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RE: Group 4 Response to CMP Motion to Strike

Jim and Bill,

Please find Group 4's response to CMP's February 19, 2019, Motion to Strike.

Respectfully submitted,



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STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

and

STATE OF MAINE  
LAND USE PLANNING COMMISSION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY  
Application for Site Location of Development  
Act permit and Natural Resources Protection  
Act permit for the New England Clean Energy  
Connect (“NECEC”)

L-27625-26- A-N  
L-27625-TB-B-N  
L-27625-2C-C-N  
L-27625-VP-D-N  
L-27625-IW-E-N

SITE LAW CERTIFICATION SLC-9

GROUP 4 RESPONSE TO CMP MOTION  
TO STRIKE

February 20, 2019

In CMP’s February 19, 2019 Motion to Strike, attorney Matthew Manahan makes the extraordinary and outrageous request that the DEP and LUPC “strike Intervenor Group 4 witnesses Todd Towle, Aram Calhoun, and Ron Joseph to the extent their testimony exceeds the permissible scope of the hearing,” all without the benefit of even seeing the testimony CMP is objecting to. Not only is this motion premature, it is an attempt to stifle the very “in-depth examination of the topics most likely to elicit conflicting evidence or technical testimony” that Mr. Manahan purports to want to promote.

Mr. Manahan, on behalf of CMP, argues that “Mr. Towle should be stricken to the extent his testimony concerns commercial uses” and that “Ms. Calhoun and Mr. Joseph should be stricken to the extent their vernal pools testimony and deer yards testimony, respectively, goes beyond habitat fragmentation.” Mr. Manahan’s request should be denied.

The first hearing topic was described by DEP as:

- a. Scenic Character and Existing Uses – 38 M.R.S. § 480-D(1), 38 M.R.S. § 484(3), DEP Rules Chapters 315 and 375 § 14: The applicant must demonstrate that the proposed activity will not unreasonably interfere with the scenic

character, existing scenic, aesthetic, recreational or navigational uses and that the development fits harmoniously into the natural environment.

- i. Visual Impact Assessment and Scenic/Aesthetic Uses
- ii. Buffering for Visual Impacts
- iii. Recreational and Navigational Uses

Title 38, section 480-D(1), specifically requires that an activity “not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses” but does not exclude the use of commercial information to determine whether or not a proposed activity will unreasonably interfere with these uses. Mr. Towle’s testimony will reflect his own recreational use and recreational use by clients of his business, Kingfisher River Guides. To the extent that Mr. Towle’s testimony on commercial uses is related to existing scenic, aesthetic, recreational or navigational uses, it should be allowed in this proceeding. Testimony related to commercial uses can provide important information on existing scenic, aesthetic, recreational or navigational uses for the area and should not be excluded by CMP’s narrow interpretation of DEP’s regulations.

Mr. Manahan also objected to testimony from Ms. Calhoun and Mr. Joseph, requesting that anything unrelated to “fragmentation” be struck. This request is unreasonable and untethered from DEP’s regulations and the hearing topics.

While testimony on vernal pools and deer wintering areas is directly relevant to fragmentation, and fragmentation involves multiple impacts in multiple scales that will impact deer yards and vernal pools on and near the proposed project, this should not be the only lens through which Group 4’s witnesses address these topics. The hearing topic related to wildlife habitat and fisheries specifically identifies 38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), and DEP Rules Chapters 335 and 375 § 15 as the relevant statutes and regulations and states that “[t]he applicant must demonstrate that the proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat.” The Second Procedural Order from DEP states that “[t]he Department and LUPC have decided upon the following four (4) major topic areas *along with* several subtopics as subject matters for the hearing.” The use of the words “along with” indicates that the subtopics are additive and not intended to exclude other topics that would otherwise fall under the broader topic heading. While the wildlife habitat and fisheries topic does include four subtopics, one of which is “habitat fragmentation,” those subtopics should not limit a broader discussion of wildlife habitat and fisheries and the material relevant to the statutes and regulations identified by DEP in its Second Procedural Order.

For instance, Title 38 M.R.S. § 484(3)(H) specifically requires a determination regarding vernal pools:

In making a determination under this subsection regarding a development's effects on significant vernal pool habitat, the department shall apply the same standards applied to significant vernal pool habitat under rules adopted pursuant to the Natural Resources Protection Act. The department may not require a buffer strip adjacent to significant vernal pool habitat unless the buffer strip is established for another protected natural resource as defined in section 480-B, subsection 8.

Chapter 335, Section 9, of DEP's Rules goes into much greater detail on vernal pools, how to identify significant vernal pools, habitat management standards, and permitting requirements. Chapter 375, Section 15, of DEP's Rules identifies both significant vernal pools and high and moderate value deer wintering areas as wildlife and fisheries resources that an applicant must show will not be unreasonably disturbed as a result of the proposed project. [Section 15(B)(3)(a) and (d)]. Together, the statutes and regulations identified by DEP in its Second Procedural Order clearly indicate that vernal pools and deer wintering habitat are appropriate topics for the DEP hearing.

In addition to broad relevance to the wildlife habitat and fisheries hearing topic, including but not limited to habitat fragmentation, vernal pools and deer wintering areas are also relevant to the fourth hearing topic, compensation and mitigation. Section 15(C) of DEP's Chapter 375 rules requires the submission of "evidence that affirmatively demonstrates that the developer has made adequate provision for the protection of wildlife and fisheries", which includes vernal pools and deer wintering areas, as well as any "[p]lans to mitigate adverse effects on wildlife and fisheries through means that at a minimum include, but are not limited to, design considerations, pollution-abatement practices, the timing of construction activities, and on-site or off-site habitat improvements or preservation."

For the foregoing reasons, CMP's Motion to Strike Intervenor Group 4 witnesses Todd Towle, Aram Calhoun, and Ron Joseph should be denied.

Respectfully submitted,



Susan J. Ely

On behalf of Group 4 – Appalachian Mountain Club, Natural Resources Council of Maine, and the Maine Council of Trout Unlimited

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