of a transmission line corridor where one presently does not exist. While some species might benefit, overall, the creation of Segment 1 would have a negative impact on wildlife habitat.

One species in particular that was discussed during the hearing is pine marten. While pine marten is not listed as threatened or endangered, which would warrant heightened regulatory protection of their habitat, testimony from Simmons-Legaard established that pine marten can be considered an “umbrella species,” meaning that planning for pine marten often serves the purpose of planning for a wide range of other wildlife. The value to other interior forest species of taller vegetation, at least 30- to 40-foot tall, closed canopies, and unfragmented habitat blocks was testified to by witnesses such as Hunter, Publicover, and Simmons-Legaard.

To minimize the impact of the project on wildlife habitat and specifically to minimize the edge effect and impact of habitat fragmentation, the Department Order requires the preservation of 12 Wildlife Areas and a range of different types of vegetation management. These Wildlife Areas and the types of vegetation management are discussed above in Section 10(B)(5) and (8) and include tapering, maintenance of vegetation with a minimum height of 35 feet, and maintenance of full canopy height vegetation.

Reflected in the Commissioner’s requirement that the Licensees must implement these forms of vegetation management is a recognition, which the Board finds is supported by the evidence in the record, that the more vegetation retained within the Segment 1 corridor and the taller this vegetation can be allowed to grow, the smaller the fragmentation impacts on wildlife habitat. The Board finds that tapering will help minimize the impacts of Segment 1. By retaining significantly more vegetation within the corridor, in stages of heights, tapering eliminates the creation of the traditional hard edge along a transmission line and also reduces, but does not eliminate, the lateral reach of the edge effect beyond the bounds of the 150-foot-wide corridor. Tapering significantly narrows the scrub-shrub opening along the center of the corridor, reducing the time and distance crossing wildlife would be out in the more open shrub-scrub habitat.

Within the Wildlife Areas where a minimum vegetation height of 35 feet is required by the Order, this taller vegetation is required across the entire width of the corridor except where access roads must be retained. While vegetation with a minimum height of 35 feet is not equivalent to full canopy height vegetation in terms of the cover it provides, the record evidence supports that vegetation of 30 feet and taller aids wildlife movement. The Board finds that the maintenance of taller vegetation in Wildlife Areas further reduces the fragmenting impact of the

Segment 1 on wildlife habitat and promotes connectivity. The Board also finds the locations of the Wildlife Areas with taller vegetation across the corridor were rationally selected, based on evidence in the record, to facilitate wildlife movement, with a focus on stream crossings and areas adjacent to conserved land and taking into consideration the habitat connectivity priority areas identified by TNC. The Wildlife Areas and vegetation management required within them are meaningful and appropriate forms of mitigation that strategically minimize the impact of the project.

The Board has considered how meaningful and effective these vegetation management requirements will be over time, which is one of the questions raised in the appeals. NRCM points out that Segment 1 crosses through a range of forest stand types and ages. (NRCM Appeal at 22.) The age and composition of the forest at the time of construction will influence both what a tapered corridor and a minimum 35-foot vegetation height Wildlife Area looks like in any one area. The full benefit could be years after construction. Additionally, NRCM argues, any benefit – whether immediately following construction or in the future as trees within the corridor grow – could be limited in time if the vegetation is or matures as an even-aged stand. (NRCM Appeal at 22, 24.) For example, if even aged, the vegetation within a Wildlife Area would grow to approximately 35 feet at the same time, be cut at the same time, and eliminate the benefit of that Wildlife Area until taller vegetation regenerates.

The Department Order acknowledges, and the Board agrees, that how the vegetation management is implemented will influence its value. The Order requires the Licensees to establish in their Vegetation Construction Plan and Vegetation Management Plan (VMP) how vegetation will be managed in accordance with the Order (Condition #12) and expressly requires the Licensees “to describe how the vegetation will be managed to ensure tapering minimizes the environmental impact of the corridor to the greatest extent practicable, including reasonable efforts to avoid the growth of even-aged stands within each taper.” (Order at 78.) Even with these requirements, NRCM raises questions about how vegetation management will be monitored and enforced and whether its maximum effectiveness can be ensured. (NRCM Appeal at 22.)

The Board finds the concern expressed by the appellants about ongoing monitoring and enforcement of the vegetation is well founded. Therefore, to ensure the effectiveness of the required vegetation management, the Board modifies the Department Order to add the following requirements:

- Prior to the first vegetation maintenance cycle and at least every three years thereafter, the Licensees must collect lidar data for Segment 1. The data must enable evaluation of vegetation height and canopy closure within each progressively taller tapered zone and the Wildlife Areas. The initial lidar data set for Segment 1 capturing conditions prior to the first vegetation maintenance cycle must be collected on or after June 1, 2021.
- After the initial lidar data set is collected, the Licensees shall identify on GIS maps submitted to the Department the following: those areas within the tapers of Segment 1 and within the Wildlife Areas in which vegetation taller than the minimum height required may be maintained (e.g., as a result of topography, conductor sag, and

project design). These maps shall be incorporated into the VMP and vegetation taller than the minimum requirements shall be maintained in these areas.

- At least two months prior to each vegetation maintenance cycle, the Licensees must provide the Department with GIS maps indicating where vegetation will be removed in accordance with the VMP, along with a narrative description of what vegetation will be removed.
- After vegetation is removed and once the subsequent set of lidar data is collected, the Licensees must provide the Department with GIS maps indicating where the vegetation was removed, along with a pre- and post-vegetation removal analysis that evaluates and compares vegetation height and describes the composition of the stand. Additionally, this analysis must identify any canopy openings greater than 2,500 square feet within any Wildlife Area. The analysis must be submitted to the Department within 90 days of collection of the lidar data. If the analysis indicates within a Wildlife Area with an opening in the canopy greater than 2,500 square feet that natural regeneration will not result in closure of the canopy within five years of the most recent vegetation removal, the Licensees must submit a replanting plan to the Department for review as part of the submitted analysis. The replanting plan must provide for the planting of native species, of such a size and in such quantity, that the planting will result in a closed canopy within five years of the vegetation having been removed.

The Board finds that, similarly, vegetation management within the Wildlife Areas is critically important because it is within these areas that habitat connectivity across the Segment 1 corridor is best provided for, minimizing the impact of the project. To maximize the benefit of the mitigation provided by the Wildlife Area and specifically those with a minimum vegetation height of 35 feet, careful management of the vegetation in these areas is important. Additionally, even with careful management, if an even aged stand exists and additional, proactive measures are not taken, much of the stand could be cut during the same maintenance cycle if the stand encroaches into the wire safety zone at the same time. To avoid such a result and ensure the Wildlife Areas are managed to maximize the benefit of the vegetation that may grow across the corridor and under the transmission lines, the Board modifies the Department Order to require the following:

- The Licensees must include in their VMP the steps that will be taken to manage each Wildlife Area with a 35-foot minimum vegetation height to maximize the closed canopy conditions and avoid growth of even aged stands. The VMP must include the quantitative metrics that will be used to evaluate whether a well-distributed stand of trees is growing and to identify (a) when removal of vegetation less than the 35-foot height minimum and (b) when the planting of vegetation is appropriate to promote growth of a well-distributed stand.
- The Licensees must include in their VMP provision that if lidar data indicates that there is an opening in the canopy in excess of 2,500 square feet within a Wildlife Area, exclusive of access roads and structure pads, the Licensees must replant those areas with native tree species if natural regeneration will not result in closure of the canopy to less than 2,500 square feet within five years of the vegetation having been removed.

- The Licensees must submit the revised VMP to the Department for review at least four months prior to the start of commercial operation.

Finally, even with the requirements in the Order that minimize the impact of the project on wildlife habitat, the Commissioner determined impacts remained that warranted conservation. As a condition of the Order, the Licensees must permanently conserve 40,000 acres in the vicinity of Segment 1 and develop a related Conservation Plan. Among other things, the Order establishes that the Conservation Plan must: “Establish as its primary goal the compensation for the fragmenting effect of the transmission line on habitat in the region of Segment 1 and the related edge effect by promoting habitat connectivity and conservation of mature forest areas.” (Order at 81.)

NRCM and West Forks argue that this conservation is inadequate. In support of its argument, NRCM claims the conservation amount is “based on best-case assumptions about the environmental benefits of tapering and Wildlife Areas” and appears to assume that a standard working forest easement allowing “commercial forestry to continue” would satisfy the conservation requirement. (NRCM Appeal at 16.) Neither is accurate. As discussed above, the Board finds each of the forms of vegetation management required in the Department Order will help minimize the fragmentation impacts of the project and, with the modifications required in this Board Order, the full benefit of these measures will be achieved. While this vegetation management is an important and necessary component of the project, its value has not been overestimated as the appellants suggest or assessed based on best-case assumptions. This is reflected in how the required compensation, specifically the required conservation, was calculated. In requiring 40,000 acres of conservation, the Commissioner calculated this total without deducting any of the areas with taller vegetation, either Wildlife Areas or tapered areas, from the conservation formula. As explained in the Order:

TNC estimates that approximately 5,000 acres would be impacted by the corridor itself and associated edge effect, assuming an edge effect width of 330 feet. While this 5,000-acre calculation of impact pre-dates the slightly shorter Merrill Strip Alternative and was made without knowing taller vegetation would be required in some areas, the Department finds this estimated area of impact remains a reasonable baseline for evaluating the appropriate amount of additional conservation that should be required.

(Order at 80.) Applying an 8:1 ratio, the same ratio used by the Department with respect to off-site compensation for wetland impacts, the Commissioner concluded 40,000 acres of conservation was warranted. As noted above, these 40,000 acres must be managed to promote habitat connectivity and conservation of mature forest areas. While commercial timber operations are not expressly precluded by the Order, typical commercial forestry operations are not conducted to achieve conservation of mature forest areas. Thus, while conceivable that some wood could be commercially harvested within the conservation area, standard sustainable forestry operations commonly allowed in areas subject to working forest easements would not.

A chief concern expressed by West Forks is that the specific area to be conserved as part of the required compensation is not identified in the Order. (West Forks Appeal at 12-13.) While

compensation parcels may be identified in the course of the permitting process and, therefore, identified in a Department order, and several conservation parcels to compensate for impacts other than habitat fragmentation totaling approximately 2,280 acres<sup>19</sup> were identified here, it is not uncommon for compensation to be required without identification of the area that will be conserved or improved. The type of compensation most commonly required as part of Department permitting is compensation for impacts to wetlands, and this most often is done through in-lieu-fee payment to the Maine Natural Resource Conservation Program. There the actual areas conserved or improved are identified after permitting is complete consistent with the guidelines governing that program.

Here, the Order sets out the guidelines to ensure the conservation parcel(s) and the management of these lands achieves the intended purpose, including the requirement that the Department review and approve the Conservation Plan. This Conservation Plan must contain, among other things, a draft forest management plan establishing how the conservation area(s) will be managed. The areas must be managed consistent with the primary goal of the Conservation Plan – compensating for the fragmenting effect of the transmission line on habitat in the region of Segment 1 and the related edge effect. This includes providing (1) blocks of habitat for species preferring mature forest habitat and (2) wildlife travel corridors along riparian areas and between mature forest habitats. While, as noted above, commercial timber operations are not expressly precluded, standard sustainable forestry operations commonly allowed in areas subject to working forest easements would not be consistent with the primary goal of the Conservation Plan.

The Board finds that the amount of conservation required in the Order – 40,000 acres – was rationally calculated and adequate to compensate for the impacts of the project on wildlife habitat, including habitat fragmentation. Further, and overall, the Board finds that with the requirements in the Department Order, along with the added requirements related to vegetation management and tapering within Segment 1 described above, the impacts of the project on wildlife and wildlife habitat will be adequately minimized and compensated for. The Board finds that, under the terms and conditions approved in this Board Order, wildlife lifecycles and wildlife habitat are adequately protected from adverse effects from the project, as required pursuant to Chapter 375, § 15.

#### 11. RELATIONSHIP BETWEEN STATE ENVIRONMENTAL PERMITTING AND FEDERAL SAFETY REQUIREMENTS

Appellant NextEra argues that Board should find the Department Order legally defective because the Commissioner did not evaluate the applicability of the North American Electric Reliability Corporation (NERC) Reliability Standard FAC-003-4 to the project and whether the vegetation management required in the Order is consistent with that standard. (NextEra Appeal at 8-9.) Suggesting that a non-profit organization’s standard that the Federal Energy Regulatory Commission requires adherence to preempts state environmental permitting, NextEra states: “It

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<sup>19</sup> The Basin Tract, Lower Enchanted Tract, and Grand Falls Tract together include 1,053.5 acres. The Little Jimmy Pond Tract, Flagstaff Lake Tract, and Pooler Pond Tract together include 510.75 acres. The Upper Kennebec River DWA conservation includes 717 acres.

is axiomatic that the Department cannot impose a condition that is inconsistent with a federally approved and mandated NERC Reliability Standard.” (NextEra Appeal at 8.)

As an initial matter, NextEra points to no law or regulation that preempts the Department’s environmental permitting authority over the NECEC project, nor is the Board aware of any such provision. Additionally, the case law pointed to by NextEra is not on point; the cases focus on wholesale rates and a gas pipeline, not state environmental permitting of a transmission line. The Board finds that to construct and operate the project the Licensees must comply with Maine’s environmental laws, including Site Law and NRPA. These laws are not preempted.

To the extent NextEra contends the Commissioner’s decision is unlawful because it imposed conditions that result in some alteration of the project, for example, by imposing vegetation management conditions that narrows the Segment 1 corridor, the Board finds this contention without merit. The Commissioner has broad authority to approve, approve with conditions, or deny a permit application. 38 M.R.S. § 344(2-A). This is reinforced in the Site Law itself and the rules interpreting it. As discussed in Section 10 above, Site Law Section 487-A(4) provides: “The [D]epartment may approve or disapprove all or portions of the proposed transmission line . . . and shall make such orders regarding its location, character, width, and appearance as will lessen its impact on the environment, having regard for any increased cost on the applicant.” In issuing a conditional approval with vegetation management requirements that narrow the width of the corridor and alter its appearance, this is exactly what the Commissioner did. Chapter 375, § 14(D), implementing the Site Law, provides: “The Department may, as a term or condition of approval, establish any reasonable requirement to ensure that the proposed development will have no unreasonable adverse effect on scenic character . . . .” And Chapter 375, § 15(D) states: “The Department may, as a term or condition of approval, establish any reasonable requirement to ensure that a developer has made adequate provision for the protection of wildlife and fisheries.” Accordingly, the Board rejects the argument that the Department is prohibited from placing reasonable conditions on the project that may, as a consequence, require alteration of the project as it was proposed.

The Board’s focus on appeal is on whether the project satisfies the controlling state law, specifically the Site Law and NRPA. Neither the Commissioner nor Board is authorized to interpret and apply federal regulatory standards or safety codes referred to in federal standards. The Board notes that proposed projects often require federal permits in addition to state approval and if a subsequent federal proceeding requires changes to a proposed project that has been issued a permit by the Department, the permit holder must reconcile the two approvals by obtaining an amendment to one of the permits. With respect to the NECEC project, the Commissioner stated that the required vegetation management “is integral to the Department’s decision and necessary to ensure the project does not violate applicable statutory and regulatory standards.” (Department Order at 82, n. 34.) The Board agrees with the Commissioner’s assessment about the importance of the vegetation management required in the Department Order and as strengthened by the modifications in this decision.

By not appealing the Department Order the Licensees have indicated that the proposed project can be constructed in accordance with the conditions of the permit. And throughout the permitting process CMP has specifically stated its commitment to meeting NERC vegetation

management requirements. This is reflected, for example, in both the Vegetation Construction Plan and VMP, including as they were revised in January 2019 to address the two areas where tapering was proposed at that time and the maintenance of taller vegetation across the corridor in Upper Kennebec River Deer Wintering Area. Notably, concerns about CMP's proposed vegetation management and commitment or ability to satisfy NERC standards were not raised by NextEra at that time. Rather, questions were raised about whether tapering and taller vegetation would be appropriate in more places than CMP proposed as a way to mitigate the environmental impact of the project. For example, on April 1, 2019, at the first day of the public hearing, when cross-examining CMP witnesses about the applicant's evaluation of alternatives, counsel for NextEra posed questions suggesting CMP should have considered tapering along all of Segment 1 and not just the two areas proposed for tapering at that time. (Hearing Transcript, Day 1, April 1, 2019, at 274:24-25 ("Did you look at tapering all of Segment 1?"); 276:7-10 ("Did your work assessing how to avoid, mitigate and compensate include looking at alternatives like undergrounding and tapering?").) Additionally, during the sixth day of the public hearing, on May 9, 2019, when vegetation management, including maintenance of taller vegetation and tapering, was a central topic of discussion, NERC standards were never mentioned by any of the parties, including by NextEra.

The Board finds the absence of an analysis by the Commissioner of whether the Project will meet the NERC standards is not a legal deficiency, as NextEra argues, but rather an appropriate approach given the Commissioner's task to review the project under the controlling state law. Had NextEra wished to present evidence that tapering or the maintenance of taller vegetation within the corridor would not be possible, it had ample opportunity to do so during the public hearing process. In addition, CMP could have appealed the Commissioner's decision. There is no need for the Board take new evidence on federal requirements that are beyond the scope of the Board's review. The Board will not review the project for compliance with the NERC standards.

Finally, NextEra argues that, aside from the issue concerning the NERC standards, the vegetation management requirements in the Order will influence pole heights and no consideration was given to potentially taller pole heights. The Board finds this is not the case. First, NextEra is not correct that tapering will require taller poles. Second, the record reflects that the potential for taller poles to be needed to allow for the maintenance of taller vegetation within the corridor (e.g., a minimum vegetation height of 35 feet in certain Wildlife Areas) was considered by the Commissioner. For example, when Department staff asked CMP about its ability to maintain taller vegetation at specific stream crossings along the corridor, CMP submitted information in response that included necessary pole heights at the individual crossings. CMP also identified where taller poles might be needed in the vicinity of priority areas for habitat connectivity that were identified by The Nature Conservancy. These areas were incorporated, in part, into the Wildlife Areas designated in the Department Order and the analysis of scenic impacts in the Department Order reflects consideration of taller poles in Wildlife Areas. The Board finds, contrary to NextEra's assertion, that the Commissioner reasonably and appropriately considered the relationship between the required vegetation management and pole height when evaluating the impacts of the project.

In sum, the Board finds that the vegetation management requirements in the Department Order, as strengthened in this decision are appropriate conditions, validly authorized by state statutes

and rules, and within the regulatory purview of the Commissioner and the Board. The Board also finds the Department appropriately analyzed vegetation management as it applies to standards in the Site Law and the NRPA and rejects NextEra's argument that the Department Order is legally deficient for not independently evaluating how NERC standards would apply to the project.

## 12. ALTERATION OF CLIMATE

Appellant NRCM raises procedural and substantive challenges to the Department's consideration of greenhouse gas emissions. NRCM states the Department "barred critical analysis" of CMP's purported greenhouse gas benefits by "denying parties an opportunity to vet CMP's greenhouse gas claims in an open hearing process." (NRCM Appeal at 32.) NRCM also alleges the Department failed to discuss the issue adequately in decision documents and, thus, "ignored compelling evidence" submitted by the appellants. (NRCM Appeal at 33.)

Chapter 3 explicitly grants a presiding officer authority to limit issues to be heard at a hearing when no prejudice to a party will result. With respect to the topic of the potential impacts to greenhouse gas and climate change, parties requesting inclusion of this topic as a hearing topic were given an opportunity to articulate their position and provide the statutory and regulatory basis for their request. Parties interested in responding to these requests similarly were provided an opportunity to do so in writing. The Department's Presiding Officer for the hearing considered which statutory and regulatory criteria should be designated as hearing topics and, in the third procedural order, determined that "net greenhouse gas emissions will not be added as a topic to be addressed at the hearing, however the parties may submit written evidence on this issue into the record." Other requested topics also were not designated as hearing topics as the amount of hearing days was not open-ended and was focused on specific statutory criteria, and those most at issue. While the decision meant the topic of greenhouse gases would not be discussed orally at the hearing, NRCM had the opportunity to provide any written evidence and related argument it desired. NRCM submitted written evidence on the topic on May 9, 2019. Evidence on this topic was also submitted by other parties and members of the public.

NRCM does not provide any support for its allegations the Department excluded such evidence or "barred critical analysis" during the proceeding, nor any basis for the claim they were prejudiced by the Presiding Officer's decision that the issue could be adequately addressed through written submissions. The parties availed themselves of the opportunity to submit written evidence specific to the issue and argument as to how it should be considered by the Department in its weighing of the reasonableness of the project. While it can be considered in judging the reasonableness of specific impacts of a proposal, the Board notes that the issue of whether a proposed project will impact greenhouse gas emissions is not a separate licensing criterion in either the Site Law or NRPA. The Board finds the choices of issues to be addressed at a hearing, as contemplated by Department rules and the Maine Administrative Procedure Act, was fairly and reasonably decided and no party to the proceeding was prejudiced by this ruling.

Regarding the allegation the Department did not consider the evidence submitted by NRCM or adequately analyze the issue, the Board turns to the Department Order itself. The introductory paragraph of Section 17 of the Order states: "The Department received extensive public comment, as well as written argument from [Intervenor] Groups 3 and 4 and the Applicant,



concerning whether and how potential greenhouse gas emission reductions resulting from the project have regulatory significance under the applicable permitting standards.” The Order briefly summarizes key aspects of the evidence and written comments and addresses the relationship between greenhouse gases and the Department’s regulatory standards. Lastly, the Department references other records it sought, included in the record, and utilized in making its findings, stating: “The Department reviewed documents in the PUC’s proceeding, including the London Economics International, LLC report. The Department also reviewed the Examiner’s Report and finds its conclusions to be credible.” The PUC retained London Economics International, LLC to provide an independent review of the likely benefits, including greenhouse gas benefits, as a part of CMP’s Request for Approval of a Certificate of Public Convenience and Necessity. The PUC Examiners’ Report articulates the PUC staff’s assessment of evidence in the record in that proceeding and represents their recommendation presented to the Commission.

The Board disagrees with NRCM’s contention that evidence submitted by appellants was not considered. The Department directly references such submissions in the Order in addition to similar comments submitted by members of the public. The Board interprets these statements as a summarization of positions considered in the Department’s review. While the Department did not refute NRCM’s contentions point by point, such detail is not a requirement. However, careful examination of the Commissioner’s statements in the Order and more specifically the broader contexts of the cited evidence demonstrates that the Commissioner did consider appellant’s arguments in detail and disagreed.

NRCM challenges whether the Department appropriately assessed the PUC conclusions in the Examiners’ Report as credible. Arguments submitted by NRCM on appeal were addressed in detail during the PUC proceeding, a proceeding in which NRCM intervened.<sup>20</sup> The Department had access to these records and the Order states that Department staff reviewed them in its proceeding. Specifically, the Department stated that it found credible the conclusions in the Examiners’ Report, including that “the NECEC [project] will result in significant incremental hydroelectric generation from existing and new sources in Quebec and, therefore, will result in reductions in overall greenhouse gas emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region.” (Order at 105 (quoting Examiners’ Report at 114).) The PUC adopted the recommendations and findings of the Examiners’ Report in its proceeding regarding the NECEC project.

The PUC decision was appealed, with the issue of whether the NECEC would help lower greenhouse gas emissions being one of the issues in the appeal. The PUC decision, including its conclusions on this issue, was upheld by the Law Court. *NextEra Energy Res., LLC v. Maine PUC*, 2020 ME 34.<sup>21</sup>

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<sup>20</sup> Public Utilities Commission Examiner’s Report (March 29, 2019), Docket No. 2017-00232, at 112 (“As discussed below, this issue involves consideration of: (1) whether there would be excess water within the HQ system that could be used to generate energy as a result of the NECEC export path; (2) whether it is reasonably likely that HQ will develop additional hydroelectric capacity on its system, at least to some significant degree, as a result of the NECEC; and (3) if HQ did divert energy from another market to meet its NECEC obligations, as has been argued by some parties, what type of supply would that other market use to replace the diverted HQ energy.”)

<sup>21</sup> “The [Public Utilities] Commission also found that the project would result in a reduction of greenhouse gas emissions. . . All of these findings are supported by significant record evidence.” *NextEra Energy Res., LLC v. Maine PUC*, 2020 ME 34, ¶ 30. Similarly, the Law Court concluded the PUC’s findings that the NECEC project

The Board has reviewed the record, including comments and arguments presented by the appellant, and concurs with the Department's analysis of the issue. The PUC Examiners' Report provides analysis of the greenhouse gas issues raised by appellant and the Board finds that the evidence supports the Commissioner's finding that the information in the Examiners' Report was credible. The Board similarly concludes that the findings on this issue by the PUC, a sister agency with expertise on sources of power generation, after a more detailed examination and one in which NRCM participated, should reasonably be given weight in the Department's analysis. Accordingly, the Board finds, based on the evidence submitted by the parties and by the public, and the PUC materials in the record, that greenhouse gas reductions are likely as a result of this project, and a benefit in weighing the reasonableness of adverse effects of the project.

### 13. DECOMMISSIONING REQUIREMENTS

The Department Order requires the Licensees to submit a decommissioning plan within one year of commercial operation of the project. Among other things, this plan must include financial assurance for the cost of decommissioning, and this cost estimate and associated financial assurance must be updated throughout the life of the project according to a schedule set in the Order. While the applicable permitting standards do not expressly require creation of a decommissioning plan, the Department found such a plan necessary here, citing the Site Law, 38 M.R.S. § 484(3). This section requires that a permit applicant demonstrate its project will not have an adverse impact on, among other things, scenic character, and natural resources. The Commissioner determined that an operating project fulfilling its project purpose would satisfy this statutory requirement, provided the conditions established in the Department Order were met. At the end of the project's useful life or if it ceased operating, the Commissioner found the project would no longer be delivering on its project purposes and that the impacts of the Segment 1 infrastructure thus would constitute an unreasonable adverse effect on scenic character and natural resources. On this basis the Department Order requires the submission of a decommissioning plan, accompanied by corresponding financial assurance, within one year of the start of commercial operation of the project.

Appellant West Forks objects to the Order's timing for submission of the decommissioning plan and incorporated financial assurance. Specifically, West Forks argues that requirement in the Order that the Licensees demonstrate financial capacity to carry out the decommissioning does not conform to the general financial capacity standards set forth in the Site Law, 38 M.R.S. § 484(1), as interpreted by the Department's Site Law Financial Capacity Rules, Chapter 373.

Title 38, Section 484(1) sets forth the standard for financial and technical capacity under the Site Law. The statute requires applicants to submit evidence that demonstrates financial means to "develop the project in a manner consistent with state environmental standards and with the provisions of [Site Law]." The law also allows the Department to issue a permit that allows a developer to provide the final demonstration of financial capacity after the permit is issued, but before the start of construction, in a form the Department deems adequate. Chapter 373 interprets and expounds upon the statutory criterion, requiring an applicant to have "financial capacity to

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"will result in incremental hydroelectric generation" and "will reduce greenhouse gas emissions in the region" are "factual findings supported by substantial evidence in the record." *Id.* at ¶ 37.

design, construct, operate, and maintain the development in a manner consistent with state environmental standards and the provisions of the Site Law . . . for all aspects of the development, and not solely the environmental protection aspects.” Ch. 373, § 2(A). Also, the rule reiterates that the Department may “defer a final finding on financial capacity by placing a condition on a permit that requires the permittee to provide final evidence of financial capacity before the start of any site alterations.” Ch. 373, § 2(A).

West Forks and the Licensees urge different interpretations of how this language interacts with the decommissioning plan required in the Order. West Forks argues that the decommissioning plan falls within the meaning of “all aspects of the development” and argues, pursuant to Chapter 373, that financial capacity for decommissioning must be supplied prior to a decision on the application, or at least prior to the start of any site alterations. (West Forks Appeal at 16.) The Licensees argue the rule only requires a financial capacity demonstration “‘to design, construct, operate and maintain the Development’ – not to decommission the project at the end of its productive life.” (Licensees’ Response at 43.)

As an initial matter, the Board agrees that requiring the decommissioning of Segment 1 upon the project reaching the end of its useful life or ceasing to operate is appropriate. Given the largely undeveloped nature and ecological significance of the surrounding area, the visibility of certain project components from scenic resources and by recreational users of the area, the singular use of a transmission line and associated physical infrastructure, a nonfunctioning project in this previously undeveloped corridor would constitute an undue adverse effect on scenic character and natural resources. Chapter 373, § 2(B)(1) does include, in a list of itemized costs that a cost estimate may include, “restoration of the site, if applicable” but this list does not mandate that financial capacity to decommission be required. The rule allows some discretion on the part of the Department in what major costs it will require to be included in the cost estimate, and thus in the extent of financial capacity that must be demonstrated prior to construction. Based on the arguments of West Forks about the importance of financial capacity for decommissioning, and the totality of the circumstances, the Board will modify the Department Order to require a demonstration of financial capacity for decommissioning before the resumption of construction of the project.

The Department Order appears to assume that if construction is commenced and the associated impacts incurred, operation will follow. This is reflected, for example, in the trigger for decommissioning discussed in the Order, which focus on contracts not being renewed or electricity not being delivered for a period of 12 consecutive months. The Board finds these triggers are reasonable once the project becomes operational.

It is possible, however, that the project will be constructed or partially constructed and never energized. The need for decommissioning a constructed Segment 1 that is never operated is the same as the need for decommissioning Segment 1 after operation at the end of its useful life. The Board notes that construction was commenced, pursuant to the valid and effective Department Order, but was halted, in part due to the November 23, 2021 Suspension Order. The suspension may be lifted under certain circumstances as outlined in the Suspension Order and with the Board’s decision here it may be possible in the future for the Licensees to resume construction of the project, including if this Board Order is appealed to Superior Court. To address this set of

facts and any possible scenarios under which Segment 1 might be all or partially constructed and not energized, the Board finds it is necessary for the decommissioning plan, including the related financial assurance demonstration, to be finalized and submitted to Department for review prior to construction resuming. Further, in addition to the components required by the Department Order, the plan must include that along with nonrenewal of the current contracts triggering implementation of decommissioning, termination of the current contracts similarly triggers the requirement to begin decommissioning within 18 months of termination. The Board finds that with these two modifications to the decommissioning requirements described in Section 18 of the Department Order, Segment 1 of the project and associated infrastructure will not adversely affect the scenic character and natural resources of the region in which it is located.

#### 14. HEARING REQUEST

In their appeals, all three appellants – NextEra, NRCM, and West Forks – request a public hearing. Hearings are governed by Chapter 2, § 7 of the Department’s rules. Section 7(B) requires that the request must “specify the reasons why a hearing is warranted.” Hearings are discretionary unless otherwise required by law. Section 7(B) provides that “[t]he Department will hold a hearing in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Department in understanding the evidence.”

Here, the Commissioner held a public hearing, spanning five consecutive days in 2019, April 1 through 5, with a sixth hearing day held a month later on May 9. As part of this hearing process parties offered 35 witnesses who focused on many of the issues central to the present appeals. In addition to oral testimony and cross-examination, witnesses provided pre-filed direct, rebuttal, and, in some instances, sur-rebuttal testimony. Parties also had the opportunity to submit written briefs advocating for their respective positions. On two evenings during the hearing, members of the public also had the opportunity to provide oral comments. In addition to the hearing process, parties and members of the public had the opportunity to provided written comments on the application, including on topics not focused on during the six days of hearing.

The result of the application review process conducted by the Commissioner, which spanned nearly two and a half years, is a comprehensive administrative record. The parties had the opportunity to present witnesses who provided testimony, some of which involved conflicting testimony between witnesses for parties for and against the project. As discussed throughout this Board Order, the existing, extensive administrative record and is sufficient for the Board to evaluate the project and assess whether it meets the permitting standards.

For example, one topic area on which the appellants request a public hearing is TRI. Specifically, NRCM, in its offer of proof, states it would submit written or oral testimony with regard to the “illegal BPL lease.” (NRCM Appeal at 35.) The lease at issue is in the record. The “legality” of the lease is a question for the courts. Whether the lease was a sufficient form of TRI for the Commissioner to have processed CMP’s permit applications is an administrative question raised on appeal. While the answer to this question is disputed by the parties, the Board finds there is no further fact finding that would aid the Board in resolving this administrative issue.

Unlike the question of TRI, which does not involve a fact-intensive assessment, central to several of key issues on appeal are the factual findings made by the Commissioner. Specifically, the question of whether the underground alternative is a practical alternative less damaging to the environment than the permitted project is raised on appeal. Also raised on appeal is whether the impact of the project on brook trout and brook trout habitat and whether the fragmenting effect of the Segment 1 corridor are reasonable as these impacts are mitigated and compensated for.

These key issues on appeal also were key issues during the original permitting of the project. For example, brook trout impacts were identified early in the review process by Department staff and MDIFW; considerable testimony also was presented on impacts to coldwater fisheries during the hearing, including by NRCM witness Reardon. Habitat fragmentation was the focus of even more testimony, including by witnesses: Mirabile, Goodwin, Johnston Calhoun, Caruso, Cutko, Emerson, Hunter, Joseph, McMahon, Merchant, Publicover, Russell, Simons-Legaard, Towle, and Wood. As NRCM notes in its request for a public hearing, the project approved in the Department Order was not exactly the same as the project proposed by the applicant. Through the imposition of conditions, the Commissioner required further impacts minimization measures and further compensation.

Based on the Board's review of the record, these additional requirements grew out the Commissioner's consideration and assessment of the evidence presented through the application review process, including the hearing. This, in part, reflects the thoroughness of that process. Particularly, notable is that these key issues now presented on appeal were the focus of the sixth day of public hearing, held after the initial week-long set of hearing days and after the Commissioner and parties had had a chance to review the previously presented material. As reflected in the 10<sup>th</sup> Procedural Order, the cost, logistics, and environmental impacts of underground transmission line construction were evaluated during that sixth day of hearing, as was the potential for tapering and maintenance of taller vegetation under the conductors to minimize environmental impacts of the project.

The Board finds the parties have had the opportunity to present written evidence and witness testimony on the alternatives analysis and environmental impacts of the project, including on how different forms of vegetation management might mitigate these impacts. The Commissioner's decision followed consideration of all information gathered during the review process. This record, on appeal, allows the Board to evaluate both the Commissioner's decision in the Department Order and the project itself to determine whether the project meets the applicable permitting standards. The Board finds the record before it allows full evaluation of the NECEC project and the issues on appeal and that a hearing is unlikely to further aid the Board in its decision-making. Therefore, the Board declines to exercise its discretion to hold a public hearing as part of its consideration of the appeals of the Department Order. The requests for public hearing are denied.

## **APPEAL OF TRANSFER ORDER**

### **15. SITE LAW TRANSFER ORDER**

On September 25, 2020, NECEC LLC submitted applications to the Department for partial transfer of the Site Law and NRPA permits and water quality certification from CMP to NECEC LLC. NECEC LLC included a signed and completed transfer application form for the Site Law permit and a separate, signed and completed Permit by Rule Notification Form pursuant to Chapter 305, Permit by Rule Standards, § 17, for partial transfer of the NRPA permit. NECEC LLC also provided a number of attachments in support of both application forms. The parties to the underlying licensing proceeding were notified of the Site Law transfer application and the record was open for public comment on that application from the date it was filed until December 4, 2020.

On December 4, 2020, the Acting Commissioner approved the application for a partial transfer of the May 11, 2020 Department Order from CMP to NECEC LLC (Transfer Order). The Transfer Order (titled “Site Location of Development Act Partial Transfer Findings of Fact and Order”) relates to NECEC LLC’s transfer application under the Site Law.<sup>22</sup>

The requested partial transfers grew out of the PUC proceeding. The PUC, in its May 2019 “Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation” approved a Stipulation requiring CMP to transfer a portion of the project and its associated development costs to a special purpose entity which was not a subsidiary of CMP. CMP designated NECEC LLC as that entity. The portions of the project subject to the transfer include the new HVDC transmission line (Segments 1, 2, and 3 of the transmission line); the converter station in Lewiston; a 1.2-mile-long 345-kilovolt transmission line from the converter station to the Larrabee Road Substation also in Lewiston; and the two termination stations for the horizontal directional drill on either side of the Kennebec River.

Portions of the project remaining in CMP ownership include transmission line Segments 4 and 5, the new Fickett Road Substation, the Larrabee Road Substation, the Coopers Mills Substation, the Crowley’s Substation, the Maine Yankee Substation, the Surowiec Substation, and the Raven Farm Substation.

#### A. Appeal and Procedural Background

On January 4, 2021, NRCM filed a request with the Board to vacate the December 4, 2020 Transfer Order, and in the alternative, appealed the Transfer Order to the Board. NRCM also requested that the Board stay the Transfer Order during the pendency of the appeal, requested that the Board consolidate the appeal of the transfer with the appeals of the Department Order, and requested a hearing before the Board on the appeal of the transfer.

By letter dated January 19, 2021, the Board Chair notified NRCM that “[t]he Board’s authority to vacate a Commissioner licensing decision lies within the context of an appeal” and accepted NRCM’s filing as an appeal of the Transfer Order. The Board Chair granted the consolidation request and consolidated NRCM’s appeal of the Transfer Order with the three appeals of the Department Order. The Board denied the request for a stay.

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<sup>22</sup> The Permit-by-Rule Notification (PBR #71019) under the NRPA was accepted by the Department on October 13, 2020. While acceptances of permit by rule notifications may be appealed pursuant to Chapter 2, § 24, no appeal of the Department’s acceptance of the PBR was filed.

NRCM argues in its appeal that the Transfer Order is invalid because the transfer application involves a project of statewide significance and that the Board should have made the original decision on the transfer application, as opposed to the Commissioner; that NECEC LLC does not have sufficient TRI in the public reserved lands in Segment 1 for the transfer application to be accepted as complete and processed; and that NECEC LLC has not provided sufficient evidence of financial capacity to fund decommissioning.

On February 18, 2021, CMP and NECEC LLC filed a response to NRCM's appeal of the Transfer Order and requested that the Board deny the appeal. Also, on February 18, 2021, West Forks submitted a response in support of the NRCM appeal.

NRCM was a party to the original licensing proceeding, and the Board finds that NRCM has demonstrated it is an aggrieved person as defined in Chapter 2, § 1(B), for the purpose of the standing requirement for an appeal of the Transfer Order, as set forth in Chapter 2, § 24.

#### B. Applicable Standards for License Transfers

Licenses are non-transferable unless the Department approves the transfer. Pursuant to Chapter 2, § 21(C) of the Department's rules, a transferee "shall demonstrate to the Department's satisfaction the technical and financial capacity and intent to: (a) comply with all terms and conditions of the applicable license, and (b) satisfy all applicable statutory and regulatory criteria."

#### C. Jurisdiction Over Transfer Application

NRCM's initial argument in its January 4, 2021 appeal is that the Transfer Order is invalid because the underlying NECEC project is a project of statewide significance and the Board was required to assert original jurisdiction over the application for the transfer. Therefore, NRCM contends, the Commissioner did not have the authority to consider the transfer application.

When the transfer applications were filed, NRCM requested, by letter dated October 7, 2020, that the Board assume jurisdiction over the transfer application and consolidate the initial decision with the pending appeals of the May 11, 2020 Department Order. By letter dated October 27, 2020, the Board Chair noted that the Board's rules do not expressly provide for consolidation of these two different types of proceedings, and he found no compelling grounds to consolidate the transfer application with the appeals and declined to do so. NRCM's October 7, 2020 letter was treated as a request that the Commissioner refer the transfer application to the Board for assumption of jurisdiction. The Acting Commissioner, by letter dated November 13, 2020, determined that the transfer application did not meet the criteria for Board jurisdiction. That letter was provided to the Board along with a copy of NRCM's October 7, 2020 request, pursuant to Chapter 2, § 17(B). The request and the Acting Commissioner's response were raised at the November 19, 2020 Board meeting during the Executive Analyst's Comments. As reflected in the minutes, at the meeting, no Board members indicated they wanted to schedule time at a future meeting to discuss the Acting Commissioner's determination or to discuss the Board assuming original jurisdiction of the transfer application. The Board took no action to

assume jurisdiction over the transfer application. On December 4, 2020, the Acting Commissioner issued the Transfer Order.

On the question of whether the Commissioner erred by not recommending that the Board take original jurisdiction or the Board erred by not assuming original jurisdiction, the Board finds that the applicable statute and regulation do not compel original jurisdiction here. None of the four criteria for a project of statewide significance set forth in 38 M.R.S. § 341-D(2) and Chapter 2, § 17(C) are met regarding the transfer application. Chapter 2, § 17(C) reads as follows:

The Board shall assume jurisdiction over and decide each license application that in its judgment represents a project of statewide significance. A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- (1) Will have an environmental or economic impact in more than one municipality, territory, or county;
- (2) Involves an activity not previously permitted or licensed in the State;
- (3) Is likely to come under significant public scrutiny; and
- (4) Is located in more than one municipality, territory or county.

For a transfer application, the focus is the proposed transferee and its financial and technical capacity, and its intent to comply with the license and with regulatory criteria. The focus is not the underlying project. Regarding the first and second criteria, the proposed transfer is administrative in nature, will not itself have environmental or economic impacts, and does not involve a type of activity (i.e., license transfer) that has not been previously licensed. As to the third criterion, the proposed transfer was required by a stipulation agreed to during the Maine PUC process. Only two comments were submitted on the transfer application, and while NRCM has filed the instant appeal of the Transfer Order, the proposed transfer has not come under significant public scrutiny. Lastly, the proposed transfer is administrative in nature, concerning mostly legal and financial responsibility, and is not something that occurs in multiple towns or counties. In sum, the Board's judgment is that the proposed transfer, as set forth in the transfer application, is not a project of statewide significance. The Board finds that the Commissioner had authority to consider and decide the transfer application.

#### D. Title, Right or Interest

Pursuant to Chapter 2, § 11(D), "an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use." Sufficient TRI must be maintained throughout the entire application processing period. When TRI is based on a lease on the property, "[t]he lease . . . must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required." Chapter 2, § 11(D)(2). While sufficient TRI is required for the Department to process an application, TRI is not a substantive licensing criterion.



In support of the application for partial transfer, NECEC LLC submitted a Transfer Agreement between CMP and NECEC LLC. The Transfer Agreement describes the specific transfers that will occur from CMP to NECEC LLC and specifies the parcels of land (by deed and lease references) required to construct and operate the parts of the project to be transferred. These include the corridor from Beattie Township to Lewiston (Segments 1, 2, and 3), the 20-acre parcel for the converter station, the land for the transmission line from the converter station to the Larrabee Road Substation, the conservation parcels, and a parcel in Bald Mountain Township for relocation of the Appalachian Trail. Included in the submissions was the Amended and Restated Transmission Line Lease, which was signed on June 15 and June 23, 2020 (2020 Lease) between CMP and the State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of Public Lands (BPL) for property located in West Forks Plantation and Johnson Mountain Township. The subject of the 2020 Lease is a 300-foot-wide transmission line corridor containing 32.39 acres located on public reserved lands. By the terms of the 2020 Lease, it superseded and terminated the 2014 Transmission Line Lease between CMP and BPL. By its terms the 2020 Lease has a term of 25 years and expires in 2045.

The Transfer Agreement also provides for the transfer of the seven Transmission Service Agreements that CMP entered into with Massachusetts utility companies and H.Q. Energy Services (U.S.) Inc. The Transfer Agreement requires CMP to assign and NECEC LLC to accept all third-party vendor and service provider agreements and related assets related to the project at the time of closing. NECEC LLC also submitted a recent Certificate of Good Standing issued by the Delaware Secretary of State.

The Department Transfer Order does not become effective until either CMP or NECEC LLC certifies in writing to the Department that the transaction contemplated by the Transfer Agreement between the parties has occurred.

NRCM, in its appeal of the Transfer Order, makes several arguments regarding title, right or interest. First, NRCM argues that CMP did not have sufficient TRI throughout the permitting process because BPL issued the 2014 Lease to CMP before CMP obtained the required Certificate of Public Convenience and Necessity (CPCN) from the Maine PUC, in violation of 35-A M.R.S. § 3132. NRCM contends that “[w]here, as here, the applicant did not have TRI during the permitting process, a transfer to another entity is inappropriate and should be denied.” NRCM raised the 35-A M.R.S. § 3132 issue in its appeal of the May 11, 2020 Department Order, and the Board’s discussion and findings are set forth in Section 7 of this Board Order. For the reasons given in that section, the Board rejects the argument that the Department was required to make a legal determination of the validity of the 2014 Lease. To the extent that the 2014 Lease has relevance to the finding of TRI for the transfer application, the Board finds that the Commissioner appropriately and reasonably accepted the decision of another state agency to enter into the 2014 Lease.

Second, NRCM argues that, had the Commissioner independently analyzed TRI, she would have found the 2020 Lease to be unlawful and invalid because BPL issued it without obtaining the constitutionally mandated 2/3 vote of the Legislature for a substantial alteration to public reserved land. NRCM made a similar argument about the 2014 Lease in its appeal of the Department Order, and the Board’s discussion and findings are set forth in Section 7 of this

Order. For similar reasons to those given in that section, the Board finds that the Department was not required to make a definitive legal determination of the validity of a lease, the decision of a sister agency, in order to find TRI under Chapter 2, § 11(D). The Commissioner appropriately and reasonably accepted the decision of the BPL to enter into the 2020 Lease, and the Board finds that that fully executed lease was sufficient TRI in that portion of the proposed corridor to apply for a license transfer.

As set forth in Section 7 of this Order, the Board takes official notice of the recent Superior Court decision in *Black v. Cutko*, BCDWB-CV-2020-29 (Bus. & Consumer Ct., Aug. 10, 2021, Murphy, J.) (litigation challenging 2014 and 2020 leases) (among other things, vacating the 2020 Lease) currently on appeal to the Maine Law Court. The eventual outcome of the appeal is unknown, but in any event, even if a lease (or other property interest) may be invalidated as a result of litigation after a permit is issued, this does not affect whether an applicant demonstrated to the Department's satisfaction sufficient TRI in the property during the application process for the application to be accepted as complete and processed. Chapter 2, § 11(D) requires that an applicant must maintain sufficient title, right or interest "throughout the entire application processing period." The application processing was complete when the Commissioner decided to grant the application and issued the permit.

Lastly, NRCM in its appeal argues that the 25-year term of the 2020 Lease is of insufficient duration, and therefore inadequate proof of TRI, because three of the Transmission Service Agreements to be transferred to NECEC LLC are for years 21-40 and one of the Transmission Service Agreements is for 40 years, because the expected life of NECEC is 40 years as reflected in the PUC CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, and because closure and post-closure care will be 40 or more years in the future. This argument was not presented in NRCM's November 25, 2020 comments to the Department on the transfer application for the Department to consider and it is therefore waived.

Even if the argument is not waived, the Board rejects the contention that the 25-year lease term is insufficient for the purpose of demonstrating TRI during the application processing period. As discussed in the analysis of this issue under the appeal of the underlying permit, pursuant to 12 M.R.S. § 1852(4), leases of public reserved land for utilities and rights-of-way, including for electric power transmission, may not exceed a term of 25 years. The Board, however, is aware of no statute that prohibits renewal of such leases, whether on the same or different terms. Moreover, regarding NRCM's argument that some of the Transmission Service Agreements have terms up to 40 years, evidence in the record shows that CMP's obligations are to deliver energy to the Massachusetts utilities for 20 years. The Power Purchase Agreements between H.Q. Energy Services (U.S.) Inc. and the Massachusetts utilities are all for 20 years, and the three corresponding Transmission Service Agreements between CMP and the Massachusetts utilities are for 20 years. The remaining four Transmission Service Agreements that extend up to 40 years are between CMP and H.Q. Energy Services (U.S.) Inc., and the Massachusetts utilities are not parties. These agreements are for available capacity on the transmission line, not for power that CMP is contractually obligated to deliver. While the life of the NECEC project may extend beyond the 20-year contractual commitments with the Massachusetts utilities, the 25-year term of the 2020 Lease is sufficient duration for a showing of TRI given the terms of the contractual commitments with the Massachusetts utilities and given that nothing precludes lease renewal.

Also, while decommissioning required in the Department Order could possibly occur more than 25 years from now, the Board finds that nothing prevents the State from renewing the lease to allow for decommissioning, if necessary.

Based on the findings and evidence described above, the Board finds there is sufficient evidence, including the 2020 Lease, in the administrative record to support the Commissioner's finding that NECEC LLC demonstrated sufficient TRI for processing of the transfer application.

#### E. Financial Capacity

NECEC LLC estimates the cost for the portions of the project being transferred at \$727,000,000. The capital cost estimate for the project as a whole is \$950,000,000, which includes compliance with permit conditions required during construction. The transfer application indicates that NECEC LLC is a wholly owned subsidiary of Avangrid Networks, Inc. (a Maine corporation), and an indirect wholly owned subsidiary of Avangrid, Inc. (a New York corporation).

The transfer application (in Attachment B) includes a September 24, 2020 letter from the Vice President and Treasurer of Avangrid, Inc. stating that Avangrid, Inc. and Avangrid Networks, Inc. have committed to provide NECEC LLC funding needed to acquire the NECEC project from CMP and for construction and operation of the project as approved. Specifically, the letter provides that Avangrid, Inc. will make equity contributions of up to \$1,000,000,000 to Avangrid Networks, Inc., which in turn will make these funds available to NECEC LLC. Also, the letter states that Avangrid, Inc. and NECEC LLC will execute a \$500,000,000 revolving loan agreement to provide a source of debt financing to NECEC LLC during construction.

NRCM, in its appeal of the Department's Transfer Order, argues that NECEC LLC has not demonstrated financial capacity. Specifically, NRCM contends that NECEC LLC has not shown that it has the financial capacity to decommission the transmission line in Segment 1 once the line is out of service, which decommissioning is required by the Department Order. NRCM argues that NECEC LLC was required to make this demonstration of financial capacity for decommissioning at the time of the transfer application, and that the Avangrid September 24, 2020 letter is silent on decommissioning. While NRCM included in its November 25, 2020 comments on the transfer application arguments that NECEC LLC failed to demonstrate sufficient financial capacity to comply with all terms and conditions of the applicable license, those comments did not include the specific argument about decommissioning made in NRCM's appeal. Nevertheless, given the general arguments made in NRCM's comments, the Board will address the issue of financial capacity to decommission the transmission line in Segment 1.

The Board finds that NECEC LLC was not required by the Department rules, Chapter 373, § 2 or Chapter 2, § 21(C)(1), to provide specific financial assurance of decommissioning at the time of the transfer application. The Department Order requires a decommissioning plan for Segment 1 to be submitted within one year of the start of commercial operation, and the Order requires that the plan include financial assurance for decommissioning costs in the form of a decommissioning bond, irrevocable letter of credit, establishment of an escrow account, or other form of financial assurance accepted by the Department. (See also discussion in Section 3 above on West Forks' appeal of the May 11, 2020 Department Order.) Chapter 2, § 21(C)(1) governing

transfers requires the transferee to demonstrate to the Department's satisfaction the financial capacity and intent to comply with all terms and conditions of the applicable license and satisfy statutory and regulatory criteria. The requirement in the Department Order is that the Licensees provide financial assurance with respect to decommissioning in the future, within one year of the start of commercial operation. The permit transfer process does not alter or amend the timing of this requirement. The Board finds that the information contained in the transfer application demonstrates NECEC LLC's intent to comply with the terms and conditions of the Department Order. Given that the Department Order requires a showing of financial assurance for Segment 1 decommissioning costs within one year of the start of commercial operation and the project is not yet in operation, NECEC LLC was not required to provide that specific financial information at the time of the permit transfer in order to demonstrate the financial capacity, required in Chapter 2, § 21(C)(1), to obtain a license transfer. The Board finds that the general financial commitments for the project evident from the Avangrid September 24, 2020 letter are sufficient to demonstrate the financial capacity necessary for the transfer.

The Board finds that the information on financial capacity submitted as part of the transfer application demonstrates commitments by NECEC LLC's parent companies to provide funding for the project as allowed by Chapter 373, § 2(B)(3)(a) of the Department's Rules. The Board finds that NECEC LLC has demonstrated adequate financial capacity to construct and operate the portions of the project to be transferred. The Board also finds that the Transfer Agreement and other information supplied by NECEC LLC as part of its application demonstrates NECEC LLC's intent to comply with all terms and conditions of the applicable licenses and satisfy applicable statutory and regulatory criteria. However, as discussed in Section 15 (E) above, the Board is amending the underlying Department Order and NECEC LLC, as the transferee and one of the Licensees, will be subject to that modification requiring the submission, for review and approval, of financial assurance for the decommissioning of Segment 1.

#### F. Technical Ability

NECEC LLC provided as part of its transfer application a service agreement to be executed between CMP and NECEC LLC that stipulates that CMP will provide certain services to NECEC LLC. These include the use of CMP personnel and expertise to construct the project. NECEC LLC also submitted resume information for key personnel involved with the project. As required by the transfer agreement between CMP and NECEC LLC, NECEC LLC will retain all third-party contractors that originally designed and permitted the project, and the remainder of the project team as described in the Department Order will remain in place.

NRCM, in the first sentence of the funding section of its appeal, asserts that NECEC LLC has not provided sufficient evidence of technical capacity. NRCM, however, provided no argument beyond this conclusory phrase in its appeal submittal. An argument raised in a perfunctory manner will not be addressed by the Board.<sup>23</sup>

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<sup>23</sup> The Board will not address the arguments on technical capability for all aspects of the project including decommissioning that are raised in West Forks' February 18, 2021 "Response in Support of NRCM Appeal of Transfer Order" because appeal issues may only be raised in an appeal, and West Forks did not file an appeal of the Transfer Order. These arguments are not raised in any other party's appeal.

Based on the information submitted in the application for partial transfer, the Board finds that NECEC LLC has demonstrated adequate technical ability to construct and operate the portions of the project to be transferred including the technical ability to comply with terms and conditions of the Department Order.

G. Request for Hearing on the Appeal of the Transfer Order

In its January 4, 2021 filing appealing the Transfer Order, NRCM requested that the Board hold a hearing on the appeal. West Forks supports NRCM's request. CMP and NECEC LLC oppose the request. Hearings are governed by Chapter 2, § 7 of the Department's rules. Section 7(B) requires that the request must "specify the reasons why a hearing is warranted." Hearings are discretionary unless otherwise required by law. Section 7(B) provides that "[t]he Department will hold a hearing in those instances where the Department determines there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Department in understanding the evidence." NRCM's request does not identify conflicting technical information regarding the criteria for granting a license transfer and does not specify reasons for holding a hearing. NRCM moreover does not explain how a hearing would assist the Board in understanding the evidence. The Board finds that a hearing is not warranted on the appeal and therefore denies the request.

## CONCLUSIONS

### APPEAL OF DEPARTMENT ORDER

BASED on the above findings of fact, and incorporating the Commissioner's conclusions on uncontested issues, subject to the conditions listed below, the Board makes the following conclusions pursuant to 38 M.R.S. §§ 480-A–480-JJ:

- A. The project will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The project will not cause unreasonable erosion of soil or sediment.
- C. The project will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The project will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life, provided the Licensees comply with the requirements in Sections 10 and the corresponding conditions below.
- E. The project will not unreasonably interfere with the natural flow of any surface or subsurface waters.

- F. The project will not violate any state water quality law including those governing the classifications of the State's waters.
- G. The project will not unreasonably cause or increase the flooding of the alteration area or adjacent properties

BASED on the above findings of fact, and incorporating the Commissioner's conclusions on uncontested issues, subject to the conditions listed below, the Board makes the following conclusions pursuant to 38 M.R.S. §§ 481–489-E:

- H. The Licensee provided adequate evidence of financial capacity and technical ability to develop the project in a manner consistent with state environmental standards.
- I. The Licensee made adequate provision for fitting the development harmoniously into the existing natural environment and the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities provided the Licensees comply with the requirements in Sections 10 and 13 and the corresponding conditions below.
- J. The development will be built on soil types which are suitable to the nature of the undertaking and will not cause unreasonable erosion of soil or sediment nor inhibit the natural transfer of soil.
- K. The development meets the standards for storm water management in 38 M.R.S. § 420-D and the standard for erosion and sedimentation control in 38 M.R.S. § 420-C.
- L. The development will not pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur.
- M. The Licensee has made adequate provision of utilities, including water supplies, sewerage facilities and solid waste disposal required for the development and the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services.
- N. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties nor create an unreasonable flood hazard to any structure.
- O. No further project modification or conditions regarding the transmission line's location, character, width, or appearance, beyond what is required by this Board Order, are warranted, under 38 M.R.S. § 487-A(4) or otherwise, to lessen the transmission line's impact on the environment or risk to public health or safety.

APPEAL OF TRANSFER ORDER

BASED on the above findings, the Board concludes that the Commissioner properly found sufficient title, right or interest to process the application for partial transfer of the Site Law permit. The Board further concludes, based on the findings described above, that NECEC LLC has provided adequate evidence of financial capacity, technical ability, and intent to comply with all terms and conditions of the applicable permit and satisfy all applicable statutory and regulatory criteria and, therefore, NECEC LLC has satisfied all applicable transfer criteria contained in Chapter 2, § 21(C)(1).

**DECISION AND CONDITIONS**

THEREFORE, the Board DENIES the requests for a public hearing on the appeals of the Department Order of the NATURAL RESOURCES COUNCIL OF MAINE, WEST FORKS, and NEXTERA ENERGY RESOURCES, LLC. The Board DENIES the appeals of NATURAL RESOURCES COUNCIL OF MAINE, WEST FORKS, and NEXTERA ENERGY RESOURCES, LLC and AFFIRMS but AMENDS the Department's Order #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, dated May 11, 2020, which approved the Site Law and NRPA applications to construct the New England Clean Energy Connect project. The Board amends Sections 7 and 18 and Condition 12 of the Department Order, as set forth above and in the conditions below.

Further, the Board DENIES the request for a public hearing on the appeal of the Transfer Order of the NATURAL RESOURCES COUNCIL OF MAINE. The Board DENIES the appeal of the NATURAL RESOURCES COUNCIL OF MAINE. The Board AFFIRMS the Department's Transfer ORDER #L-27625-26-K-T, dated December 4, 2020, which approved the partial transfer of the Department Order, including the portions related to the following components of the NECEC project: the HVDC line from Beattie Township to Lewiston, the Merrill Road Converter Station, a 1.2-mile-long, 345-kilovolt transmission line from the converter station to the Larrabee Road Substation in Lewiston, and the two termination stations associated with the horizontal directional drilling on either side of the Kennebec River.

This affirmation of the Department's Orders is SUBJECT TO THE FOLLOWING CONDITIONS and all applicable standards:

1. All other Findings of Fact, Conclusions, and Conditions remain as approved in Department Orders #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 and #L-27625-26-K-T, and subsequent orders, and are incorporated herein.
2. Prior to the first vegetation maintenance cycle and at least every three years thereafter, the Licensees must collect lidar data for Segment 1. The data must enable evaluation of vegetation height and canopy closure within each progressively taller tapered zone and

within each Wildlife Area. The initial lidar data set for Segment 1 capturing conditions prior to the first vegetation maintenance cycle must be collected on or after June 1, 2021.

3. After the initial lidar data set is collected, the Licensees shall identify on GIS maps submitted to the Department the following: those areas within the tapers of Segment 1 and within the Wildlife Areas in which vegetation taller than the minimum height required may be maintained (e.g., as a result of topography, conductor sag, and project design). These maps shall be incorporated into the VMP and vegetation taller than the minimum requirements shall be maintained in these areas.
4. The Licensees shall include in their VMP the steps that will be taken to manage each Wildlife Area with a 35-foot minimum vegetation height to maximize the closed canopy conditions and avoid growth of even-aged stands. The VMP must include the quantitative metrics that will be used to evaluate whether a well-distributed stand of trees is growing and to identify (a) when removal of vegetation less than the 35-foot height minimum and (b) when the planting of vegetation is appropriate to promote growth of a well-distributed stand.
5. After vegetation is removed and once the subsequent set of lidar data is collected, the Licensees shall provide the Department with GIS maps indicating where the vegetation was removed, along with a pre- and post-vegetation removal analysis that evaluates vegetation height, identifies any canopy openings within any Wildlife Area greater than 2,500 square feet, and describes the composition of the stand. The analysis shall be submitted to the Department within 90 days of collection of the lidar data. If the analysis indicates natural regeneration will not result in a closed canopy within five years of the most recent vegetation removal, the Licensees shall submit a replanting plan to the Department for review as part of the submitted analysis. The vegetation to be replanted shall be native species and be of such a size and in such quantity and, if necessary, actively managed to ensure that it will result in a closed canopy within five years of the vegetation having been removed.
6. At least two months prior to each vegetation maintenance cycle, the Licensees shall provide the Department with GIS maps indicating where vegetation will be removed in accordance with the VMP, along with a narrative description of what vegetation will be removed.
7. The Licensees shall include in their VMP provision that if lidar data indicates that there is an opening in the canopy in excess of 2,500 square feet within a Wildlife Area, exclusive of access roads and structure pads, the Licensees shall replant those areas with native tree



species if natural regeneration will not achieve a closed canopy within five years of the vegetation having been removed.

8. The Licensees must submit the revised VMP to the Department for review at least four months prior to the start of commercial operation.
9. Prior to the resumption of construction, the Licensees shall submit a decommissioning plan to the Department, for review for Segment 1. The decommissioning plan must demonstrate financial assurance for the decommissioning and identify triggers for when decommissioning will commence. In addition to the requirements in the Department Order pertaining to decommissioning, termination of the current contracts similarly must be identified in the plan as triggering the requirement to begin decommissioning within 18 months of termination of the contracts.

THIS APPROVAL DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DONE AND DATED IN AUGUSTA, MAINE, THIS \_\_\_\_\_ DAY OF JULY 2022.  
BOARD OF ENVIRONMENTAL PROTECTION

BY: \_\_\_\_\_  
Mark C. Draper, Presiding Officer  
As designated by Susan M. Lessard, Chair

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