

NEXTERA ENERGY RESOURCES, LLC,  
WEST FORKS PLANTATION, *et al.*,

Petitioners,

v.

MAINE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, *et al.*,

Respondents,

and

CENTRAL MAINE POWER CO., *et al.*,

Parties-in-Interest.

**NRCM’S MOTION TO STAY DEP  
COMMISSIONER’S ORDER  
GRANTING CONDITIONAL PERMITS  
TO CMP WITH INCORPORATED  
MEMORANDUM OF LAW**

**HEARING REQUESTED**

Natural Resources Council of Maine (“NRCM”) moves this Court pursuant to 5 M.R.S. § 11004 for a stay of an order by the Commissioner of the Department of Environmental Protection (“Commissioner”) conditionally approving the application of Central Maine Power Company (“CMP”) to construct the New England Clean Energy Connect (the “NECEC Order”). CMP sought these permits in connection with its plans to build a 145-mile, high-voltage, direct current transmission line that will traverse Maine from Québec to an interconnection with the New England grid in Lewiston. About 54 miles of the Corridor would cut an entirely new 150-foot wide swath through a currently undeveloped section of Maine’s North Woods. Critically, one part of this 54 mile section cuts across two public reserved lots.

On June 10, 2020, NRCM appealed the Commissioner’s NECEC Order to the Board and simultaneously sought a stay of that Order from the Board. In a July 16, 2020 letter, Board Chair

Draper referred NRCM's stay request to the Commissioner, over NRCM's objection. The Commissioner denied NRCM's request, finding that NRCM had not shown that it was likely to succeed on appeal and had not demonstrated sufficient harm. *See Ex. 1* (Aug. 26, 2020 Letter). NRCM then appealed that decision to the Board. On October 23, 2020, Board Chair Draper adopted the Commissioner's decision and declined to revisit or reconsider it in any way. He also noted that that "[n]o further appeal to the Board of either the Commissioner's Stay Decision or my decision not to revisit and reconsider that decision is necessary to exhaust administrative remedies for purposes of the APA and 5 M.R.S. § 11004." *See Ex. 2* (Oct. 23, 2020 Letter).

In denying the Board the opportunity to act on NRCM's stay request, the Board Chair improperly focused on the difficulty of evaluating certain record-based arguments on appeal, but ignored two issues that do not require an extensive review of the record and could easily be considered and resolved by the Board: (1) the statutory mandate that the Board, not the Commissioner, take original jurisdiction of a project of statewide significance such as NECEC, which here precludes issuance of a permit by the Commissioner rather than the Board; and (2) CMP's lack of sufficient title, right, and interest in the public reserved lands it intends to cross. Because NRCM has established a likelihood of success on the merits, and irreparable harm will result without a stay, the balance of the equities weighs in favor of this Court granting a stay of the NECEC Order, at least until the Board takes up and resolves the above two issues.

### **Argument**

5 M.R.S. § 11004 provides an avenue for parties to seek relief from the courts when an agency denies a request for a stay.<sup>1</sup> As demonstrated below, NRCM meets all three criteria: it has

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<sup>1</sup> In its August 11, 2020 Order, the Court granted CMP's request to consolidate the 80C appeals brought by NextEra and West Forks, (in which NRCM is a party) but did not then decide CMP's application to transfer the consolidated cases to the Business & Consumer Docket, instead remanding the 80C appeals to the DEP and indicating that, "[s]hould the cases return to the Superior Court after the administrative appeal, the application to transfer the cases to

a strong likelihood of success on the merits; irreparable injury will result if the Court does not grant a stay; and no substantial harm to adverse parties or the general public will result from a stay. *Vafiades v. Maine State Harness Racing Com'n*, No. CUMSC-AP-16-21, 2016 WL 4151506, at \*2 (Me. Super. June 8, 2016) (granting stay request brought pursuant to 5 M.R.S. § 11004).

## I. NRCM Is Likely to Succeed on the Merits of Its Appeal

### *a. The NECEC Order Is Invalid Because the Commissioner Does Not Have Jurisdiction over License Applications for Projects of Statewide Significance.*

The Commissioner did not have jurisdiction over CMP’s license applications, which undoubtedly relate to a project of statewide significance, and accordingly the NECEC Order is invalid. Controlling statutes require the Board to assume jurisdiction over and decide applications—including CMP’s recently filed Transfer Application<sup>2</sup>—that involve such projects. 38 M.R.S. §§ 341-D(2), 344(2-A); 06-96 CMR Ch. 2 § 17(C). The Commissioner erroneously argues that Board jurisdiction is discretionary, even for projects of statewide significance. *See Ex. 1* (Aug. 26, 2020 Letter, 5). To the contrary, the applicable statutes state that the Board—not the Commissioner—“**shall** decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance.” 38 M.R.S. § 341-D(2) (emphasis added).

A project is of statewide significance if it meets at least 3 of the 4 statutory 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.

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the BCD will be promptly acted upon.” Because the Court appears to have retained jurisdiction during the remand, NRCM files this motion under the consolidated docket.

<sup>2</sup> The Maine Public Utilities Commission required that ownership of the Corridor be transferred from CMP to NECEC Transmission LLC, including all related permits. On September 25, 2020, CMP filed with the Department an application to transfer the permits granted by the May 2020 Order from CMP to NECEC Transmission LLC. As discussed herein, the Board—not the Commissioner—must consider this Transfer Application because it relates to a project of statewide significance.

*Id.* § 341-D(2)(E-H); *accord* 06-96 CMR. Ch. 2 § 17(C).

Use of the word “shall” imposes a mandatory duty and does not provide the Board or Commissioner with discretion. The Legislature set forth specific rules to “be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment.” 1 M.R.S. § 71. One of those rules is that, when used in laws enacted after December 1, 1989, the words “‘shall’ and ‘must’ are terms of equal weight that indicate a mandatory duty, action or requirement.” *Id.* § 71(9-A); *accord* *McGee v. Sec’y of State*, 2006 ME 50, ¶ 14 & n.3, 896 A.2d 933, 938–39. “If the meaning of the language is clear, we interpret the statute to mean what it says.” *N.A. Burkitt, Inc. v. Champion Rd. Mach. Ltd.*, 2000 ME 209, ¶ 6, 763 A.2d 106, 107 (citations omitted).

Here, the statutory mandate is clear.<sup>3</sup> Because there is no serious question that NECEC meets the definition of a project of statewide significance<sup>4</sup>, the Board and only the Board can act on the applications. That issue is squarely before the Board and requires a stay of the permit until the Board has made a final decision.

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<sup>3</sup> The Commissioner’s decision seems to rely on a sentence from a previous version of the statute that states that the Board “may” take jurisdiction over projects that meet the statewide significance definition. But the mandatory duty language was a later-enacted statute and therefore controlling, *see, e.g.*, *Opinion of the Justices*, 311 A.2d 103, 108 (Me. 1973), as the legislative intent underlying the revised definition of a project of statewide significance and the Board’s mandatory duty to decide such applications makes clear. *See, e.g.*, *Joint Select Committee on Regulatory Fairness and Reform, Legislative Digest of Bill Summaries and Enacted Laws*, at 1-2 (July 2011) (Part H “[m]akes the commissioner responsible for the granting of all licenses and permits, except that the board is responsible for licenses and permits that either meet at least three of the four criteria for projects of statewide significance ....”); *Report to the Joint Standing Committee on Environmental and Natural Resources, Board of Environmental Protection Program Evaluation Report*, at 5-6 (November 2017) (noting “[t]he Board issues license decisions on applications of statewide significance”).

<sup>4</sup> NECEC meets each of the criteria of a project of statewide significance: (1) it will have environmental impacts across more than one county, municipality or territory; (2) it is the first high-impact transmission line in the State of Maine; (3) it is the subject of enormous public interest as the number of parties to the proceedings before DEP demonstrate; and (4) it is located across multiple municipalities and counties.

The Commissioner, moreover, has an independent obligation to refer projects of statewide significance to the Board. 38 M.R.S. § 344(2-A) (“the commissioner **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 board assume jurisdiction of that application. .... *If at any subsequent time* during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner **shall request** that the board assume jurisdiction of the application”) (emphasis added). Whatever arguments could have been made previously, there can be no question but that the Transfer Application involves a project of statewide significance requiring Board action.

In light of the foregoing, the Board is the proper—and only authorized—decision maker. The Commissioner was required to refer the matter to the Board, and the Board is required to assert original jurisdiction over and decide CMP’s applications for the Corridor. *See* 38 M.R.S. §§ 341-D(2), 344(2-A); 06-096 CMR Ch. 2 § 17(C). Until the Board corrects this flawed process and assumes responsibility by holding a public hearing, *see* 06-096 CMR Ch. 2 § 7(B), undertakes its own independent review of CMP’s permit and transfer applications, and makes a final decision, any activities purportedly authorized by the Commissioner’s unauthorized Order must be stayed.

*b. CMP Does Not Have Sufficient Title, Right, or Interest in the Public Reserved Lands That Comprise a Portion of Its Planned Corridor.*

The CMP Corridor will substantially alter two public reserved lots in Johnson Mountain and West Forks Plantation owned by the State of Maine and managed by the Bureau of Parks and Lands. The record before the Department reflects that CMP based its alleged title, right, or interest (“TRI”) in these lands on a 2014 lease issued by the Bureau (“2014 Lease”) that was void as a matter of law because it (i) was unlawfully issued to a utility that lacked the requisite certificate of

public convenience and necessity (“CPCN”),<sup>5</sup> and (ii) lacked the constitutionally mandated 2/3 vote of approval of the State Legislature for any substantial alteration to public reserved lands. Me. Const. art. IX, § 23; 12 M.R.S. §§ 598-598-A.<sup>6</sup>

In a move that amounts to an admission of the 2014 Lease’s infirmities, the Bureau subsequently terminated that lease and granted CMP another lease in June 2020 (the “2020 Lease”) for these public reserved lands.<sup>7</sup> But the Department’s NECEC Order was based only on the invalid 2014 Lease, which did not—because it could not—confer on CMP sufficient TRI in the public reserved lands that were the subject of that lease. This is a fatal flaw because CMP, as the applicant, must demonstrate and “maintain sufficient title, right, or interest throughout the entire [DEP] application process.” *Collins v. Maine Dept. of Env’l Prot.*, No. AP0415, 2004 WL 6247990, at \*2 (Me. Super. Nov. 17, 2004) (applicant failed to show TRI). Because the 2014 Lease has effectively been conceded to have been invalid, NRCM is likely to prevail on this issue.

CMP now claims in its Transfer Application that the 2020 Lease gives it sufficient TRI to proceed with the Corridor in West Forks and Johnson Mountain. CMP Transfer Application, p. 105. That Lease, however, just like the 2014 Lease, lacks the necessary 2/3 Legislative approval and thus is unconstitutional and incapable of furnishing sufficient TRI. In a related case currently before the Business and Consumer Docket (*Black et al. v. Cutko et al.*, No. BCD-CV-20-29),

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<sup>5</sup> The 2014 Lease clearly violated 35-A MRS § 3132(13) because no CPCN had been issued for NECEC and none was until 2019. 35-A M.R.S. § 3132 states: “Public lands. The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any interest in public land... to any person for the purpose of constructing a transmission line subject to this section, unless the person **has received** a certificate of public convenience and necessity from the commission pursuant to this section” (emphasis added).

<sup>6</sup> The Commissioner refused to address arguments that the proposed Corridor would substantially alter the uses of the public reserve lands in violation of Me. Const. art. IX, § 23; 12 M.R.S. §§ 598-598-A, saying only “The Department accepts the decision of its sister agency to enter into the leases and the fully executed leases as sufficient title, right, or interest in that portion of the proposed corridor to apply for permits for the project.” NECEC Order at 8.

<sup>7</sup> See **Ex. 3** (In an April 20, 2020 email, Anthony Calcagni, representing the State, wrote that the State and CMP entered the 2020 Lease to show that the Lease did “nothing to ‘substantially alter’ the leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.”).

plaintiffs, including NRCM, have sued the Bureau of Parks and Lands over its illegal issuance of this Lease. There, CMP has argued that it is the DEP's decision on the permits—not BPL's decision on the lease—that would result in any substantial alteration of the public reserved lands.<sup>8</sup> If this is true, then the Commissioner's refusal to address these constitutional and statutory arguments is error that invalidates the NECEC Order. If, instead, complete deference to BPL is justified, then BPL's subsequent actions demonstrate that such deference with regard to the 2014 Lease was entirely misplaced.

At a minimum, the seriousness of NRCM's (and the other plaintiffs') challenge to the 2020 Lease warrants a stay of the NECEC Order at least until that issue has been resolved—if the plaintiffs are successful, CMP will have failed to demonstrate TRI and no permit can be issued.

*c. The Department's Record Reflects the Devastating Environmental Effects of CMP's Proposed Corridor and the Department*

Finally, NRCM has a strong likelihood of success on the merits of its appeal and a stay is appropriate. The record reflects—and the Department agreed—that the Corridor will cause substantial environmental harm. Despite this overwhelming evidence, the Commissioner nevertheless conditionally approved CMP's permits. The mitigation conditions imposed are insufficient, as NRCM will show, to assuage the harm the Corridor will cause. For example, the Department's proposed mitigation conditions will not adequately protect affected fisheries, and the money CMP must set aside for culvert replacements has no nexus to, and will not mitigate, the harm to affected brook trout habitats. The Department-imposed mitigation conditions likewise will not compensate for the harm caused to wildlife, including deer, birds, and other native species who make their home in the affected area.<sup>9</sup> Troublingly, the Department did not permit NRCM to

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<sup>8</sup> In *Black v. Cutko*, No. BCD-CV-20-29, CMP argued that any injury alleged by plaintiffs does not “flow[] ‘directly’ from the Lease, but rather from the DEP’s permitting decisions.” CMP Motion to Dismiss, p. 19.

<sup>9</sup> See notes 11 & 12 below.

present evidence about the greenhouse gas effects of the Corridor, and it erred by relying, without any independent assessment, on CMP's incorrect representations that the Corridor will result in climate benefits. NRCM is therefore likely to succeed in demonstrating that the NECEC Order insufficiently addresses the Corridor's effects on protected resources and the environment, and a stay of the Commissioner's NECEC Order is appropriate. *See, e.g., Vafiades*, No. CUMSC-AP-16-21, 2016 WL 4151506, at \*2 (granting stay request where no competent and substantial record evidence supported agency's holding).

## **II. Irreparable Harm Will Result Absent a Stay.**

NRCM will suffer irreparable injury if the stay is not granted. "An irreparable injury is one for which there is no adequate remedy at law." *Suzman v. Harvey*, No. AP-07-78, 2008 WL 7929211 (Me. Super. May 05, 2008) (Jabar, J.) (citations omitted). Here, no remedy at law can reverse the irreparable damage that will result to Maine's environment if CMP obtains the remaining permits it needs and is able to begin construction on the Corridor during the pendency of Board proceedings relating to the NECEC Order. This is not an abstract threat; recent media reports indicate that CMP may break ground as early as November 2020.<sup>10</sup>

As the record of the underlying proceeding reflects, there will be significant adverse environmental effects if CMP begins construction of the Corridor based on the Department's conditional approval of its land use permits. Such construction will devastate trout streams, wildlife habitats, and the other natural resources that NRCM exists to protect.<sup>11</sup>

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<sup>10</sup> *See, e.g., Construction Could Soon Begin on CMP's Controversial Energy Corridor*, WGME, Oct. 9, 2020, available at <https://wgme.com/news/local/construction-could-soon-begin-on-cmps-controversial-energy-corridor>.

<sup>11</sup> *See, e.g., Ex. 4*, David Publicover Direct Testimony, p. 3 (Corridor would negatively affect "the heart of a globally significant forest region that is notable for its relatively natural forest composition, lack of permanent development, and high level of ecological connectivity"); *Ex. 5*, Jeff Reardon Direct Testimony, p. 6 (planned area of construction contains the majority of the remaining un-degraded aquatic habitat in the northeast region, making this project an incredible threat to Maine's brook trout habitat). The testimony cited in Notes 11 and 12 was originally submitted to the DEP, and NRCM has attached copies here for the Court's convenience.



NRCM and its members will also suffer economic harm if the Board does not stay the NECEC Order. NRCM counts among its members guides who make their living offering guided tours (*e.g.*, fishing and hunting opportunities) on the land that is the subject of this Order. If the Board does not stay the Order and CMP begins construction, it will gravely affect the ability of NRCM members to pursue their livelihoods because of the number of crossings, warming stream temperatures, and destruction of deer wintering yards.<sup>12</sup>

The Order also fails to require an adequate assessment of alternatives. For example, CMP did not consider whether burying the transmission line is a possible alternative that would allow the project to proceed while significantly decreasing the impact to the environment. If CMP is allowed to begin construction, it could limit NRCM's ability to address CMP's inadequate alternative analysis during the course of this appeal.

For the foregoing reasons, NRCM, its members, and the public will be irreparably harmed if CMP begins construction. *See Suzman*, No. AP-07-78, 2008 WL 7929211 ("simple notion" that an ill patient deprived of care will suffer sufficient to show irreparable harm).

### **III. A Stay Will Not Harm CMP or the General Public.**

CMP will not be irreparably harmed if the Court grants a stay. Although CMP is apparently nearing the point of construction, any harm to CMP created by a stay long enough for the Board to address whether it should exercise original jurisdiction and for the Board to evaluate CMP's TRI in light of the Court's determination in *Black v. Cutko* is outweighed by the harm to NRCM and the public of the commencement of construction prior Board decisions on these issues. Because the NECEC Order could yet change at the Board level, CMP will not be harmed by a stay

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<sup>12</sup> *See, e.g.*, **Ex. 6**, Todd Towle Direct Testimony, pp. 3-6; **Ex. 7**, Ron Joseph Direct Testimony, pp. 2-4.

that lasts long enough to determine if such a change will be ordered.<sup>13</sup> For this same reason, a stay will not harm but will *benefit* the general public—which overwhelmingly opposes the CMP Corridor<sup>14</sup>—by avoiding permanent adverse impacts to Maine’s natural resources before CMP obtains all necessary permits. A stay is undoubtedly appropriate where, as here, there is minimal harm to the party seeking the permits and substantial harm to the party seeking the stay. *See Vafiades*, No. CUMSC-AP-16-21, 2016 WL 4151506, at \*2 (stay appropriate where no harm would result to the public or the party opposing the stay).

### **Conclusion**

For the foregoing reasons, the Court should stay the Commissioner’s NECEC Order during the pendency of NRCM’s appeal of the NECEC Order. If CMP is permitted to proceed on the basis of an Order issued without jurisdiction by the Commissioner, and without the required TRI, it will cause irreparable harm to both the affected lands and to Mainers more generally.

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<sup>13</sup> As the Department has already argued to this Court, “Absent a remand to the Commissioner, the Board’s order on appeal supersedes the Commissioner’s Licensing Decision and constitutes the Department’s final decision on CMP’s NECEC Application.” *See* Department Motion for Remand at 3, filed July 2, 2020 in AP-20-27.

<sup>14</sup> A statewide poll conducted in 2019 found that 65 percent of respondents opposed the CMP Corridor and only 15 percent supported it. Lauren McCauley, *With \$9 million already spent, CMP on track to break records opposing citizen initiative*, Maine Beacon (April 15, 2020), <https://mainebeacon.com/with-9-million-already-spent-cmp-on-track-to-break-records-opposing-citizen-initiative/> (last visited Oct. 29, 2020).

Dated: November 2, 2020

*/s/ James T. Kilbreth*<sup>15</sup>

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**NOTICE**

Any opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion unless another time is provided by Rule 7(b)(1) of the Maine Rules of Civil Procedure or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

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<sup>15</sup> This electronic signature is authorized by Section G of PMO-SJC-2 (rev. June 5, 2020).

STATE OF MAINE  
Kennebec and Somerset, ss.

Docket Nos. KEN-AP-20-27  
and SOM-AP-20-04

NEXTERA ENERGY RESOURCES, LLC,  
WEST FORKS PLANTATION, *et al.*,

Petitioners,

v.

MAINE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION, *et al.*,

Respondents,

and

CENTRAL MAINE POWER CO., *et al.*,

Parties-in-Interest.

**(PROPOSED)  
ORDER**

Natural Resources Council of Maine (“NRCM”) has moved to stay the Commissioner of the Department of Environmental Protection’s May 2020 Order issuing conditional permits to Central Maine Power Company relating to its planned project, the New England Clean Energy Connect transmission line. NRCM has met the standards for a stay established by 5 M.R.S. § 11004, and its Motion is GRANTED.

Date: \_\_\_\_\_

\_\_\_\_\_  
Justice, Superior Court

**EXHIBIT 1**



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



GERALD D. REID  
COMMISSIONER

August 26, 2020

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BCM Environmental & Land Law, PLLC  
2 Union St, Suite 402  
Portland ME 04101

James Kilbreth  
Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland ME 04101-2480

Dear Ms. Boepple and Mr. Kilbreth:

This letter serves as my decision on your clients' pending requests for a stay of the May 11, 2020, Order conditionally approving the application of Central Maine Power (CMP) to construct the New England Clean Energy Connect project (NECEC Order).

**PROCEDURAL BACKGROUND**

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pilsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting that the Commissioner stay the NECEC Order. West Forks subsequently filed supplements to its motion on June 15, 2020, and June 25, 2020. The following intervenors and intervenor groups filed supporting, opposing, and neutral responses to the West Forks Motion: Old Canada Road, Friends of Boundary Mountains, Industrial Energy Consumer Group, the Natural Resources Council of Maine (NRCM), Wagner Forest, and Western Maine Mountains & Rivers Corp. CMP filed a response in opposition to the West Forks Motion.

NRCM filed a separate application for a stay of the NECEC Order with the Board of Environmental Protection (Board) on June 10, 2020 (NRCM Motion) in conjunction with its appeal to the Board of the Commissioner-issued NECEC Order. The following intervenors and intervenor groups filed supporting and opposing responses to the NRCM Motion: Friends of

AUGUSTA  
17 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0017  
(207) 287-7688 FAX: (207) 287-7826

BANGOR  
106 HOGAN ROAD, SUITE 6  
BANGOR, MAINE 04401  
(207) 941-4570 FAX: (207) 941-4584

PORTLAND  
312 CANCO ROAD  
PORTLAND, MAINE 04103  
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE  
1235 CENTRAL DRIVE, SKYWAY PARK  
PRESQUE ISLE, MAINE 04769  
(207) 764-0477 FAX: (207) 760-3143

Boundary Mountains, Industrial Energy Consumer Group, AMC, Trout Unlimited, and Western Maine Mountains & Rivers. CMP filed a response in opposition to the NRCM Motion.<sup>1</sup>

On July 16, 2020, Board Chair Mark Draper referred the NRCM Motion to the Commissioner to allow for a single, consolidated Departmental decision with respect to both the West Forks and NRCM Motions. NRCM objected to Chair Draper's decision and filed an appeal to the full Board. Chair Draper ruled that such a decision is not appealable to the full Board.

### **STAY CRITERIA**

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S § 11004. The filing of an appeal does not operate to stay a permit issued by the Department. Petitioners seeking a stay (here West Forks and NRCM) bear the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits on the petitioners' appeals, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. Petitioners must satisfy all three parts of this test to obtain a stay. Importantly, the burden of demonstrating that the criteria are met rests with the petitioners.

### **ARGUMENTS**

In support of its stay request, West Forks argues that several appeals were likely to be filed and any one of them could result in an ultimate denial of the permit application, that a citizen referendum could negate the Maine Public Utilities Commission's (PUC) approval of the project, and that the project will cause irreparable harm through the destruction of "pristine" forests and the disruption of wildlife corridors. With regard to the likelihood of success on the merits of their appeal, West Forks argues that the evidence in the record does not support the Commissioner's decision on the impacts of forest fragmentation and impacts to scenic resources, and that the conditions on the permit requiring the conservation of 40,000 acres of land are inadequate. West Forks' first supplement to its motion adds discussion of the challenges to the Commissioner's factfinding in the NRCM Board appeal and NextEra's Superior Court appeal. In its second supplemental filing, West Forks argues that a lease CMP relies upon to show title, right, or interest (TRI) in the land proposed for development is legally defective – an issue NRCM raises in its Board appeal. West Forks also states that a stay of the NECEC Order would not cause substantial harm to CMP as it has not yet received its federal approvals for the project and, in any case, an additional delay to begin construction would not cause substantial harm. Finally, West Forks asserts that a stay would cause no harm to the general public; rather, it would benefit the public if a stay were in place until the appeals are resolved and the referendum decided.

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<sup>1</sup> West Forks filed an appeal of the NECEC Order in Somerset County Superior Court, Docket No. SOM-AP-20-04. NextEra Energy Resources, LLC (NextEra) also filed an appeal of the NECEC Order in Kennebec County Superior Court, Docket No. KEN-AP-20-27. NRCM filed an administrative appeal of the NECEC Order before the Board. By a combined order dated August 11, 2020, the Superior Court consolidated and remanded the West Forks and NextEra judicial appeals to the Board for consideration with NRCM's pending administrative appeal.

NRCM's Motion focuses primarily on the argument in its appeal that the Board should have decided this permit application on the basis that the NECEC project meets the definition of a project of statewide significance. NRCM also argues that it is likely to succeed on its claims that the Commissioner insufficiently addressed impacts of the project and that CMP's lease of two public reserve lots lacks requisite approval. NRCM contends there will be irreparable harm if the stay is not granted, citing as support testimony it provided at the hearing about the significance of the forest and aquatic habitat that will be affected, and the impacts to its members who are outdoor guides in the area. NRCM also argues that the initiation of construction would limit its ability to address potential alternatives to the proposed project during the appeal. On the question of harm to CMP, other parties, or the public if a stay is granted, NRCM states that no harm will ensue because CMP has not obtained federal approvals and a state-wide vote on whether the PUC approval should be reversed is scheduled for November 2020.

CMP argues that West Forks has failed to meet the high bar for the issuance of a stay. CMP states that vegetation that will be cut in the construction of the transmission line would grow back if the permits are ultimately vacated. CMP further argues that the harm alleged by West Forks involves impacts to existing recreational uses, which was a topic considered during the licensing proceeding, with the Commissioner finding no unreasonable harm to those uses resulting from the NECEC project. On the likelihood of success on the merits of the West Forks appeal, CMP contends that the evidence in the record, and the analysis and conclusions in the NECEC Order, demonstrate that there will be no irreparable harm in the form of forest fragmentation and visual impacts.

In response to both the West Forks and NRCM Motions, CMP states that a stay would harm CMP because construction must begin well before any appeals are resolved in the Maine Law Court in order to meet a required in-service date. CMP contends that such a delay would risk possible cancellation of the project pursuant to its contractual in-service obligations, and a cancellation would result in harm to the general public with the loss of economic benefits of the NECEC project.



## DISCUSSION

Petitioners have not carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required.

### I. Irreparable Harm to Petitioners

There is a contradiction at the heart of the Petitioners' arguments that undercuts their stay request. On the one hand they argue that a stay is essential to forestall the project's environmental impacts, and on the other they argue a stay will not harm CMP because construction cannot begin until two additional federal permits have been issued. Petitioners cannot have it both ways: either a stay is urgently needed or it will have no immediate, real-world impact, but both things cannot be true.<sup>2</sup> The Petitioners have provided no legal analysis of what, if any, construction CMP can perform before it receives its federal permits, and no factual analysis of whether and how any such construction would actually cause them harm. Without satisfactorily answering these questions, Petitioners did not carry their burden of showing irreparable harm.

The Petitioners' underlying claims of irreparable harm are also unpersuasive. They assert that the cutting of trees and other vegetation in a pristine and significant forest will harm their economic and recreational interests as users of the area. The evidence in the record supports a finding that the project would pass through an ecologically significant forest, but contradicts the claim that this forest is "pristine." The evidence shows that the project area is largely within a commercial forest that is harvested periodically and rather intensely. My observations from a visit to several locations within the proposed project site are consistent with the evidence presented. Segment 1 of the corridor (that segment with no pre-existing transmission line) would run through an area that has been harvested significantly and contains a patchwork of clearcuts, both fresh and in various stages of regeneration. It is remote, but certainly not pristine. The question is whether Petitioners would suffer irreparable harm if clearing of the corridor in this area were to begin while an appeal is pending.

CMP argues that the area cleared would regenerate as it does when it is commercially harvested, and therefore, even if the appeals were successful, any harm to Petitioners would not be irreparable. This theory, by itself, is not a full answer to the Petitioners' claim of harm. The cutting of trees and clearing of vegetation during an appeal could very well cause irreparable harm depending on the circumstances, because such activity will have immediate effects where it takes place, and those effects cannot quickly be reversed. But Petitioners have failed to explain how clearing that occurs through commercial forestland and in compliance with the numerous conditions set forth in the NECEC Order – many of which are designed to reduce or eliminate

---

<sup>2</sup> The NECEC Order approves both a Site Location of Development Act permit and a Natural Resources Protection Act permit. Both permits require, in Standard Conditions C and B respectively, as follows: "The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate." When Petitioners filed their stay requests, both a Presidential Permit and a permit from the U.S. Army Corps of Engineers were still required. The Army Corps of Engineers issued an initial proffered permit while the stay requests were pending. A Presidential Permit has not yet been issued.

the environmental and aesthetic impacts of concern to Petitioners – would cause them any concrete and specific injury. Their argument amounts to the conclusory assertion that any such clearing or construction activity would inherently cause them irreparable harm. That is not enough to justify the issuance of a stay.

## II. Likelihood of success on the merits of the Petitioners' appeals

Both Petitioners have likewise failed to show a strong likelihood of success on the merits of their appeals. As to the significant portions of West Forks' and NRCM's appeals that are challenges to the factual findings made in the NECEC Order, I find that the likelihood of success with respect to those arguments is low. West Forks and NRCM challenge the findings on the practicability of the underground option and alternative routes, the impacts to brook trout habitat and forest fragmentation, and the conservation land. Petitioners made these same arguments during the processing of the application, and the evidence of potential harm to the environment received great scrutiny. The terms and conditions of the NECEC Order are supported by extensive evidence in the record, and are the product of thorough analysis by the Department's professional staff. The order's factual findings are therefore likely to be upheld on appeal.

Petitioners' argument that a November 2020 referendum vote might effectively strip the project of a required PUC approval is not relevant to the likelihood of success on the merits of the two appeals of the Commissioner's NECEC Order, and consequently to these stay requests. In any event, I take notice of a recent Maine Law Court decision addressing whether the question is within the citizens' referendum authority, and the Secretary of State's response, which together make clear the question will not be appearing on the ballot.

NRCM's Motion also argues that it has a strong likelihood of success on the merits of its claim that the Board was required to assume original jurisdiction pursuant to Chapter 2, §17 of its regulations, and 38 M.R.S. §§ 341-D(2) and 344(2-A), and that the NECEC Order is therefore invalid. The record reflects that neither NRCM nor any other party requested that the Board assume jurisdiction of the permit applications during the 20-day period for filing such a request set forth in Ch. 2, §17(A). Similarly, no party ever attempted to raise this issue in the two and a half years the applications were pending. In a proceeding where neither the Commissioner nor any party requests Board jurisdiction, the Board has discretion as to whether to assume jurisdiction, but is not required to do so. *See* 38 M.R.S. § 341-D(2) ("The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection are met."); Chapter 2, §17(B) ("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."). In any event, all appeals of the NECEC Order are now before the Board, *see* fn. 1 above, and in its review of the NECEC Order the Board "is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify, or reverse findings of fact or conclusions of law established by the commissioner." 38 M.R.S. § 341-D(4)(A). Even if NRCM could show that the Board was required to assume jurisdiction over the application at the outset, which they cannot, it is difficult to see how the Board's current involvement would not render that harmless error. Accordingly, I find that there is not a strong likelihood of reversal of the NECEC approval on the basis of this argument.

NRCM also makes the argument, echoed by West Forks, that CMP failed to show adequate TRI over two lots leased from the Maine Bureau of Public Lands, and that this argument has a strong likelihood of success. NRCM contends that the lease relied on was void because it was issued by the Bureau of Public Lands in violation of statutory and Constitutional requirements. NRCM challenged the validity of the lease in the hearing record, and as I understand it is now separately challenging an amended and restated version of the lease in litigation that is pending against the Bureau of Public Lands in Kennebec County Superior Court, Docket No. CV-2020-94. If NRCM's argument indeed has merit, it presumably could pursue judicial remedies in its pending litigation to enjoin CMP's reliance on the lease. It is, however, outside the purview of this Department to determine the merits of those claims. Courts have recognized that the Department has discretion in making its determinations of TRI, and the Department's determination that a lease that on its face gives the lessee the right to construct the proposed project, absent a court ruling otherwise, is likely to be upheld. *See* Chapter 2, §11(D) (“[A]n applicant shall demonstrate to the Department’s satisfaction sufficient title, right or interest in all of the property proposed for development or use.”). Accordingly, I find that there is not a strong likelihood of success on the merits of this TRI argument.

Overall, I find that the Petitioners have not demonstrated a strong likelihood of success on the merits of their respective arguments and appeals.

III. Harm to adverse parties or the general public

The parties make competing claims of harm to their interests and the general public depending on whether a stay is granted or denied. As noted above, Petitioners' failure to analyze whether and to what extent construction activities may begin before required federal permits have been issued makes it difficult to assess these claims. Putting that aside, and noting that full analysis of this issue is not necessary in light of my conclusions regarding irreparable harm and likelihood of success on the merits, I find that these considerations do not, on balance, weigh in favor of a stay of the NECEC Order.

CONCLUSION

For all the reasons set forth above, Petitioners have not made the showings necessary to justify a stay of the NECEC Order. Petitioners have failed to establish a strong likelihood of success on the merits of their respective appeals, and this criterion alone warrants denial of their stay requests. The grounds for this denial are bolstered when all three of the stay criteria, as discussed above, are considered and weighed together. Accordingly, the stay requests of the Petitioners West Forks and NRCM are denied.

Sincerely,



Gerald D. Reid  
Commissioner

cc: Cynthia Bertocci, Executive Analyst BEP

Peggy Bensinger, Asst. Attorney General

**EXHIBIT 2**

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS  
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel  
Executive Analyst

Ruth Ann Burke  
Board Clerk

October 23, 2020

**SENT VIA ELECTRONIC MAIL ONLY**

Matthew D. Manahan, Esq.  
Pierce Atwood, LLP  
[mmanahan@pierceatwood.com](mailto:mmanahan@pierceatwood.com)

Gerry Mirabile  
Central Maine Power Company  
[gerry.mirabile@cmpco.com](mailto:gerry.mirabile@cmpco.com)

Natural Resources Council of Maine  
James Kilbreth, Esq.  
David Kallin, Esq.  
Elizabeth Mooney, Esq.  
Tynan Lawrence, Legal Assistant  
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[dkallin@dwmlaw.com](mailto:dkallin@dwmlaw.com)  
[emooney@dwmlaw.com](mailto:emooney@dwmlaw.com)  
[tlawrence@dwmlaw.com](mailto:tlawrence@dwmlaw.com)

NextEra Energy Resources, LLC  
Joanna B. Tourangeau, Esq.  
Drummond Woodsum  
[jtourangeau@dwmlaw.com](mailto:jtourangeau@dwmlaw.com)

West Forks Plantation, et. al  
Elizabeth A. Boepple, Esq.  
BCM Environmental & Land Law, PLLC  
[boepple@nhlandlaw.com](mailto:boepple@nhlandlaw.com)

**Re: Central Maine Power Company, New England Clean Energy Connect  
Department Order L-27625-26-A-N, L-27625-TB-B-N, L-27625-2C-C-N,  
L27625-VP-D-N, L-27625-IW-E-N (“NECEC Order”)  
Chair ruling regarding West Forks’ Supplement to Motion for Stay of Agency Decision**

Dear Participants:

On September 25, 2020, appellants Natural Resources Council of Maine (“NRCM”) and West Forks, et al. (“West Forks Group”) filed with the Board of Environmental Protection (“Board”) separate requests for a stay of the May 11, 2020, Order of the Commissioner of the Department of Environmental Protection (“Commissioner”) conditionally approving the application of Central Maine Power Company (“CMP”) to construct the New England Clean Energy Connect (“NECEC Order”). These renewed requests were made after the August 26, 2020, decision by the Commissioner denying NRCM’s and the West Forks Group’s initial requests for a stay of the NECEC Order (“Commissioner’s Stay Decision”).

On October 16, 2020, and by and through their respective attorneys, CMP, Industrial Energy Consumer Group, and, jointly, the Maine State Chamber of Commerce and City of Lewiston, filed responses in opposition to the renewed requests for a stay.

The Maine Administrative Procedure Act (“APA”) provides that an “[a]pplication for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.” 5 M.R.S. § 11004. The Commissioner’s Stay Decision was made on behalf of the agency (the Department) and addresses the APA criteria that must be met for the agency to issue a stay. It summarizes the petitioners’ arguments and provides a thorough discussion of both the applicable stay criteria and why the petitioners failed to make the showings necessary to justify a stay of the NECEC Order.

In considering the renewed requests for a stay of the NECEC Order, I note at the outset that in making his stay decision, the Commissioner had the benefit of his direct knowledge having attended the evidentiary hearing and his review of the underlying agency record in the formulation of his decision. In order to fully assess all of the petitioners’ arguments, in particular to determine whether there is a strong likelihood of success on the merits of various record-based arguments, I would likely need to conduct an independent review of significant portions of the voluminous NECEC record – a record that reflects the 29-month regulatory review, which included six days of evidentiary hearing. The time required for me to undertake such a review would likely be comparable to the thorough assessment required for the Board to decide the entirety of the appeal.

Upon consideration of the NRCM’s and the West Forks Group’s renewed requests for a stay of the NECEC Order, and putting aside any questions raised regarding my authority to consider such requests, I see no compelling grounds to revisit and reconsider the Commissioner’s Stay Decision and decline to do so here.

The NRCM’s and the West Forks Group’s applications for a stay were already made to the agency and the Commissioner’s Stay Decision already addresses those requests on behalf of the Department. No further appeal to the Board of either the Commissioner’s Stay Decision or my decision not to revisit and reconsider that decision is necessary to exhaust administrative remedies for purposes of the APA and 5 M.R.S. § 11004.

If you have any questions, you may contact Board Analyst, William F. Hinkel, at [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov) (207) 314-1458 or Assistant Attorney General, Peggy Bensinger, at [peggy.bensinger@maine.gov](mailto:peggy.bensinger@maine.gov) (207) 626-8578.

Respectfully,



Mark C. Draper, Chair  
Board of Environmental Protection

cc (via e-mail only): Service List (rev. October 19, 2020)

**EXHIBIT 3**

---

**From:** William Harwood <wharwood@verrill-law.com>  
**Sent:** Monday, April 20, 2020 12:36 PM  
**To:** Derek Langhauser (derek.langhauser@maine.gov)  
**Cc:** Abello, Thomas; Anthony Calcagni  
**Subject:** FW: CMP lease with BPL  
**Attachments:** CMP-BPL Transmission Line Lease 2020-04-20(13736063.1).docx

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Derek,

As discussed, my partner Tony Calcagni has summarized below the proposed changes to the BPL lease. They are reflected in the attached draft sent over to Pierce Atwood this morning with the caveat that it is still under review by the Mills Administration.

You will see that we have characterized this as an "Amended and Restated Lease".

We would like to propose to CMP an increase in the annual rent from approximately \$4K/yr. to \$65K/yr. as soon as you and/or Tom give the OK to do so.

The exercise of determining FMV of a spaghetti shaped parcel of undeveloped land in rural Maine is plenty challenging. However, we believe (and can show you the math) that, based on a few "comparables", the proponents of the NECEC project can comfortably state that \$65K/yr. reasonably reflects of the FMV of the parcel.

Tony and I would be happy to discuss with you and Tom the open issues at your convenience.

Stay well.

Bill

William S. Harwood PARTNER  
One Portland Square  
Portland, ME 04101-4054

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(207) 774-4000

C  
(207) 233-1050

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(207) 253-4703

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From: Anthony Calcagni  
Sent: Monday, April 20, 2020 10:01 AM  
To: William Harwood <wharwood@verrilldana.com>  
Subject: RE: CMP lease with BPL

Bill, here's the summary of the substantive revisions in what I just forwarded to Eben Adams:

- With input from Andy Cutko, we've characterized this as an "Amended and Restated Lease," and added a provision in Sec. 23 that specifies this Amended and Restated Lease expressly supersedes the 2014 Lease. (As opposed to just signing a new Lease and signing a separate agreement to terminate the 2014 Lease.) Idea is to help show that this 2020 Lease does nothing to "substantially alter" the leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.

- Sec. 2 – Rent

- o We've left the annual rent ("Initial Payment") amount blank for now.
- o Annual payment date has been changed from Dec. 1 to Apr. 1, on the assumption this will be executed sometime soon (may end up making sense to bump that to May 1).
- o Added a requirement that, within 12 months, CMP must commission an appraisal of the annual rent, at CMP's cost. If the appraised value is higher, the Initial Payment goes up; if the appraised value is lower, the Initial Payment remains unchanged.
- o Added details on how the CPI escalator will work, and now specifies that if the annual CPI goes down the rent does not (a "ratchet effect").
- o Added back the requirement that CMP pay for stumpage value of removed timber.

- Sec. 3 – Use

- o Adds a reference to the 2019 CPCN
- o Clarifies that CMP's right to use land outside the corridor is limited as specified in other Lease provisions.
- Exhibit A: Now uses a specific survey description of the leased Premises.
- We'll want to make sure the three attachments are the latest versions of the specified "Recommended Performance Standards."

Let me know if you need anything else or would like to discuss. Tony

Anthony M. Calcagni PARTNER  
One Portland Square  
Portland, ME 04101-4054

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(207) 253-4516

acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>

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From: Abello, Thomas <Thomas.Abello@maine.gov<mailto:Thomas.Abello@maine.gov>>  
Sent: Saturday, April 18, 2020 8:01 AM  
To: William Harwood <wharwood@verrilldana.com<mailto:wharwood@verrilldana.com>>  
Cc: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>  
Subject: RE: CMP lease with BPL

Thanks. Yes, please call me at 4060230.

Yes, that message is fine.

Tom

From: William Harwood <wharwood@verrill-law.com<mailto:wharwood@verrill-law.com>>  
Sent: Saturday, April 18, 2020 7:20 AM  
To: Abello, Thomas <Thomas.Abello@maine.gov<mailto:Thomas.Abello@maine.gov>>  
Cc: Anthony Calcagni <acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>>  
Subject: RE: CMP lease with BPL

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Thanks, Tom.

9:30 on Tuesday works for me.

Tony and I can call you or I can send out a call in number.

In the meantime, can we send the draft language to Pierce Atwood with the caveat that it is still under review by the Mills Administration?

Bill

William S. Harwood PARTNER  
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From: Abello, Thomas [mailto:Thomas.Abello@maine.gov]

Sent: Friday, April 17, 2020 5:39 PM

To: William Harwood <wharwood@verrilldana.com<mailto:wharwood@verrilldana.com>>

Cc: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>

Subject: RE: CMP lease with BPL

Thanks. Governor is good with the lease. As far as timing goes, she's not in any rush to finalize. Can we talk on Tuesday at 930?

Best,

Tom

From: William Harwood <wharwood@verrill-law.com<mailto:wharwood@verrill-law.com>>

Sent: Thursday, April 16, 2020 4:13 PM

To: Abello, Thomas <Thomas.Abello@maine.gov<mailto:Thomas.Abello@maine.gov>>

Cc: Anthony Calcagni <acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>>

Subject: RE: CMP lease with BPL

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Tom,

As requested, I believe the attached is the most recent version of the BPL Lease.

Bill

William S. Harwood PARTNER

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From: Abello, Thomas [mailto:Thomas.Abello@maine.gov]

Sent: Thursday, April 16, 2020 3:54 PM

To: William Harwood <wharwood@verrilldana.com<mailto:wharwood@verrilldana.com>>

Subject: RE: CMP lease with BPL

Bill – Can you send along the latest version?

Thanks

Tom

From: William Harwood <wharwood@verrill-law.com<mailto:wharwood@verrill-law.com>>

Sent: Thursday, April 16, 2020 2:05 PM

To: Abello, Thomas <Thomas.Abello@maine.gov<mailto:Thomas.Abello@maine.gov>>

Subject: RE: CMP lease with BPL

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Thanks, Tom.

William S. Harwood PARTNER

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v5A\_CdpgnVfiiMM&r=a10PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=Z0T11WCZ34ANpkIPcginQMwg8m68XD5f6I0-nPlciZc&e=>

From: Abello, Thomas [mailto:Thomas.Abello@maine.gov]  
Sent: Thursday, April 16, 2020 1:33 PM  
To: William Harwood <wharwood@verrilldana.com<mailto:wharwood@verrilldana.com>>  
Cc: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>  
Subject: RE: CMP lease with BPL

Hey Bill. We are meeting with the Governor today at 4 to discuss. I'll have an update at that point.

Tom

From: William Harwood <wharwood@verrill-law.com<mailto:wharwood@verrill-law.com>>  
Sent: Thursday, April 16, 2020 9:36 AM  
To: Abello, Thomas <Thomas.Abello@maine.gov<mailto:Thomas.Abello@maine.gov>>  
Cc: Anthony Calcagni <acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>>  
Subject: FW: CMP lease with BPL

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Tom, any progress on the BPL lease??

William S. Harwood PARTNER  
One Portland Square  
Portland, ME 04101-4054

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C

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F

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wharwood@verrill-law.com<mailto:wharwood@verrill-law.com>

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From: Anthony Calcagni  
Sent: Wednesday, April 15, 2020 6:10 PM  
To: 'Rodrigues, David' <https://urldefense.proofpoint.com/v2/url?u=http-3A\_\_David.Ro&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-

v5A\_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6H  
bOYa5HjmRSHEE6IFUOcl&s=qz-vokSZqlgA-\_b6Xuxc5CjoBzM3Ty9gr7vKEvWT-  
f4&e=drigues@maine.gov<mailto:David.Rodrigues@maine.gov>>  
Cc: William Harwood <wharwood@verrilldana.com<mailto:wharwood@verrilldana.com>>  
Subject: FW: CMP lease with BPL

David, I hope you're doing well. Know you're busy but am just forwarding this message I received earlier this evening from Pierce Atwood, who still are anxious to hear back from us on the proposed CMP lease. Let me know if you'd like to discuss anything. Tony

Anthony M. Calcagni PARTNER  
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acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>

[logo96]<[From: Eben Adams <eadams@PierceAtwood.com<mailto:eadams@PierceAtwood.com>>  
Sent: Wednesday, April 15, 2020 5:02 PM  
To: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>  
Subject: RE: CMP lease with BPL](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttp-253A-252F-252Fwww.verrill-2Dlaw.com-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dcceccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597485938-26amp-3Bsdata-3Ds75R4-252Fli-252B2UjijMINJ4f474zdpJGY8HoinY5IzgkA-252BQ-253D-26amp-3Breserved-3D0&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=Z0T11WCZ34ANpkIPcginQMwg8m68XD5f6I0-nPlciZc&e=></a>></p></div><div data-bbox=)

Tony,

I am following up on our call Monday to see if you have received any updates from your client as to the revised lease. Also, in your email below you indicated that the proposed rent amount would take a bit more time. At this point, is it your sense that the revised draft will include a proposed rent amount?

Thanks.

Eben

Eben Adams

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From: Anthony Calcagni <acalcagni@verrill-law.com<mailto:acalcagni@verrill-law.com>>

Sent: Friday, April 10, 2020 9:15 AM

To: Eben Adams <eadams@PierceAtwood.com<mailto:eadams@PierceAtwood.com>>

Cc: Rodrigues, David <[https://urldefense.proofpoint.com/v2/url?u=http-3A\\_\\_David.Ro](https://urldefense.proofpoint.com/v2/url?u=http-3A__David.Ro&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=qz-vokSZqlgA-_b6Xuxc5CjoBzM3Ty9gr7vKEvWT-f4&e=drigues@maine.gov<mailto:David.Rodrigues@maine.gov>>)

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<[wharwood@verrill-law.com](mailto:wharwood@verrill-law.com)<mailto:wharwood@verrill-law.com>>

<mailto:wharwood@verrill-law.com>>

Subject: RE: CMP lease with BPL

\*\*\*This message originated outside your organization\*\*\* \_\_\_\_\_ Eben, thanks for your message and your separate voice-mail message. I'm working with my client on a revised version of your proposed Lease, which we expect to have to you shortly. It will have all of our suggested revisions other than the final proposed rent amount, which will take a bit more time. We'll be back to you shortly. Tony

Anthony M. Calcagni PARTNER

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From: Eben Adams <eadams@PierceAtwood.com<mailto:eadams@PierceAtwood.com>>

Sent: Wednesday, April 8, 2020 8:31 AM

To: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>

Subject: RE: CMP lease with BPL

Tony,

Do you any other questions or do you need any clarifications on the items below? If not, are you going to mark up the lease?

Thanks.

Eben

Eben Adams

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Sent: Monday, April 6, 2020 6:25 PM

To: 'Anthony Calcagni' <[acalcagni@verrill-law.com](mailto:acalcagni@verrill-law.com)<<mailto:acalcagni@verrill-law.com>>>

Cc: Rodrigues, David <[<\[<\\[wharwood@verrill-law.com\\]\\(mailto:wharwood@verrill-law.com\\)<<mailto:wharwood@verrill-law.com>>>\]\(https://urldefense.proofpoint.com/v2/url?u=http-3A\_\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\)](https://urldefense.proofpoint.com/v2/url?u=http-3A__David.Ro&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=qz-vokSZqlgA-_b6Xuxc5CjoBzM3Ty9gr7vKEvWT-f4&e=drigues@maine.gov<mailto:David.Rodrigues@maine.gov>>; Cutko, Andy</a></p></div><div data-bbox=)

>>; Cutko, Andy

<[<\[<\\[<\\\[<\\\\[<\\\\\[Tony, my answers to your questions are below in red. Let me know if you have additional questions or would like to discuss.\\\\\]\\\\\(https://urldefense.proofpoint.com/v2/url?u=http-3A\\\\\_\\\\\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\\\\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\\\\\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\\\\\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\\\\\)\\\\]\\\\(https://urldefense.proofpoint.com/v2/url?u=http-3A\\\\_\\\\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\\\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\\\\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\\\\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\\\\)\\\]\\\(https://urldefense.proofpoint.com/v2/url?u=http-3A\\\_\\\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\\\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\\\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\\\)\\]\\(https://urldefense.proofpoint.com/v2/url?u=http-3A\\_\\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\\)\]\(https://urldefense.proofpoint.com/v2/url?u=http-3A\_\_Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=\)](https://urldefense.proofpoint.com/v2/url?u=http-3A__Andy.Cu&d=DwlGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_Cdp gnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUocl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</a></p></div><div data-bbox=)

Thanks.

Eben

Eben Adams



PIERCE ATWOOD LLP <[From: Anthony Calcagni <\[acalcagni@verrill-law.com\]\(mailto:acalcagni@verrill-law.com\)<<mailto:acalcagni@verrill-law.com>>>](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttp-253A-252F-252Fwww.pierceatwood.com-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dceccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597485938-26amp-3Bdata-3DMz8TmQUu7PI6WAK8O4-252BILc6JZrWq8G1XSxvAqw4D6Wo-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=4mstkQ9k4mewnKdwukVK8I3fsvs_pVw3CJGKGLF_bw&e=> PH 207.791.1175</p></div><div data-bbox=)

Sent: Monday, April 6, 2020 4:05 PM

To: Eben Adams <[eadams@PierceAtwood.com](mailto:eadams@PierceAtwood.com)<<mailto:eadams@PierceAtwood.com>>>

Cc: Rodrigues, David <[<\[<\\[wharwood@verrill-law.com\\]\\(mailto:wharwood@verrill-law.com\\)<<mailto:wharwood@verrill-law.com>>>\]\(https://urldefense.proofpoint.com/v2/url?u=http-3A\_\_Andy.Cu&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=wLRTGbBakAQYfzHFOyrha-iPzYUE5\_xRVJfX7x8T5N0&e=tko@maine.gov<mailto:Andy.Cutko@maine.gov>>; William Harwood</p></div><div data-bbox=\)](https://urldefense.proofpoint.com/v2/url?u=http-3A__David.Ro&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=qz-vokSZqlgA-_b6Xuxc5CjoBzM3Ty9gr7vKEvWT-f4&e=drigues@maine.gov<mailto:David.Rodrigues@maine.gov>>; Cutko, Andy</p></div><div data-bbox=)

Subject: RE: CMP lease with BPL

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Subject: RE: CMP lease with BPL

Subject: RE: CMP lease with BPL

Subject: RE: CMP lease with BPL

\*\*\*This message originated outside your organization\*\*\* \_\_\_\_\_ Eben, a few questions for you:

\* That revised spreadsheet shows a \$2,500,000 value for the 2 acres affected by the Passamaquoddy lease. But I assume the lease actually calls for some periodic rent payment as opposed to a one-time payment. Can you explain how the \$2,500,000 relates to what the lease says? CMP paid \$1.7 million at execution of the lease. Post-completion of the transmission line, NECEC must pay rent equal to a percentage of net income from the NECEC project with a minimum of \$250,000 in the aggregate over the first 25 years (the annual minimum payment is \$10,000 and the expected annual payment is \$20,000 based the NECEC's financial forecasts). Additionally NECEC must pay \$10,000 annually to fund Passamaquoddy Tribe Scholarship Fund. While the exact rent is to be determined, we think \$2.5 million is a fair estimate of the value.

\* You mention that "the lease is no long needed for the corridor." So will the corridor actually avoid the Pssamaquoddy lands? Can you tell us if any payments actually been made to the Passamaquoddy, and will any future payments be made, pursuant to the lease agreement? The approved corridor plan avoids the Passamaquoddy lease lands entirely. However, CMP has made, and NECEC will continue to make, all payments due under the Passamaquoddy lease. CMP (and NECEC) are obligated to make such payments under the lease and under an agreement to purchase land CMP needed for the new route.

\* Mind if we add a reference in the Lease to the May 3, 2019 CPCN? No we think this is a good idea.

\* Mind if we add a new last paragraph to the Lease explaining that the new Lease supersedes the 2014 Lease (rather than signing a separate Lease Termination Agreement)? Our preference is to have a separate lease termination to more clearly separate the lease (we want to avoid arguments that the new lease is a

continuation of the first lease), but if that is important to the State we aren't going to hold up the process on that issue.

Thanks. Tony

Anthony M. Calcagni PARTNER

One Portland Square

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[logo96]<https://urldefense.proofpoint.com/v2/url?u=https-3A\_\_nam03.safelinks.protection.outlook.com\_-3Furl-3Dhttps-253A-252F-252Fprotect-2Dus.mimecast.com-252Fs-252F7hE-5FCjRvv5Sj6njLu5CJBc-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dcccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597485938-26amp-3Bdata-3DQTVGqQQhVzr8BivF8q1MI7ASH7zqh4yLdbFThLJiacc-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A\_CdpgnVfiiMM&r=aIOPJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo\_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=c-eQ9OcOJGQ-m\_1Jv3XcxR9GJP-C6gmtv3xJld3gQeo&e=>

From: Eben Adams <eadams@PierceAtwood.com<mailto:eadams@PierceAtwood.com>>

Sent: Monday, April 6, 2020 10:54 AM

To: Anthony Calcagni <acalcagni@verrilldana.com<mailto:acalcagni@verrilldana.com>>

Subject: RE: CMP lease with BPL

Tony,

Attached is a updated spreadsheet including the Passamaquoddy lease. That lease had not been included in the prior spreadsheet because the lease is no long needed for the corridor. Additionally, the Tribe is incredibly reluctant to grant any interests in its lands (for obvious historical reasons) so we do not feel the price charged by the Tribe is a fair indicator of fair market value as applied to corridor land in general.

Having said that, adding the Passamaquoddy lease does not make a huge difference in the numbers because the values are based on a weighted average tied to acreage and the Passamaquoddy lease while very high in cost, is very low in acreage.

One final note, in the top portion of the table, the acreage show has been rounded to the nearest acre for display purposes, but the math is based the actual acreage (including decimals). For example, the Passamaquoddy lease is shown as being 2 acres, but it is actually 2.07 acres, which explains why the price per acre is \$1,207,729 rather than \$1,250,000.

Let me know if you have any other questions.

Eben

Eben Adams

PIERCE ATWOOD LLP <[From: Anthony Calcagni <\[acalcagni@verrill-law.com\]\(mailto:acalcagni@verrill-law.com\)<<mailto:acalcagni@verrill-law.com>>>  
Sent: Monday, April 6, 2020 8:53 AM  
To: Eben Adams <\[eadams@PierceAtwood.com\]\(mailto:eadams@PierceAtwood.com\)<<mailto:eadams@PierceAtwood.com>>>  
Subject: RE: CMP lease with BPL](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttps-253A-252F-252Fwww.pierceatwood.com-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dceccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597495914-26amp-3Bdata-3DNeTmDm-252BQS82-252BFB5l0Skmv3apixPWa4E6lkVVvTxAWiQ-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0lfcFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6lFUOcl&s=36XTnOWy3lVRwlX7Z9Wjp703LF6me9Elotk_yZ4xXC4&e=> PH 207.791.1175</p></div><div data-bbox=)

\*\*\*This message originated outside your organization\*\*\* \_\_\_\_\_ Good morning Eben. I have a (very hard-to-schedule) call with my client at 2pm this afternoon, and any additional information you may be able to provide on valuation before then would be very helpful. Thanks. Tony

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[logo96]<[From: Eben Adams <\[eadams@PierceAtwood.com\]\(mailto:eadams@PierceAtwood.com\)<<mailto:eadams@PierceAtwood.com>>>  
Sent: Thursday, April 2, 2020 6:03 PM  
To: Anthony Calcagni <\[acalcagni@verrilldana.com\]\(mailto:acalcagni@verrilldana.com\)<<mailto:acalcagni@verrilldana.com>>>  
Subject: RE: CMP lease with BPL](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttps-253A-252F-252Fprotect-2Dus.mimecast.com-252Fs-252FyA5YckRwwBSnLONVH9Hgyd-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dceccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597495914-26amp-3Bdata-3D6W8pLod93NXrOAZ6iQDIkayeNZlslCfC-252FEAsqfT4KaE-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0lfcFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6lFUOcl&s=EQVQBLkvjnJiODIGs8uFF0w7xRJh7BohxcZqV6oUXvs&e=></p></div><div data-bbox=)

Thanks Tony. I made a comparison and while there are some formatting changes, I did not see any substantive differences.

I will get back to you on the valuation question.

Eben

Eben Adams

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Sent: Thursday, April 2, 2020 4:43 PM  
To: Eben Adams <\[eadams@PierceAtwood.com\]\(mailto:eadams@PierceAtwood.com\)<<mailto:eadams@PierceAtwood.com>>>  
Subject: RE: CMP lease with BPL](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttps-253A-252F-252Fwww.pierceatwood.com-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dcccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597495914-26amp-3Bsdata-3DNeTmDm-252BQS82-252BFB5l0Skmv3apixPWa4E6lkVVvTxAWiQ-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=a10PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=36XTnOWy3IVRwlX7Z9Wjp703LF6me9Elotk_yZ4xXC4&e=> PH 207.791.1175</p></div><div data-bbox=)

\*\*\*This message originated outside your organization\*\*\* \_\_\_\_\_ By the way Eben, I'm told this is a Word version of the final 2014 Lease. Please take a look and let me know how it compares to the scanned version you made. Tony

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[logo96]<[From: Eben Adams <\[eadams@PierceAtwood.com\]\(mailto:eadams@PierceAtwood.com\)<<mailto:eadams@PierceAtwood.com>>>  
Sent: Wednesday, April 1, 2020 9:46 AM  
To: Anthony Calcagni <\[acalcagni@verrilldana.com\]\(mailto:acalcagni@verrilldana.com\)<<mailto:acalcagni@verrilldana.com>>>  
Subject: CMP lease with BPL](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttps-253A-252F-252Fprotect-2Dus.mimecast.com-252Fs-252FejPOCIYvvXho92oJs1Eas7-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dcccdd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597495914-26amp-3Bsdata-3D3WLJ5qzebqpOctpl88tDUknL1icfXyUH0M-252Blmn6Y6ts-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=a10PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=5-2k6WFVK1167i0tWfrGe4FTZsfjivFIK8OHqmHxabcQ&e=></p></div><div data-bbox=)

Tony,

Following up on our call yesterday, attached is the financial data that CMP previously provided to the State regarding the market value of the lease. Let me know if you have any questions.

Eben

Eben Adams

PIERCE ATWOOD LLP<[Merrill's Wharf](https://urldefense.proofpoint.com/v2/url?u=https-3A__nam03.safelinks.protection.outlook.com_-3Furl-3Dhttp-253A-252F-252Fwww.pierceatwood.com-252F-26amp-3Bdata-3D02-257C01-257Cthomas.abello-2540maine.gov-257C92dccccecd444ec468f508d7e548ddbc-257C413fa8ab207d4b629bcdea1a8f2f864e-257C0-257C0-257C637229973597495914-26amp-3Bsdata-3DNeTmDm-252BQS82-252BFB5I0Skmv3apixPWa4E6IkVVstxAwiQ-253D-26amp-3Breserved-3D0&d=DwIGaQ&c=euGZstcaTDllvimEN8b7jXrwqOf-v5A_CdpgnVfiiMM&r=aI0PJBGAcNgkUWoSS8KgWYNdRZa5IEb0IfCFzzqKH9g&m=pX0yafPABu3zo_cbWLgOO6HbOYa5HjmRSHEE6IFUOcl&s=36XTnOWy3IVRwIX7Z9Wjp703LF6me9Elotk_yZ4xXC4&e=></a></p></div><div data-bbox=)

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This email and any attachment was sent from the law firm Verrill Dana, LLP. It may contain information that is privileged and confidential. If you suspect that you were not intended to receive it, please delete it and notify us as soon as possible. Thank you.

**EXHIBIT 4**

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

PRE-FILED TESTIMONY OF  
DR. DAVID PUBLICOVER  
APPALACHIAN MOUNTAIN CLUB

ON BEHALF OF INTERVENOR GROUP 4  
(APPALACHIAN MOUNTAIN CLUB,  
NATURAL RESOURCES COUNCIL OF  
MAINE AND TROUT UNLIMITED)

February 22, 2019

1 **Q. State your name and current position.**

2 A. My name is David Publicover. I am currently employed as a Senior Staff  
3 Scientist and Acting Director of Research with the Appalachian Mountain Club (AMC), a  
4 non-profit conservation and recreation organization with headquarters in Boston, MA.  
5 My business address is P.O. Box 298, Gorham, NH 03581.

6 **Q. What are your background and qualifications?**

7 A. I have a B.S. in Forestry from the University of New Hampshire (1978), an M.S.  
8 in Botany from the University of Vermont (1986), and a D.F. in Forest Ecology from the  
9 Yale University School of Forestry and Environmental Studies (1993).

10 I have been employed as a staff scientist by the AMC since 1992. My primary  
11 responsibility is to provide scientific information and analyses to AMC in support of our  
12 mission in the areas of terrestrial ecology, landscape analysis, land use and conservation  
13 planning, sustainable forestry, biological conservation and energy facility siting.

14 For most of my tenure at AMC I have been involved with issues related to energy  
15 facility siting. I have served as an expert witness for AMC during interventions in four  
16 commercial wind power development applications in Maine and New Hampshire as well  
17 as the Northern Pass transmission line project in New Hampshire. I served as an alternate  
18 member of the Governor's Task Force on Wind power Development in Maine (2007-08)  
19 and was actively involved in the revision of the New Hampshire Site Evaluation  
20 Committee's energy facility permitting rules (2013-15). I have conducted multiple  
21 landscape-level GIS-based analyses on conflicts between wind power siting and  
22 ecological and scenic values.



1 I have also been involved in debates and discussions on sustainable forestry, land  
2 management and biological conservation dating back to the Northern Forest Lands  
3 Council and the Maine Forest Biodiversity Project in the 1990s. I have served on  
4 numerous public policy committees and working groups and am currently a member of  
5 the Maine Ecological Reserves Scientific Advisory Committee and the New Hampshire  
6 Forest Advisory Board. I was a contributing author to *Good Forestry in the Granite State*  
7 and served on the steering committee overseeing the development of *Biodiversity in the*  
8 *Forests of Maine: Guidelines for Land Management*. I oversee forest and land  
9 management planning, Forest Stewardship Council certification and forest carbon offset  
10 project development for AMC's 75,000 acres of forest land in Piscataquis County.

11 My CV is attached as Appendix A.

12 **Q. Have you previously testified before DEP or LUPC?**

13 A. I have not testified before DEP. I have testified before the (then) Land Use  
14 Regulation Commission on three wind power project permit applications.

15 **Q. What is the purpose of your testimony?**

16 A. For the DEP Site Law and NRPA applications, my testimony addresses the value  
17 of the Western Maine Mountains region, the fragmenting impacts of the new corridor  
18 (Segment 1) on wildlife habitat in this region, the failure of the Applicant to adequately  
19 assess these impacts, the failure of the Applicant to adequately assess alternatives to the  
20 proposed project, and the failure of the Applicant to adequately mitigate the impacts of  
21 the proposed project on wildlife habitat.

22 For the LUPC certification, my testimony addresses the special exception criteria  
23 related to the crossing of the Appalachian Trail P-RR zone.

1 **Q. Please summarize your testimony.**

2 A. DEP Site Law and NRPA applications: The Western Maine Mountains is the  
3 heart of a globally significant forest region that is notable for its relatively natural forest  
4 composition, lack of permanent development, and high level of ecological connectivity.  
5 The proposed new corridor would be one of the largest permanent fragmenting features  
6 bisecting this region and would have an adverse effect on wildlife habitat, wildlife life  
7 cycles and travel corridors. The Applicant's assessment of these impacts is cursory,  
8 overly general, lacking in specific analyses, and inappropriately conflates the impacts of  
9 the corridor with those of timber management. The Applicant has failed to meet the  
10 burden of proof requirement of 38 MRS §486-A.2 to demonstrate that the project will  
11 not cause an unreasonable adverse impact on the natural environment. The Applicant has  
12 also failed the burden of proof to demonstrate that there is not a practicable alternative to  
13 the proposed project that is less damaging to the natural environment. Finally, the  
14 Applicant has failed to provide adequate mitigation for the project's impacts. For these  
15 reasons the DEP should deny the permit.

16 LUPC certification: The proposed project would significantly degrade the  
17 experience of Appalachian Trail users at the crossing of the existing transmission line  
18 corridor by widening the corridor by 50% and installing a second much larger  
19 transmission line. As proposed the project fails the second criteria for a special exception  
20 in that this increased impact cannot be buffered from existing uses. The opportunity  
21 exists to improve rather than degrade the users' experience by relocating the trail in this  
22 area. LUPC should condition the granting of the special exemption on a resolution of this

1 issue between the Applicant and AT trail managers. Absent such a resolution LUPC  
2 should deny the special exception.

3  
4 **TESTIMONY RELATED TO DEP SITE LOCATION OF DEVELOPMENT AND**  
5 **NATURAL RESOURCES PROTECTION ACT APPLICATIONS**

6 **Q. Please describe the values of the Western Maine Mountains region through which**  
7 **the new corridor would pass.**

8 A. While the undeveloped forests of the north Maine woods (and the Western Maine  
9 Mountains region in particular) may be taken for granted by those who live, work and  
10 recreate here, they have been recognized as a regionally, nationally and even globally  
11 significant forest region by many analyses.

12 The values of the region have been well summarized by McMahon (2016)<sup>1</sup>, who  
13 states:

14 The five million acre Western Maine Mountains region is a landscape of superlatives. It includes  
15 all of Maine's high peaks and contains a rich diversity of ecosystems, from alpine tundra and  
16 boreal forests to ribbed fens and floodplain hardwood forests. It is home to more than 139 rare  
17 plants and animals, including 21 globally rare species and many others that are found only in the  
18 northern Appalachians. It includes more than half of the United States' largest globally important  
19 bird area, which provides crucial habitat for 34 northern woodland songbird species. It provides  
20 core habitat for marten, lynx, loon, moose and a host of other iconic Maine animals. Its cold  
21 headwater streams and lakes comprise the last stronghold for wild brook trout in the eastern  
22 United States. Its unfragmented forests and complex topography make it a highly resilient  
23 landscape in the face of climate change. It lies at the heart of the Northern Appalachian/Acadian  
24 Forest, which is the largest and most intact area of temperate forest in North America, and perhaps  
25 the world. Most importantly, the Western Maine Mountains region is the critical ecological link

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<sup>1</sup> References are included as Appendix B.

1           between the forests of the Adirondacks, Vermont and New Hampshire and northern Maine, New  
2           Brunswick and the Gaspé.

3           The value of the Western Maine Mountains lies in both its ecological diversity  
4           (encompassing an array of mountains, lakes and ponds, rivers and streams, wetlands, and  
5           hardwood, mixed and softwood forests) and its undeveloped character. Across much of  
6           the region the primary human impact has been from timber harvesting and logging roads,  
7           and only two major fragmenting features (Routes 201 and 26) traverse the breadth of the  
8           region. It is one of the few areas in the eastern United States that is sufficiently intact and  
9           natural to maintain viable populations of almost all native species.

10           Globally the Western Maine Mountains lies within the Temperate Deciduous and  
11           Mixed Forest ecoregion (Olson et al. 2001). This biome encompasses some of the most  
12           heavily settled regions in the world – the eastern United States, much of Europe, and  
13           northeastern Asia (China and Japan). Within this biome the region stretching from  
14           northern New Hampshire across western and northern Maine into Maritime Canada is the  
15           largest area of relatively intact forest blocks due to the lack of permanent settlement,  
16           development and land conversion (Haselton et al. 2014; Exhibit 1).

17           Other sources that recognize the value of the region as a large ecologically intact  
18           forest region include:

- 19           • The Northern Maine Forest Block is the largest Globally Important Bird Area  
20           in the continental United States as identified by the National Audubon Society  
21           (NAS 2019; Exhibit 2).
- 22           • The region was identified as one of the largest areas in the eastern United  
23           States of above-average climate change “resilience” by The Nature  
24           Conservancy, due in part to the high level of “local connectedness” (i.e., the

1 permeability of the landscape to species movement based on fragmentation  
2 and barriers to movement). (Anderson et al. 2016; Exhibit 3).

- 3 • The region was identified as a priority ecological linkage by the Staying  
4 Connected Initiative, a regional partnership working to “conserve, restore, and  
5 enhance landscape connectivity across the Northern Appalachian/Acadian  
6 region” (SCI 2019; Exhibit 4). (Maine Department of Inland Fisheries and  
7 Wildlife and Maine Department Transportation are partners in this initiative.)

8 The region’s values are also reflected in the Land Use Planning Commission’s  
9 2010 Comprehensive Land Use Plan (LUPC 2010) which includes the following:

- 10 – *“One of the four principle values of the Unorganized Territories is “Natural*  
11 *Character, which includes the uniqueness of a vast forested area that is largely*  
12 *undeveloped and remote from population centers. Remoteness and the relative*  
13 *absence of development in large parts of the jurisdiction are perhaps the most*  
14 *distinctive of the jurisdiction's principal values, due mainly to their increasing*  
15 *rarity in the Northeastern United States.” (CLUP p. 2)*
- 16 – *“Natural resources are generally enhanced when they are part of a large,*  
17 *relatively undeveloped area, especially one that encompasses entire watersheds*  
18 *or ecosystems.” (CLUP p. 2)*
- 19 – *“The forests of the jurisdiction are part of the largest contiguous block of*  
20 *undeveloped forestland east of the Mississippi.” (CLUP p. 197)*
- 21 – *“Scientists are increasingly aware of the value of managing forests in large*  
22 *blocks as part of habitat conservation efforts... However, even large habitat*  
23 *blocks have less value if they lack connections or corridors linking them to other*

1                   *habitat patches that allow genetic flow from one patch to another.” (CLUP p.*  
2                   233)

3                   In addition, a conservation priorities map developed by MDIFW as part of the  
4                   Wildlife Action Plan (MDIFW 2010) notes that “*Northern Maine is unique as the largest*  
5                   *area of undeveloped natural land in the eastern US. It is critically important for its*  
6                   *economically valuable forest base and as a draw for unique outdoor recreational*  
7                   *experiences, but especially for the habitat it provides for the species characteristic of and*  
8                   *dependent on the Eastern Forest and especially those species that need large areas to*  
9                   *maintain viable populations.”*

10                  Intact forests such as these are critical to the maintenance of global biodiversity,  
11                  as noted by Watson et al. (2018), who stated, “*As the terrestrial human footprint*  
12                  *continues to expand, the amount of native forest that is free from significant damaging*  
13                  *human activities is in precipitous decline. There is emerging evidence that the remaining*  
14                  *intact forest supports an exceptional confluence of globally significant environmental*  
15                  *values relative to degraded forests... Retaining the integrity of intact forest ecosystems*  
16                  *should be a central component of proactive global and national environmental*  
17                  *strategies...”.*

18                  To summarize, the Western Maine Mountains region is the heart of a globally  
19                  significant forest region that is notable for its lack of permanent development and  
20                  fragmentation and high level of ecological connectivity. These are the values that would  
21                  be most significantly affected by the clearing of the new NECEC corridor.  
22

1 **Q. Has the Applicant adequately considered the value of this region in their**  
2 **application?**

3 A. They have not. Rather the Applicant consistently minimizes its value, and  
4 nowhere is there any discussion of the regional, national or global significance of the  
5 region. Instead, we find limited statements such as *“this area of the state is already*  
6 *intensively managed (i.e., periodically clearcut) forested land and the creation of a*  
7 *transmission corridor is not likely to disrupt or significantly alter existing land uses.”*  
8 (Site Law Application Chapter 7, p. 7-24; multiple similar statements may be found in  
9 Application Section 7.4.1). CMP’s project website<sup>2</sup> states *“The new corridor section*  
10 *crosses through a large area of commercial woodlands laced with roadways and*  
11 *active areas of timber harvesting and forest management.”*

12 By characterizing the region as merely managed forest land, the Applicant fails to  
13 recognize that these expansive commercial forest lands are an important part of what has  
14 helped to maintain the value of the region. As noted by the Keeping Maine’s Forests  
15 coalition (KMF 2010):

16 Maine’s forests, which include the largest unbroken tract of undeveloped forest east of the  
17 Mississippi River, sustain tens of thousands of jobs in the forest products and forest-based tourism  
18 industries. That this national resource is intact and productive today is a testament to good  
19 management by landowners and the ability of the forest-based economy to adapt, strengthen, and  
20 diversify markets for forest products and tourism

21 McMahon (2018) similarly notes:

22 Fragmentation has already significantly degraded ecosystems in much of the eastern United States  
23 and in temperate forests throughout the world. By contrast, in large part because historical forest

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<sup>2</sup> <https://www.necleanenergyconnect.org/faqs>.

1 management maintained vast connected forest blocks in the region, the Western Maine  
2 Mountains' biodiversity, resilience and connectivity are unparalleled in the eastern United States.

3 In addition, the Applicant mischaracterizes the region as "intensively managed".

4 To a large degree these forests are managed using natural regeneration and maintain a  
5 relatively natural species composition (though the age-class structure has been  
6 significantly altered towards a younger overall condition). Only a small proportion is  
7 intensively managed as foresters understand the term, meaning the use of techniques such  
8 as planting and herbicide application to maximize timber production. This distinguishes  
9 the region from forests that are truly intensively managed such as the pine forests of the  
10 southeastern United States.

11 In presentations on their route selection process to AMC and others, CMP  
12 representatives described how the route was sited through working forests in a gap  
13 between higher value areas<sup>3</sup>. In reality no such gap exists, as can easily be seen by  
14 viewing the landscape in Google Earth – the working forests are an integral part (in fact  
15 the major component) of this vast undeveloped landscape.

16 It is true that the Western Maine Mountains region is not pristine wilderness.  
17 However, on a scale of human impact from natural wilderness to dense urban  
18 development, the forests of the region lie very close to the natural end of the scale. The  
19 fact that the new corridor would be carved through managed timberland rather than  
20 pristine wilderness in no way diminishes the impact of the corridor on the ecological  
21 value of the region.  
22

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<sup>3</sup> For example, see the recording of CMP's presentation to a forum in Lewiston, ME hosted by the Sierra Club on 8/22/18. (<https://www.youtube.com/watch?v=EelQI-QCWu0> beginning at 26:30)



1 **Q. Please describe the fragmenting impacts of the new corridor.**

2 A. The new corridor would be one of the largest permanent fragmenting features in  
3 the Western Maine Mountains region. It would be only the third feature (other than  
4 logging roads) that completely bisects the region.

5 The effects of fragmentation on forests have been summarized in numerous  
6 studies, both locally (McMahan 2018) and globally (e.g., Saunders et al. 1991, Harper et  
7 al. 2005, Haddad et al. 2015). The continued loss and degradation of intact forests is one  
8 of the major threats to biodiversity and other ecosystem services worldwide; as noted by  
9 Watson et al. (2018), *“the relative value of intact forests is likely to become magnified as  
10 already-degraded forests experience further intensified pressures (including  
11 anthropogenic climate change).”*

12 The 53 miles of new corridor will have three types of impacts:

13 Direct loss of habitat. The 53.5-mile by 150-foot new corridor encompasses  
14 nearly 1,000 acres, the great majority of which would be permanently lost forest habitat.

15 Edge effects. The creation of extensive permanent “hard” edge along both sides  
16 of the new corridor would have significant and long-lasting adverse effects on the  
17 adjacent forest habitat. Edges alter the adjacent forest in numerous ways including  
18 increased penetration of light and wind, increased temperatures, lower humidity and soil  
19 moisture, increased blowdown, and increased growth of understory and early  
20 successional vegetation (Matlack and Litvaitis 1999, Harper et al. 2005, McMahan  
21 2018). These effects cause significant changes in the forest within the edge zone as noted  
22 by Matlack and Litvaitis (1999, p. 227):

23 One artifact of the human modification of forests has been the tremendous increase in forest edges.

24 Historically, land managers considered the lush plant growth and diversity of animals at edges as

1           beneficial. However, recent investigations have described radical changes in community structure  
2           at edges, suggesting serious problems from a biodiversity perspective. Edge habitats are  
3           advantageous to a variety of exotic plants, predators, brood parasites, and herbivores that are  
4           capable of altering the composition of local forest communities. Radical changes in the forest  
5           microclimate at edges lead to dramatic changes in plant community structure with may persist  
6           several decades, at least.

7           A major consequence of edge effect is the consequent decline in interior forest  
8           habitat, which is forest sufficiently removed from edge to be free of its effects. While  
9           edges are beneficial to some species, many others avoid them and require interior habitat.  
10          Pfeifer et al. (2017), in a meta-analysis of fragmentation studies from across the globe,  
11          found that while relatively equal numbers of species were attracted to or avoided edges,  
12          those that avoided edges (and were dependent on interior forest) were more likely to be  
13          habitat specialists of high conservation concern. In contrast, species attracted to edges  
14          are more likely to be common generalist species.

15          Mature interior forest in northern Maine comprises less than 3% of the landscape  
16          (MDIFW 2015) and some species associated with it are of high conservation concern.  
17          These include migratory songbirds such as scarlet tanager, wood thrush, veery, and  
18          various warblers as well as mammals such as American marten (Rosenberg 1999, 2003;  
19          MDIFW 2015, MAS 2017).

20          Different types of edge effects extend for different distances into the adjacent  
21          forest (Harper 2005, McMahon 2018). One hundred fifty to 300 feet (50-100 meters) is  
22          commonly used to define the edge zone (Rosenberg 1999), though some effects can  
23          extend farther than this. Pfeifer et al. (2017) found that the abundance of interior forest-  
24          dependent species was reduced up to 400 meters from edges.

1           The linear configuration of the corridor maximizes the amount of edge zone for  
2           the cleared area as compared to a more compact shape. The area within 300 feet of the  
3           new corridor encompasses nearly 4,000 acres – about four times the area that will be  
4           directly cleared. Not all of this is forest, and not all of the forest is interior forest due to  
5           the presence of roads and the shifting patterns of timber harvesting. However, in the  
6           absence of the corridor most of the forest is potential interior forest, and would be interior  
7           forest at some part of the timber management cycle. With the corridor all of this forest  
8           will be permanently subject to edge effects, reducing its ability to support interior forest  
9           species.

10           Reduction in connectivity. The high level of ecological connectivity is one of the  
11           most significant characteristics of the Western Maine Mountains regions, and the new  
12           corridor would be one of the most significant features impeding the connectivity,  
13           particularly because it bisects the entire region.

14           This impact is recognized in LUPC's 2010 Comprehensive Land Use Plan (p.  
15           241), which states "Scientists have identified fragmentation of habitat as a serious  
16           concern. Roads, utility corridors, certain types of recreation trails, structures and  
17           clearings create breaks in the landscape. These breaks can act as barriers to animals and  
18           isolate populations of both plants and animals." Maintaining connectivity was one of  
19           three "super themes" guiding wildlife conservation actions identified in the 2015 Wildlife  
20           Action Plan (MDIFW 2015).

21           Not all species will be equally affected. Generalist species that use a range of  
22           habitats will likely cross the corridor with little difficulty. Some small-bodied species  
23           may find the shrubby vegetation less of a barrier than a 20' bare gravel road. The species

1 that will be most affected are those that avoid large openings or extensive shrub or  
2 regenerating forest habitat.

3 For example, American marten in the Northeast avoid openings and regenerating  
4 forest, but occupy areas with forest cover at least 30' high with canopy closure of at least  
5 30% and diverse forest structure including snags and coarse woody debris (Payer and  
6 Harrison 2000, 2003, 2004; Lambert et al. 2017). DeMaynadier and Hunter (1995, 1998)  
7 documented significant declines in amphibian populations in recent clearcuts, with red-  
8 backed, spotted and blue-spotted salamanders and wood frogs particularly sensitive.  
9 These effects can be ameliorated by the retention of microhabitat "refugia" such as  
10 patches of retained trees and coarse woody debris. However, the corridor will be  
11 maintained in a permanent early-successional condition without retained overstory cover  
12 or woody debris inputs, and thus is likely to present a significant barrier to these species.

13 **Q. Has the Applicant adequately assessed these impacts in their application?**

14 A. No they have not. These impacts are discussed in Site Law Application Section  
15 7.4.1. However, this section is marred by meaningless general statements and the  
16 absence of any significant analysis of fragmentation effects. For example:

17 – *"Habitat conversion along transmission line corridors results in a loss of habitat*  
18 *types which, in turn, may adversely impact species that are reliant on the original*  
19 *habitat types. Conversely, such alteration provides benefits to several species."*

20 Also, *"Impacts of habitat conversion along the proposed transmission line*  
21 *corridor are expected to be minimal, beneficial to some species while detrimental*  
22 *to other species."* (Both on Site Law Application p. 7-24.) The Applicant  
23 includes a discussion of the habitat benefits of transmission line corridors (which

1 are irrelevant to permitting) but no discussion of which species may be adversely  
2 impacted (which is). In fact, it is mature forest habitat that is in short supply in  
3 northern Maine, not the early successional habitat that would be created by the  
4 new corridor (MDIFW 2015).

- 5 – *“Some bird species within the NECEC Project area that may be sensitive to forest  
6 fragmentation are the long distance, neotropical migrants that rely on forest  
7 interior habitats, but plentiful suitable habitat is available near the NECEC  
8 Project areas for these interior forest species. Most of the potential breeding  
9 birds that are likely to be found in the vicinity of the transmission line corridor  
10 are not dependent on mature forest stands... Most of the terrestrial mammal  
11 species that are likely to be found near the proposed transmission line corridors  
12 are likewise not dependent on mature forest”* (Site Law Application p. 7-25.)

13 The fact that “most” species will not be affected is irrelevant. There is no  
14 assessment in the application of which species may be adversely affected, the  
15 extent of interior forest habitat in the vicinity of the project, or the effect of the  
16 project on this habitat. The Applicant wants to have it both ways – the  
17 surrounding managed landscape is already heavily fragmented by timber  
18 harvesting, but yet mature interior forest habitat is plentiful. In fact, as noted  
19 previously less than 3% of the forest in northern Maine is mature interior forest.

20 The Applicant also consistently and inappropriately conflates the impacts of the  
21 new corridor with the impacts of timber harvesting in the surrounding landscape. For  
22 example: *“Approximately 27 percent of the Project will require new clearing, however  
23 this area of the state is already intensively managed (i.e., periodically clearcut) forested*

1        *land...*” and “*In general, given the existing landscape characteristics of the overall*  
2        *NECEC Project area, construction and maintenance of the transmission line corridors*  
3        *will result in habitat conversion that is already common to the area, i.e. forested to*  
4        *scrub-shrub.*” (Both on Site Law Application p. 7-24.) However, the new corridor is  
5        qualitatively different than timber harvesting in many ways:

6                Permanence. The new corridor would be an enduring feature in the landscape. In  
7        contrast, timber harvesting creates a shifting mosaic of temporary impacts which are  
8        ameliorated over time through natural succession.

9                Spatial configuration. The new corridor would be a linear feature extending  
10       across the entire Western Maine Mountains region; a configuration that maximizes edge  
11       effect and impediments to species movement. In contrast, timber harvest units are  
12       smaller and more compact units with lower edge-to-area ratio, and which exist in a  
13       mosaic of forest conditions that allow freer movement of species throughout the  
14       landscape.

15               Habitat condition. The new corridor will be permanently maintained in an  
16       herbaceous or shrubby condition, without residual overstory trees or other forest  
17       structures (snags, woody debris, etc.) that provide microhabitats or localized refugia for  
18       many species. Contrary to the Applicant’s contention, most timber harvesting in the state  
19       is done by various forms of partial harvesting that retains some level of residual overstory  
20       and biological legacies. Between 2013 and 2017 clearcutting accounted for less than 7%  
21       of harvested acres in the state (MFS 2013-2017).

22               The Applicant’s conclusions regarding the fragmenting impacts of the new  
23       corridor consist of little more than general statements such as:

- 1           – *“It is anticipated that local wildlife populations will adapt and respond to any*  
2           *additional alterations much as they already do to uses within the vicinity of the*  
3           *transmission line corridor.”* (Site Law Application p. 7-24)
- 4           – *“...the creation of a transmission corridor is not likely to disrupt or significantly*  
5           *alter existing land uses.”* (Site Law Application p. 7-24)
- 6           – [The new corridor] *“is located in an intensively managed timber production area*  
7           *and therefore not likely to significantly alter existing fragmentation.”* (Site Law  
8           Application p. 7-25)
- 9           – [The new corridor is] *“located in an intensively managed area for timber*  
10           *production; this transmission line segment is therefore not likely to significantly*  
11           *alter or increase the existing edge effect.”* (Site Law Application p. 7-26)

12           These statements are unsubstantiated by any analysis or evidence in the  
13           application, and are contradicted by extensive evidence on the consequences of forest  
14           fragmentation. They are also contradicted by numerous photographs of the Segment 1  
15           landscape included in Application Chapter 6 Appendix D (Photosimulations). These  
16           photos do not show a landscape dominated by clearcuts, but rather one in which recent  
17           harvest units of various shapes, sizes and intensities exist within a matrix of relatively  
18           continuous forest. Even during leaf off snowcovered conditions, when harvesting would  
19           be most noticeable, harvest units exist as patches within a dominantly forested matrix. In  
20           addition, most harvest units retain some level of residual forest overstory.  
21           Photosimulation 44 clearly illustrates the difference in spatial configuration and habitat  
22           condition between the permanent corridor and the transient harvest units. The new  
23           corridor is not just another clearcut.

1 **Q. Are there other impacts of the new corridor that you would like to address?**

2 A. Yes. The new corridor would clear and fragment two occurrences of the rare Jack  
3 Pine Forest<sup>4</sup> natural community where it passes south of No. 5 Bog. Rare natural  
4 communities are encompassed in the definition of “unusual natural areas” under DEP  
5 rules (Chapter 375.12(B)).

6 Jack Pine Forest is ranked as S1 (“Critically imperiled in Maine because of  
7 extreme rarity”) by the Maine Natural Areas Program. S1 communities represent the  
8 rarest of the rare in the state. The occurrences that would be impacted by the new  
9 corridor represent only the second and third occurrences in the state documented by the  
10 Maine Natural Areas Program<sup>5</sup>. The impact of the new corridor on this extremely rare  
11 natural community is thus of very high conservation concern.

12 The full extent and condition of these occurrences has not been determined,  
13 precluding a full evaluation of the impact of the new corridor. One of them is described  
14 as “*fairly extensive, extending outside of the survey area to the north and south.*”<sup>6</sup>  
15 However, the corridor would fragment both of these occurrences, separating portions on  
16 either side of the corridor. In addition, portions of these occurrences adjacent to the  
17 corridor would be subject to edge effects that would alter the structure and composition  
18 of this community within the edge zone.

19 It appears that a minor relocation of the proposed corridor would eliminate the  
20 impact to these rare natural community occurrences. However, they were only

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<sup>4</sup> This community is distinct from the Jack Pine Woodland community, which is ranked S3. Most documented occurrences of Jack Pine Woodland are located in Hancock and Washington counties.

<sup>5</sup> Information on documented occurrences of Jack Pine Forest was provided by MNAP in email from Lisa St. Hillaire to David Publicover dated 2/19/19. The Applicant’s Rare Plant Survey Narrative Report (September 2018) lists three occurrences, but two of these are considered a single occurrence by MNAP.

<sup>6</sup> Application Rare Plant Survey Narrative Report, Appendix F.



1 documented following a request for rare plant and natural community surveys by  
2 MNAP<sup>7</sup>. They were not known when the route was being identified, but only after the  
3 corridor had been delineated and purchased, precluding the opportunity to route the  
4 corridor around them. This is indicative of extremely poor planning on the part of the  
5 Applicant, as well as their total lack of understanding of or consideration for the  
6 ecological values of the region through which the new corridor would pass.

7 In addition, the fact that these occurrences extend beyond the corridor presents an  
8 opportunity for the Applicant to work with the adjacent landowner to conserve and  
9 manage these occurrences in a way that maintains their presence and ecological values as  
10 mitigation for these impacts. However, this was not done.

11 **Q. Has the Applicant adequately analyzed alternatives to the location of the new**  
12 **corridor?**

13 A. No they have not. Such an analysis is required under the Site Location of  
14 Development law [38 MRSA §487-A(4); specific to transmission lines] and DEP rules  
15 [Chapter 310.5(A)]<sup>8</sup> as well as LUPC P-WL special exception determination.

16 The alternatives analysis is contained in NRPA application Section 2. The  
17 Applicant describes the purpose and need of the project as delivering Quebec hydropower  
18 to the New England grid “at the lowest cost to ratepayers”. While cost is a consideration  
19 in determining whether an alternative is practicable, defining the purpose and need in this  
20 way is inappropriate and cannot be a consideration for DEP. This definition of purpose

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<sup>7</sup> MNAP memo to DEP of 12/12/17.

<sup>8</sup> While this requirement is specific to wetland impacts, these impacts are dispersed throughout the length of the new corridor, and such an analysis would also serve to address alternatives to other impacts described in this testimony. In addition, the requirement in 38 MRSA §487-A(4) is speaks to “impact on the environment” without limitation and thus encompasses the full range of impacts.

1 and need makes any but the lowest-cost alternative not practicable by definition and  
2 would render the alternatives analysis meaningless.

3 The Applicant assesses two alternative locations for the new corridor. Neither  
4 can be considered a reasonable alternative. Alternative 1 (1980s Quebec Corridor) was  
5 denied a permit by the PUC at that time. Subsequent developments, primarily land  
6 conservation that has taken place since that time, would make the ability to reacquire  
7 rights to this corridor uncertain and in one case “highly unlikely”. Alternative 2  
8 (Bigelow Corridor) also presents many difficulties; by CMP’s own admission there are  
9 serious impediments and engineering challenges to securing this route.

10 However, there is another alternative that should have been analyzed - burial  
11 along existing corridors, most realistically along the Spencer Road (the primary gravel  
12 road accessing the Moose River valley; see Exhibit 5) but also potentially Route 201.  
13 The new corridor parallels and lies within two miles of the Spencer Road for a distance of  
14 over 20 miles, and for the most part lies within the ownership of the same landowner  
15 (Weyerhaeuser) from whom CMP acquired the proposed corridor.

16 Burial of HVDC lines is both technologically and financially feasible, as  
17 demonstrated by its use in two projects that were competitors to NECEC in the  
18 Massachusetts RFP process. Eversource’s Northern Pass project in New Hampshire  
19 proposed burial of 60 miles of line along public roadways<sup>9</sup>. TDI’s New England Clean  
20 Power Link project in Vermont would bury 56 miles of line along public roadways and  
21 railroads<sup>10</sup>. Burial along paved public roadways with existing development (as in these  
22 projects) would be more difficult than burial along undeveloped gravel logging roads,

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<sup>9</sup> <http://www.northernpass.us/route-info.htm>.

<sup>10</sup> <http://www.necplink.com/about.php>.

1           thus there is no basis to conclude that burial of the NECEC line along logging roads  
2           would be technologically or logistically unfeasible.

3           This alternative would almost certainly have less impact on the environment than  
4           the proposed new corridor. It would eliminate or greatly reduce the fragmentation  
5           impacts, resulting in much less clearing (just a narrow expansion of the existing road  
6           corridor), no new edge, no additional loss of existing or potential interior forest habitat,  
7           and a minimal increase in impediments to species' ability to cross the corridor. There  
8           would be wetland and stream impacts, but these resources are already impacted by the  
9           road, and burying the line next to the road would result in limited and marginal additional  
10          impacts, as opposed to the greater impacts to relatively intact streams and wetlands  
11          located within the new corridor..

12          We recognize that cost is a consideration in analyzing alternatives, and burial  
13          would be more expensive. That fact alone does not render an alternative as not  
14          practicable. The standard of 38 MRSA §487-A(4) is that the alternative would not  
15          “unreasonably” increase the cost. Without any financial information it is impossible to  
16          make a determination as to whether the increased cost is reasonable. However, this cost  
17          was not an impediment to the Northern Pass or Clean Power Link projects. Given that  
18          Northern Pass was the first choice in the Massachusetts RFP process, it is evident that the  
19          increased cost of burial was not an impediment to this selection. Thus it appears clear  
20          that burial is a financial feasible alternative.

21          To summarize, it appears that there is an alternative that is technologically,  
22          logistically and financial feasible, and which would be significantly less damaging to the

1 environment. The failure to include an assessment of this alternative, and to demonstrate  
2 why it should not be considered practicable, is a fatal flaw in the application.

3 **Q. In your expert opinion, do the fragmenting impacts of the new corridor constitute**  
4 **an adverse effect on natural resources under the Site Location of Development law**  
5 **sufficient to support a denial of the permit?**

6 A. Yes they do. My reasons for this conclusion include:

7 Adverse impacts of fragmentation of wildlife habitat. The new corridor would be  
8 one of the largest permanent fragmenting features bisecting the largest expanse of  
9 relatively undeveloped and intact natural forest in the eastern United States and one of the  
10 largest such areas in the Temperate Deciduous and Mixed Forest biome in the world.

11 The corridor would eliminate thousands of acres of existing and potential interior forest  
12 habitat through clearing and edge effects, adversely impacting wildlife lifecycles<sup>11</sup> for  
13 species dependent on this habitat. It would reduce the permeability of the landscape and  
14 impede the ability of some wildlife species to move through the region<sup>12</sup>. The

15 Applicant's discussion of these impacts is extremely cursory, general and lacking in  
16 specific analyses on the adverse fragmenting impacts of the new corridor. The Applicant  
17 mischaracterizes the nature of existing timber harvesting in the region and

18 inappropriately equates the impacts of the corridor to those of timber harvesting. The

19 Applicant's conclusions are unsupported by any evidence in the application, are

20 contradicted by extensive scientific evidence on the consequences of forest

21 fragmentation, and amount to little more than "There's lots of forest, it's already heavily

22 impacted, the new corridor is just another clearcut so it's no problem." The Applicant's

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<sup>11</sup> As recognized in DEP rules Chapter 375 Section 15.B(2).

<sup>12</sup> As recognized in DEP rules Chapter 375 Section 15.B(1).

1 analysis does not come close to meeting the burden of proof for a demonstration of no  
2 adverse impact on the natural environment as required under 38 MRSA §486-A.2<sup>13</sup>.

3 Adverse impact on unusual natural areas<sup>14</sup>. The new corridor would destroy  
4 portions of and fragment two occurrences of Jack Pine Forest, ranked S1 (“critically  
5 imperiled”) by the Maine Natural Areas Program and one of the state’s rarest natural  
6 vegetation communities. It appears that this impact could have been completely avoided  
7 by a minor relocation of the corridor, but this was not done since the ROW was fixed  
8 prior to any survey for rare plants and natural communities. This is indicative of  
9 extremely poor planning on the part of the Applicant, as well as their total lack of  
10 understanding of or consideration for the ecological values of the region through which  
11 the new corridor would pass.

12 Lack of adequate alternatives analysis. The Applicant’s analysis of alternative  
13 routes for the new corridor considers two alternatives that cannot be considered realistic.  
14 By the Applicant’s own admission both would involve significant difficulties in route  
15 acquisition and permitting. However, they failed to consider an alternative (burial along  
16 existing road corridors) that has been utilized by at least two other major transmission  
17 line projects in New England, demonstrating that this approach is both technologically  
18 and financially feasible under more difficult conditions than would occur for this project.  
19 By not analyzing an obvious and potentially practicable alternative that would have a  
20 significantly lower impact on the environment, the Applicant has failed the burden of

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<sup>13</sup> “At the hearings held under this section, the burden is upon the person proposing the development to demonstrate affirmatively to the department that each of the criteria for approval listed in this article has been met, and that the public's health, safety and general welfare will be adequately protected.”

<sup>14</sup> As recognized in DEP rules Chapter 375 Section 12.

1 proof standard as it applies to 38 MRSA §487-A(4) and DEP rules Chapters 310.5(A)  
2 and 335.3(A).

3 Lack of adequate mitigation. Mitigation consists of three components: avoidance,  
4 minimization and compensation. The Applicant falls short in all three areas.

5 – *Avoidance.* As noted above, the Applicant has failed to demonstrate that there is  
6 not an alternative practical route that would avoid the necessity of clearing the  
7 new corridor. At a more local scale, the Applicant has failed to avoid the impact  
8 to the Jack Pine Forest occurrences by designing a route around them.

9 – *Minimization.* DEP rules (Chapters 375.9 and 375.15) envision buffer strips as a  
10 way to provide wildlife travel corridors between areas of habitat. However, the  
11 riparian buffers proposed by the Applicant do not sufficiently minimize the  
12 impediment to species movement created by the new corridor. As described in  
13 Application Chapter 10 Exhibit 10-2 (Post-Construction Vegetation Management  
14 Plan) vegetation within the wire zone of riparian buffers will be maintained at a  
15 height of 10 feet. This is insufficient to provide habitat for American marten and  
16 other species that require taller forest cover of minimum density. In addition, in  
17 multiple locations mapped streams are a mile or more apart. These measures do  
18 not adequately minimize the impact of the new corridor on landscape  
19 connectivity.

20 – *Compensation.* The Applicant's final Compensation Plan focuses on  
21 compensation for resources considered under the Natural Resources Protection  
22 Act and for which compensation is specifically required. However, the Site Law  
23 considers impacts at a broader level. 38 MRSA §484(3) addresses impacts to

1           “other natural resources” without limitation. In addition, DEP rules Chapter  
2           375.15.A addresses “the need to protect wildlife and fisheries by maintaining  
3           suitable and sufficient habitat”, indicating consideration of the full range of  
4           wildlife. Chapter 375.15.B(1) and (2) speak generally of “travel lanes” and “fish  
5           and wildlife lifecycles” without reference to specific species or habitats (which  
6           are considered in 375.15.B(3)). Finally, 375.15.C addresses the need for the  
7           Applicant to provide that they have made “adequate provision for the protection  
8           of wildlife and fisheries” (again without limitation), and 375.15.C(2) includes  
9           habitat preservation as a component of mitigation for adverse impacts to wildlife.  
10          In total this section makes clear that compensatory mitigation is not limited just to  
11          NRPA-protected resources but may be applied to all wildlife habitat impacts.

12                 The new NECEC corridor would be one of the largest permanent  
13          fragmenting features in a globally significant forest region that is distinguished by  
14          its high level of ecological connectivity. It would eliminate thousands of acres of  
15          existing and potential interior forest habitat and reduce the permeability of the  
16          landscape to species movement. The landscape includes extensive streams  
17          (particularly cold water fisheries) and wetlands that exist not as isolated features  
18          but as integral and connected parts of the broader ecological system.

19                 The new corridor is not a compact feature such as a sawmill or shopping  
20          mall impacting degraded wetlands in an already developed area. It is a sprawling  
21          feature that will impact multiple natural resource values across a broad area of  
22          high ecological value. The 13 parcels proposed as compensatory land  
23          conservation are small (averaging about 215 acres in size), scattered and have

1 little nexus to the landscape-level fragmentation impacts of the project. The  
2 Applicant has provided compensation for the impact to individual pieces but not  
3 the cumulative impact to the whole interconnected ecosystem. Compensation for  
4 this cumulative impact should be held to a higher standard than provided by the  
5 Applicant.

6 Though we contend that the project should not be permitted as proposed,  
7 if it is permitted then very significant habitat protection should be required as  
8 compensation given the ecological values of this region and the magnitude of the  
9 impact of the new corridor on wildlife habitat. We support the position of The  
10 Nature Conservancy and Maine Audubon Society<sup>15</sup> that land conservation in the  
11 range of 75,000 to 100,000 acres is the appropriate scale to compensate for the  
12 project's very significant fragmenting impacts.

13 For these reasons, we believe that the proposed new corridor constitutes an  
14 unreasonable adverse impact on the environment and that DEP should deny the permit.

15 **Q. Does this conclude your testimony relative to the issues before DEP?**

16 A. Yes.

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<sup>15</sup> See <https://bangordailynews.com/2018/10/16/opinion/contributors/hydro-line-project-doesnt-go-far-enough-to-mitigate-conservation-concerns/>.



1                   **TESTIMONY RELATED TO LAND USE PLANNING COMMISSION**  
2                   **CERTIFICATION**

3   **Q.     Please describe the situation regarding the crossing of the Appalachian Trail by the**  
4           **existing transmission line corridor (Segment 2).**

5   A.           Currently the Appalachian Trail (AT) crosses the existing 150-foot-wide  
6           transmission line corridor three times within a stretch of two-thirds of a mile. Hikers are  
7           exposed to an unnatural linear opening and multiple 45-foot-high transmission line  
8           structures that compromise the backcountry experience. We recognize that the  
9           transmission line corridor predates the establishment of the AT as a National Scenic  
10          Trail.

11 **Q.     What would be the impact of adding the new line to this corridor on the experience**  
12 **of hikers?**

13 A.           As proposed the addition of the new line would make the existing situation worse.  
14          The widening of the corridor and the addition of a second transmission line with taller  
15          towers would increase the exposure of hikers to the open corridor and intensify the  
16          experience of being in a developed rather than backcountry environment. The  
17          Applicant's Visual Impact Assessment (Application Chapter 6 pp. 6-43 to 6-44) rates the  
18          impact as "minimal to moderate". The Applicant also states (Application Chapter 25,  
19          Section 25.3.1.3) that there would be a "negligible" change in visual impact. However,  
20          these conclusions are contradicted by the revised Chapter 6 Appendix F (Scenic  
21          Resources Chart, 1/30/19) that rates the impact as "Moderate/Strong".

22               The Applicant also states (Application Chapter 6 p. 6-50), "*The Project should*  
23               *not negatively affect the hikers' experience or their continued use and enjoyment the*  
24               *Appalachian Trail.*" The statement that the project will not negatively affect hikers'

1 experience is made without any supporting evidence, and is contradicted by the revised  
2 impact rating of Moderate/Strong and the Applicant's recognition of the need to mitigate  
3 this impact through vegetative screening. There is a noticeable difference between a  
4 single line with wooden towers shorter than the surrounding forest and a corridor that is  
5 50% wider with two lines, one with steel towers considerably taller than the surrounding  
6 forest, which are experienced by hikers passing directly under the line. The change is  
7 quite noticeable in the photosimulation from this area (Application Chapter 6, Appendix  
8 E, Photosimulation B, pp. 27-28). The photosimulation of the proposed vegetative  
9 screening (Appendix D: Photosimulations – Leaf Off/Snow Cover, Photosimulation 50A)  
10 does not inspire confidence that the proposed mitigation will be adequate. Vegetative  
11 screening alone cannot mitigate the exposure of hikers to the wider corridor and an  
12 additional larger transmission line.

13 **Q. Does the proposed project satisfy the first requirement for a special exception in the**  
14 **AT P-RR district that “*there is no alternative site which is both suitable to the***  
15 ***proposed use and reasonably available to the applicant*”?**

16 A. Yes. We accept that co-locating the new line in the existing right-of-way is the  
17 preferred solution, and that an alternate location in a new corridor would have a greater  
18 impact on the AT by creating a new crossing where none currently exists.

19 **Q. Does the proposed project satisfy the second requirement for a special exception in**  
20 **the AT P-RR district that “*the use can be buffered from those other uses and***  
21 ***resources within the subdistrict with which it is incompatible*”?**

22 A. As proposed it does not. While the existing situation is not ideal, the addition of a  
23 second larger line in a wider corridor constitutes an additional incompatible use of

1 moderate to strong impact that cannot be buffered from the AT. The available evidence  
2 does not support the contention that the proposed vegetation planting will be sufficient to  
3 buffer the trail from this increased impact

4 However, this requirement could be satisfied by a realignment of the AT that  
5 moves it away from the transmission line corridor in this area and leaves only a single  
6 crossing that minimizes exposure of hikers to the transmission line. If this were done  
7 there would be an improvement in the experience of AT hikers in this area rather than a  
8 diminishment as would occur with the project as proposed, and the increased buffering of  
9 the trail would satisfy the second requirement. This was noted as an appropriate  
10 mitigation strategy by the Applicant (Application Chapter 6 Section 6.2.2.7). We are  
11 aware that Appalachian Trail managers have had discussions with Applicant on ways to  
12 address the NECEC project impacts on trail users but we have not seen any resolution or  
13 conclusions from these discussions.

14 **Q. Are there any conditions that the Commission should impose under Part (c) of the**  
15 **special exception criteria?**

16 A. Yes. The Commission should condition the granting of the special exception on  
17 the Applicant reaching an agreement with AT managers on the relocation of the trail and  
18 providing funding for the relocation. As noted by the Applicant this would be an  
19 appropriate mitigation strategy for the increased impact on the AT experience in this area.  
20 In the absence of such an agreement the Applicant should provide funding for off-site  
21 mitigation that would be used to protect other AT viewsheds.

22 **Q. Does that conclude your testimony relative to the LUPC certification?**

23 A. Yes.

**EXHIBIT 5**

**State of Maine, Department of Environmental Protection and Land Use Regulatory  
Commission**

**CENTRAL MAINE POWER COMPANY  
NEW ENGLAND CLEAN ENERGY CONNECT**

Application for Site Location of Development Act permit, and Natural Resources Protection Act permit for the New England Clean Energy Connect ("NECEC") Project in 25 municipalities, 13 Townships or Plantations and 7 Counties from Beattie Township to Lewiston and Wiscasset to Windsor.

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

Pre-filed Testimony of Jeff Reardon  
Maine Brook Trout Project Director  
Trout Unlimited  
Manchester, ME  
Witness for Trout Unlimited

**Qualifications and Purpose of Testimony**

**1. State your name, address and current occupation:**

Jeff Reardon, 267 Scribner Hill Road, Manchester, ME 04351. For the past 20 years I have worked for Trout Unlimited in Maine. My current title is Maine Brook Trout Project Director.

**2. What is your relevant professional experience?**

I have been working for Trout Unlimited in a variety of positions since 1999. I worked as New England Conservation Manager from 1999-2006. From 2006 to 2011 was the Design and Permitting Coordinator for the Penobscot River Restoration Project. Since 2011, I have worked full time on brook trout conservation at Maine Brook Trout Project Director. I have broad experience working on coldwater fish conservation. I have represented Trout Unlimited in more

than a dozen hydroelectric dam relicensings before the Federal Energy Regulatory Commission; coordinated four dam removals and construction of a “nature-like” fish bypass; overseen TU’s efforts to identify and fix impassable culverts; coordinated citizen-science projects related to water temperature monitoring and identifying undocumented brook trout populations in remote ponds and coastal streams; testified on legislation and regulatory rule-making in the Maine and New Hampshire legislatures and the US House of Representatives; and worked to identify and complete land conservation projects intended to protect brook trout habitat in Maine’s rivers, streams, and ponds. Before working for Trout Unlimited, I worked for the Sheepscot Valley Conservation Association, a land trust in mid-Coast Maine, as the Watershed Projects Director for 3 years. In that role, I identified parcels and coordinated conservation of lands through conservation purchase or conservation easement to protect Atlantic salmon habitat; worked with landowners to improve riparian buffers to protect coldwater aquatic habitat; and surveyed the entire length of the Sheepscot River to monitor the condition of riparian buffers.

**3. What is your education?**

I graduated from Williams College with a degree in biology in 1989. My senior honors thesis was related to impacts of disturbance on northern forests.

**4. Have you previously testified before the Maine Department of Environmental Protection (DEP) or the Maine Land Use Planning Commission (LUPC?)**

I have testified at many DEP and LUPC (or LURC) hearings, but this is the first time I have done so as an expert witness.

**5. Do you have specific expertise that relates directly to your testimony in this case?**

I have worked on a number of projects directly related to the issues I am testifying on here, chronologically:

1. In 1997-99, working for the Sheepscot River Conservation Association and as lead for the Sheepscot River Watershed Council, I helped implement and test a “Methodology for Determining Optimal Riparian Buffer Width” that had been developed by Kleinschmidt Associates for the Maine Atlantic Salmon Commission. My role was to work with two landowners to implement the method on conservation lands adjacent to Atlantic salmon habitat in the Sheepscot River. More information on this project is available here: <http://kleinschmidtgroup.com/index.php/projects/eco-fisheries/atlantic-salmon-riparian-buffer-zone-determination>
2. In 1999, for the Sheepscot Valley Conservation Association, I worked closely with the Maritimes and Northeast Pipeline to coordinate construction of a pipeline corridor through the Sheepscot watershed with no damage to aquatic habitat at stream crossings.
3. From 1999 to 2002 I represented Trout Unlimited during the relicensing of the Indian Pond Dam on the Kennebec River, and, with other parties, negotiated a settlement agreement that required extensive studies of the brook trout population in the Upper Kennebec watershed. These studies informed decisions by the Indian Pond Fisheries Habitat Committee, which used the information to plan habitat restoration and protection projects funded by the Indian Pond licensee. Those studies documented, for the first time, extensive migrations of brook trout between the Kennebec and Dead River mainstems and multiple small tributaries, particularly Cold Stream and Tomhegan Stream. I continue to serve as a member of the Indian Pond Fisheries Habitat Committee.

4. On behalf of Trout Unlimited, in 2003-2006, I hired Kleinschmidt Associates to refine their Atlantic salmon riparian buffer methodology for protection of brook trout habitat, particularly in higher elevation streams in western Maine. We developed a recommended buffer that was broadly applicable for brook trout habitat in Maine. The recommendations were then vetted with fisheries biologists from the Maine Department of Fisheries and Wildlife, and, in cooperation with the Forest Society of Maine, with large forest landowners. Trout Unlimited and partners have used those recommendations as the basis for planning conservation projects, including conservation easement terms, ever since.
5. In 2010-2016, I worked closely with partners at the Maine Department of Inland Fisheries and Wildlife (MDIFW), Maine Bureau of Parks and Lands (MBPL), Trust for Public Land and landowner Plum Creek on the Cold Stream Forest Project, in which MBPL acquired the 8,200-acre parcel primarily to protect brook trout habitat in Cold Stream and its tributaries. Since acquisition was completed in 2016, I have been working with BPL staff to develop the management plan for the property by serving on the Advisory Committee for that planning process.

**6. Are you familiar with the application for the New England Clean Energy Connect (NECEC)?**

I have reviewed the Site Law application and the Natural Resources Protection Act application. I have spent extensive time reviewing the route and proposed stream crossings, both on the map—primarily using the KMZ layer provided by Maine DEP—and on paper. I have reviewed much of the agency consultation regarding stream crossings, fisheries, riparian buffers, and



proposed mitigation. I have reviewed the Compensation Plan, dated January 30, 2019, in detail. I have compared the information and data presented in these documents to other available data on fisheries and aquatic habitat, primarily available in on-line GIS format from the Maine Department of Inland Fisheries and Wildlife<sup>1</sup>, from the Eastern Brook Trout Joint Venture<sup>2</sup>, from the National Fish Habitat Partnership<sup>3</sup>, and from Trout Unlimited's Conservation Portfolio Analysis of native brook trout habitat<sup>4</sup>.

**7. Are you familiar with area through which the NECEC will pass?**

I have worked extensively in two regions that will be impacted by the NECEC. I worked full time on the Sheepscot River from 1996 to 1999, while working as the Watershed Program Director. I have worked extensively in the Upper Kennebec Watershed for my entire 20-year career with TU, with multiple projects in the Dead, Kennebec, and Sandy River drainages. I am most familiar with the Cold Stream watershed, where I worked nearly full time from 2010-2016. I have also fished, hiked and paddled throughout the Upper Kennebec region. I have fished many of the streams that will be crossed by the NECEC and the ponds where the route will pass nearby.

**8. What is the purpose of your testimony?**

My testimony addresses the impacts of the project as proposed on brook trout and Atlantic salmon fisheries habitat; the failure of the Applicant to adequately assess these impacts; the

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<sup>1</sup> Maine Stream Habitat Viewer: <https://www.maine.gov/dmr/mcp/environment/streamviewer/>

<sup>2</sup> EBTJV data are viewable in an online GIS at [http://ecosheds.org:8080/geoserver/www/Web\\_Map\\_Viewer.html](http://ecosheds.org:8080/geoserver/www/Web_Map_Viewer.html)

<sup>3</sup> <http://assessment.fishhabitat.org/>

<sup>4</sup> <http://trout.maps.arcgis.com/apps/webappviewer/index.html?id=1bbd262b634647b3beb78a6685a607d5>

inadequacy of proposed buffers to protect brook trout habitat; the failure of the applicant to adequately assess and pursue potential alternatives to the project that would be less damaging to natural resources, including brook trout habitat—particularly alternative methods or sites for stream crossings; the degree of impact and the quality of resources impacted by the proposed NECEC project; the quality and quantity of brook trout habitat on parcels and funds proposed as compensation for impacts of the proposed project; and the failure of the applicant to adequately mitigate the impacts of the NECEC project on brook trout habitat.

**9. Summarize your testimony.**

The region through which the proposed NECEC project will be completed is the heart of the largest reservoir of intact aquatic habitat in the Northeast. This habitat supports populations of native brook trout that have been identified as the “last true stronghold for brook trout in the United States.”<sup>5</sup> The proposed new corridor would substantially fragment this habitat, with multiple stream crossings that impact brook trout habitat, and the creation of a new corridor that could be a vector for increased human use and introduction of invasive species. The Applicant’s assessment of these resources and impacts is inadequate, does not contain a specific analysis of impacts to brook trout habitat, and assumes the impacts of the new permanent corridor will be identical to the impacts of past and present forest management. The Application fails to consider reasonable alternatives to reduce impacts on brook trout habitat—including alternatives that were employed to reduce impacts on other resources. There are practicable alternatives to the project that would be less damaging to brook trout habitat. The Application’s proposed mitigation is

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<sup>5</sup> Eastern Brook Trout Joint Venture (2006): [Eastern Brook Trout: Status and Threats.](https://easternbrooktrout.org/reports/eastern-brook-trout-status-and-threats%20%282006%29/view)

inadequate to compensate for impacts on brook trout habitat.

With respect to the DEP Site Law and Natural Resources Protection Act Application, the provisions for buffer strips are inadequate to protect brook trout habitat, including brook trout migration. The application does not meet the Chapter 375 standard that “Proposed alterations and activities will not adversely affect wildlife and fisheries lifecycles,” particularly with respect to brook trout. The proposed mitigation to address these adverse effects on brook trout is not adequate. The DEP should therefore deny the permit.

With respect to the LUPC’s certification that a utility corridor should be allowed within the PRR Zone around Beattie Pond, the Applicant has not demonstrated that there is “no alternative site that is both suitable for the use and reasonably available to the applicant”, or that existing uses can be reasonably buffered from the impacts of the NECEC corridor. In particular, we are concerned that the NECEC corridor will become a pathway for motorized vehicles, including ATV’s, and this increased motorized use around Beattie Pond will substantially increase the risk that invasive fish species become established in Beattie Pond, a designated State Heritage Fish Water for brook trout.

**Brook Trout Habitat Values of Maine’s Western Mountains and Impacts of NECEC on  
Selected Brook Trout Resources**

**10. Please describe the aquatic habitat and brook trout resource in Maine’s Western Mountains Region.**

Other witnesses will speak to the broader ecological values of the uninterrupted forest in western Maine, and they will primarily focus on terrestrial resources. I will address the aquatic

resources. These are among the most intact watersheds remaining in the continental United States. Western Maine contains the vast majority of un-degraded aquatic habitat in the northeastern states. Just 17% of the land area in the region is considered to have “very low” levels of aquatic habitat degradation, and most of this is in western and northern Maine. The entire Maine/Quebec border falls into this category<sup>6</sup>. (See Exhibit 1.)

This intact habitat supports the nation’s most significant stronghold of native brook trout populations. More than half of all subwatersheds designated as supporting “intact” populations of brook trout are in Maine, and the Western Mountains Region is the heart of this stronghold. Maine is the only state with any significant remaining lake and pond populations of brook trout, with more than 97% of those remaining<sup>7</sup>. (See Exhibit 2.) With the notable exception of the mainstem Dead River and the Kennebec River downstream of the Williams Dam, both of which are stocked annually with hatchery trout, virtually every stream and river in the region supports wild brook trout, and assessments of these populations for the Eastern Brook Trout Joint Venture classify almost all of them as “intact” at the subwatershed scale.

This is a resource of national significance. It is without doubt the most important and extensive reservoir of native trout biodiversity east of the Mississippi and may be the most intact native trout resource in the continental United States.

#### **11. Does the Application accurately describe this resource?**

No. The description of the brook trout resource in the Site Law Application is limited to a

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<sup>6</sup>National Fish Habitat Partnership, 2015. [Through a Fish’s Eye, the Status of Fish Habitat’s in the United States, 2015.](#)

<sup>7</sup> Eastern Brook Trout Joint Venture (2006): [Eastern Brook Trout: Status and Threats.](https://easternbrooktrout.org/reports/eastern-brook-trout-status-and-threats%20%282006%29/view)



single paragraph. Although this paragraph<sup>8</sup> notes that “Brook trout are essentially pervasive in the Project Area and may be found in some portion of many of the waterbodies,” it does not distinguish between the essentially intact populations in the region crossed by the “Greenfield” route from Beattie Township to Moxie Gore, and the far less extensive and more fragmented resources found in areas at lower elevations, within the mainstem Kennebec and Dead River and farther south. It also does not provide the important context that intact populations of brook trout at the landscape scale essentially exist only in western and northern Maine, and nowhere else within the species’ US range. Other than counting stream crossings—without providing information on the fisheries values of the streams in question—the Alternatives Analysis in the NRPA Application does not discuss fisheries impacts.<sup>9</sup> In the discussion of “Site Specific Design to Minimize Environmental Impacts”, measures to avoid or protect fisheries are not discussed, although the Applicant notes that “CMP has been in consultation with MNAP and MDIFW regarding potential rare, threatened, and endangered plant communities and animal occurrences.”<sup>10</sup> Consultation with MDIFW staff about brook trout presence at crossings appears to have been left until very late in the process, with handwritten comments on the NECEC Water Body Crossing Table (Exhibit 7-7) provided on by MDIFW February 2, 2019.<sup>11</sup>

Similarly, the Revised Compensation Plan, dated January 30, 2019, contains little information regarding brook trout. Table 1-1: “Summary of Compensation as Required by NRPA and USACE” does not mention impacts to fisheries habitat. In Table 1-2: “Summary of

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<sup>8</sup> Site Law Application, Chapter 7, page 40.

<sup>9</sup> NRPA Application, Pages 2-2 to 2-23.

<sup>10</sup> NRPA Application, Pages 2-22 to 2-23.

<sup>11</sup> See emails from Bob Stratton (MDIFW) to Jim Beyer (MDEP), late January/early February 2019, retrieved at: <https://www.maine.gov/dep/ftp/projects/necec/review-comments/2019-02-01%20MDIFW%20Comments/>

Compensation Resulting from Consultation with Resource Agencies,” the only indirect reference to fisheries habitat is the inclusion of “12.02 linear miles of stream” in preservation parcels to compensate for 11.02 linear miles of forested conversion in riparian buffers. There is no assessment of the fisheries resources or habitat values of the streams on the preservation parcels compared to the impacted streams.<sup>12</sup> In the section regarding “Indirect Impacts to Coldwater Fisheries”, there is discussion of the need to provide mitigation for the impacts of inadequate buffers, a notation that “CMP also intends to replace improperly installed or non-functioning culverts to improve habitat connectivity”, and another reference to the 12.02 miles of streams to be protected on the Grand Falls, Basin, and Lower Enchanted Tracts under a deed restriction or conservation easement.<sup>13</sup> CMP also proposes to make two monetary contributions: \$180,000 to the Maine Endangered and Nongame Wildlife Fund “to protect coldwater fishery habitat” and a contribution of “\$200,000 of funding, sufficient to replace approximately 20-35 culverts.”<sup>14</sup> But there is no actual assessment of the impacts to coldwater fisheries habitat, of the appropriate scale of mitigation, nor of the coldwater fisheries values to be protected, restored, or enhanced by the Compensation Plan.

Finally, there is no discussion whatsoever of impacts to Atlantic salmon habitat, or mitigation for these impacts.

**12. Are there particular locations where impacts to brook trout habitat are significant?**

Yes. I have not completed an exhaustive analysis of all of the stream crossings, but in the

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<sup>12</sup> Compensation Plan, Revised January 30, 2019, pages 5 and 6.

<sup>13</sup> Compensation Plan, Revised January 30, 2019, pages 20-22.

<sup>14</sup> Compensation Plan, Revised January 30, 2019, page 35.

“Greenfield” route from Beattie Township to Moxie Gore, I have identified several locations where high value brook trout streams—some of the “best of the best” of the state’s headwater brook trout waters—are impacted by multiple stream crossings that impact a single, relatively small stream. For example:

1. In Skinner TWP, the route includes 18 separate crossings (3 on permanent streams, 12 on intermittent streams, and 3 on ephemeral streams) that impact the West Branch and South Branch of the Moose River near their confluence just east of Moose Mountain. The combination of multiple crossings, each of which will be maintained without a closed canopy cover, in a relatively small area risks cumulative impacts on the headwaters of one of Maine’s most remote wilderness trout rivers. (Exhibit 3A)
2. On Piel Brook near the four corners of Bradstreet, Parlin Pond, Upper Enchanted and Johnson Mountain TWPs, a total of 10 crossings (3 on permanent streams, 5 on intermittent streams, and 2 on ephemeral streams) impact the headwaters. (Exhibit 3B)
3. The Cold Stream crossing in Johnson Mountain TWP is an especially important site for brook trout. (See additional discussion about the special value of Cold Stream for brook trout below.) It’s also a particularly impactful crossing. In this case, the issue is not so much the number of crossings in close proximity to each other within a single watershed, but the fact that in addition to a crossing of Cold Stream, the NECEC ROW parallels two small perennial tributaries that have their confluence essentially at the NECEC crossing of Cold Stream. This results in an extended reach—about 1400 feet of stream—that closely parallels the cleared ROW. These

impacts are increased because the NECEC ROW abuts an existing cleared ROW at the Capital Road. The ROW also has direct impacts on BPL's Cold Stream Forest Unit, which abuts the ROW to both the north and south. Lack of shade and warming are likely exacerbated by this long parallel impact of road and utility ROW. (Exhibit 3C)

4. The Tomhegan Stream crossing in West Forks Plantation is another example where there are multiple crossings of permanent streams, all of which are either tributaries to or braided channels of Tomhegan Stream, in a very short section. In this case, there are 9 crossings—8 of permanent streams and 1 of an intermittent stream—within about 1200 feet. Like Cold Stream, Tomhegan Stream and its importance to brook trout conservation is discussed in more detail below. (Exhibit 3D)

### **Failure to Consider Alternatives That Could Have Avoided or Minimized Brook Trout Habitat Impacts**

**13. Did the Applicant consider alternatives that would avoid or minimize impacts to brook trout and Atlantic salmon habitat?**

No. As discussed above, in the Alternatives Analysis, there is no assessment—other than the total number of stream crossings—of the relative fisheries habitat impacts of the alternative routes considered. Nor are any routes co-located along existing disturbed areas—for example, buried along a road corridor. More importantly, with respect to fisheries, minor modifications to the route or to the size and location of structures could have been considered or implemented to avoid or reduce the impacts of lost riparian buffers on brook trout and salmon habitat but



were not. These include taller poles to put the wires high enough that full forest canopy closure could be maintained; changing locations of poles—for example, higher on slopes, to achieve the same effect; and minor route changes to avoid stream crossings altogether or to cross at locations where impacts would be smaller.

Significantly, these measures have been used at some stream crossings to reduce impacts on wildlife resources and on recreational users. Similar measures could have been used to reduce impacts on important brook trout streams. Some examples of these measures include:

1. Gold Brook is a highly significant brook trout water that is in a watershed with Rock Pond and Iron Pond, both State Heritage Fish Waters for brook trout, and is a tributary to Baker Stream, which flows into Baker Pond, another State Heritage Water. Gold Brook is important spawning and rearing habitat for these three ponds and is also a fine trout stream on its own. Significant impacts to Gold Brook are caused by a combination of multiple stream crossings, a long section of the ROW that parallels Gold Brook, and additional crossings in the watershed on the inlet to Rock Pond. In this case, however, these impacts were reduced by raising the structure heights at most of these crossings to allow mature trees to be maintained along most of this section of the ROW. These changes were made to address concerns about Roaring Brook Mayfly and Northern Spring Salamander habitat in Gold Brook.<sup>15</sup> (Exhibit 4A) A better solution at this site might have been to reroute the ROW slightly to the north or south. As currently laid out, the

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<sup>15</sup> Philip DeMaynadieres, ME DIFW, personal communication.

ROW crosses a curve in Gold Brook twice in a short reach, then closely parallels the shore of Rock Pond, with multiple other crossings nearby. All of these impacts could have been avoided if the ROW had been located a half mile to the north or south to avoid Gold Brook and Rock Pond altogether. (Exhibit 4A)

2. Similar measures were taken, also to prevent impacts to Roaring Brook Mayfly and Northern Spring Salamander, at the crossing on Mountain Brook in Johnson Mountain Township<sup>16</sup>. Again, taller structures allowed for the ROW to be constructed while leaving an intact forested canopy for a buffer on the stream. (Exhibit 4B)
3. Originally, similar plans were made to use tall structures placed high on the walls of the Kennebec Gorge to allow an over-water crossing of the Kennebec River from West Forks TWP to Moxie Gore while maintaining an undisturbed forested buffer on both banks. Impacts at this site have been further reduced by locating the lines underneath the river bed. (Exhibit 4C)

These or similar measures should have been evaluated as alternatives that could avoid or minimize impacts of the NECEC at stream crossings where the Applicant is not proposing to maintain a forested canopy in the buffer area. If these alternatives were reasonable to protect particularly sensitive insect and salamander populations, they could also have been used to protect particularly sensitive brook trout.

#### **14. Are there places where using these techniques to maintain forested riparian buffers**

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<sup>16</sup> Philip deMaynadier, ME DIFW, personal communication.

**would significantly reduce the impacts of the project?**

Yes. The crossings at the South Branch/West Branch Moose River, at Cold Stream, and at Tomhegan Stream all are of significantly high impact on brook trout resources of very high value. Further analysis would likely reveal some others. The additional cost of installing taller structures at these sites would be marginal given the total cost of the project.

**15. Are there places where impacts to brook trout and salmon habitat especially concern you?**

Several areas are of special concern to me.

1. Cold Stream, including Tomhegan Stream and other tributaries. Cold Stream represents one of the most intact and highest value watersheds for native brook trout in Maine. The Cold Stream property contains a combination of pristine native brook trout ponds and intact streams. Cold Stream from its source to its mouth at the Kennebec River is a brook trout factory and there is not a single known occurrence of non-native fish in the watershed. Both the stream and the ponds have been destination fisheries for anglers for more than 100 years. Extensive fisheries studies were conducted before, during, and after the Indian Pond Dam FERC relicensing, including habitat surveys of the Kennebec River and many tributaries, electrofishing, water temperature profiles, and radio-telemetry of adult brook trout. These resources documented the importance of Cold Stream to supporting the Kennebec and Dead River fisheries for wild brook trout. Key findings include: (1) More than 98% of Kennebec River brook trout are wild. (2) No brook trout spawning or juveniles were observed in the Kennebec mainstem. (3) All tributaries to Kennebec Gorge except

Cold Stream have impassable blockages very close to Kennebec River. (4) Cold Stream was the only location where radio-tagged brook trout were observed spawning, with tagged fish during spawning period recorded as much as five miles up Cold Stream. (5) Tagged brook trout also moved into Cold Stream during summer warm periods for thermal refuge. (6) Tagged brook trout seeking thermal refuge not only entered Cold Stream, but also swam upstream and into Tomhegan Stream. (7) The Cold Stream fish community is markedly different from Kennebec mainstem based on angling, snorkel, and electrofishing surveys, and contains no non-native fish species. The Kennebec supports slimy sculpin, blacknose dace, smallmouth bass, fallfish; limited numbers of adult brook trout and landlocked salmon. Cold Stream is dominated by brook trout, mostly juveniles, with limited numbers of slimy sculpin and blacknose dace.<sup>17</sup>

Because of these findings, Cold Stream was prioritized for habitat protection, and TU worked with the ME DIFW, ME BPL, Trust for Public Lands and many other partners to help the state acquire 8,200 acres that protects all the headwater ponds in the Cold Stream watershed and protects the stream corridor from its source to its mouth EXCEPT FOR a narrow corridor along the Capital Road. In the ultimately successful application for funding for the Cold Stream Forest Project from the Land for Maine's Future Fund, the project partners identified the brook trout habitat in on the property as a "Single Exceptional Value" for the property.

The NECEC ROW crosses Cold Stream through this corridor. In addition to this

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<sup>17</sup> E/PRO Engineering & Environmental Consulting, LLC. November 2000. Assessment of Salmonid Fishes in the Upper Kennebec/Lower Dead River Watershed, Maine. Report for The Indian Pond Project Relicensing, FERC # 2142.

crossing—discussed in detail above—there are more than 20 additional NECEC ROW crossings of perennial and intermittent streams in the Cold Stream watershed. The cumulative effects of these crossings, in particular the impacts depicted in Exhibits 3C and 3D at the Cold Stream and Tomhegan Stream ROW crossings, threaten to degrade the public’s investment in protecting this valuable habitat.

2. Lakes and Ponds Designated as State Heritage Fish Waters. The NECEC ROW passes very close to several designated State Heritage Fish Waters. These are waters are designated by the ME DIFW based on their native brook trout populations that have been self-sustaining for at least 25 years with no history of stocking. The following designated State Heritage Fish Waters are within less than one mile of the NECEC ROW.

- a. Beattie Pond, Beattie TWP. 1200 feet from the ROW.
- b. Rock Pond, T5R6 BKP WKR. 900 feet from the ROW. (The ROW also crosses the inlet to Rock Pond.)
- c. Iron Pond, T5R6 BKP WKR. 2500 feet from the ROW.
- d. Mountain Pond #1, Johnson Mountain TWP. 3700 feet from the ROW.
- e. Little Wilson Hill Pond, Johnson Mountain TWP. 1300 feet from the ROW. (The ROW also crosses the inlet to the pond.)
- f. Big Wilson Hill Pond, West Forks PLT. 4300 feet from the ROW.
- g. Baker Pond, Caratunk. 2300 feet from the ROW

The primary concern for these waters is increased ease of access, if the NECEC ROW is used formally or informally as a motorized road or trail. The primary threat to lake and pond brook trout populations is introduction of non-native fish species that compete with or

prey on brook trout.<sup>18</sup>

3. West Branch Sheepscot River. The concern here is the cumulative impact of an additional crossing of the West Branch Sheepscot, an important river for endangered Atlantic salmon. The West Branch Sheepscot is already heavily impacted by powerline and pipeline crossings that have removed most of the riparian vegetation from almost a half mile of the river. The new crossing will have significant impact because it crosses the West Branch at a shallow angle and parallels the river. As a result, the ROW clearing limits stretch for more than 1300 feet along stream. The Google Earth View (Exhibit 5) clearly shows that what little riparian vegetation remains on this impacted river reach is within the ROW clearing limits and will be removed. This is another area where alternatives, including an alternate route or using taller structures so that mature trees could be allowed to remain standing, would have substantially reduced the impact on Atlantic salmon habitat in the Sheepscot.

**The Proposed Riparian Buffers Will Not Protect Aquatic Habitat,  
Including Brook Trout Habitat.**

**16. What is an adequate buffer to protect brook trout and other aquatic habitat? What are the most important functions of this buffer?**

There are a variety of recommendations for buffers to protect brook trout and other aquatic habitat. The Maine Natural Areas Program's Beginning with Habitat reviewed buffer practices

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<sup>18</sup> Eastern Brook Trout Joint Venture (2006): [Eastern Brook Trout: Status and Threats.](https://easternbrooktrout.org/reports/eastern-brook-trout-status-and-threats%20%282006%29/view)

and standards from a range of landowners, managers, foresters, and regulators in northern New England. Their report (attached as Exhibit 6) emphasizes the importance of closed canopy in the riparian zone for some wildlife species and of organic and woody debris inputs to streams that result from allowing standing wood to die and be recruited. The report recommends retention of “relatively continuous forest canopy closure (>70%) in riparian management zones” and consideration of “a limited no-cut zone (25-100 ft is often recommended) immediately adjacent to the stream or wetland shoreline, particularly in areas containing steep slopes and shallow or poorly drained soils.”<sup>19</sup>

To protect brook trout habitat, ME DIFW recommends:

*limiting the harvest of trees and alteration of other vegetation within 100 feet of streams and their associated fringe and floodplain wetlands to maintain an intact and stable mature stand of trees, characterized by heavy crown closure (at least 60–70%) and resistance to wind-throw. In some situations wider buffers should be considered where severe site conditions (e.g., steep slope, vulnerable soils, poor drainage, etc.) increase risk to soil and stand stability. Any harvest within the riparian management zone should be selective with a goal of maintaining relatively uniform crown closure.*<sup>20</sup>

In a 2005 report for Trout Unlimited, after an extensive literature review and consultation with fisheries biologists, foresters, and land managers, Kleinschmidt Associates recommended a multiple zone buffer with a fixed width no-cut buffer of at least 75 feet, followed by an

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<sup>19</sup> deMaynadier, P., T. Hodgman, and B. Vickery. 2007. Forest Management Recommendations for Maine's Riparian Ecosystems. Technical report submitted to the Maine Department of Inland Fisheries and Wildlife, Bangor, ME.

<sup>20</sup> ME DIFW, undated. Forest Management Recommendations for Brook Trout. [https://www.maine.gov/ifw/docs/brook\\_trout\\_factsheet\\_forestry.pdf](https://www.maine.gov/ifw/docs/brook_trout_factsheet_forestry.pdf)

additional 75 feet with no soil disturbance and relatively high stocking levels of standing timber. The primary functions of the no-cut buffer—which is difficult to provide with even relatively light levels of cutting, are shading and temperature regulation, large woody debris inputs (dead trees that provide instream habitat when they are recruited into the stream), protection of water quality and bank stabilization.<sup>21</sup> The report is attached. (Exhibit 7)

**17. Are the “100-foot riparian buffers” proposed for the stream crossings on the NECEC project adequate to protect brook trout?**

They are not. CMP has committed to 100-foot buffers adjacent to all streams identified as “coldwater fisheries”, an all perennial streams within segment 1—the “greenfield” portion of new transmission line from Beattie TWP to Moxie Gore. All other streams will have a 75-foot buffer applied. There are several concerns.

1. It is not clear that CMP and ME DIFW have reached agreement on which streams are “coldwater fisheries”. The current “record” is a set of hand-marked and highlighted tables provided by Bob Stratton of ME DIFW in early February. There is no evidence that CMP concurs that this is the correct list.
2. The designations of streams as “brook trout” or not appear to be somewhat arbitrary. Based on my experience, anywhere along the NECEC “Greenfield” route in the Moose, Dead, Cold Stream or other Kennebec River tributaries watersheds should be considered as brook trout habitat.

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<sup>21</sup> Trout Unlimited. 2005. Riparian Buffer and Watershed Management Recommendations for Brook Trout Habitat Conservation. Focus: Mountainous Brook Trout Watersheds of Maine and Northern New Hampshire. Report Prepared for Trout Unlimited, Augusta, Maine, by Kleinschmidt Associates, Pittsfield, Maine.



3. The biggest concern, however, is not with the width of the buffer, but with how the buffer will be maintained. Nowhere within the clearing limits of the ROW will there be the mature trees and full canopy closure that are required to provide the most important buffer functions for brook trout habitat: shading, recruitment of organic matter and large woody debris, and bank stabilization. In the center 30 feet of the cleared ROW, vegetation will be no more than 10 feet tall. Outside that zone, all “capable” vegetation will be removed. The “100-foot riparian buffer” will therefore be a scrub/shrub habitat at best and will not fulfill the most important buffer functions that are envisioned by the recommendations in ME DIFW and MNAP for closed canopy forest.

**18. Do the proposed compensation parcels contain valuable brook trout habitat that would compensate for impacts from inadequate riparian buffers on impacted streams.**

As described in the revised Compensation Plan dated January 30, 2019, they provide very little.

1. The Little Jimmie Pond-Harwood Tract has no value for wild brook trout. All streams on the parcel are warmwater habitat.
2. The Flagstaff Lake parcel has very limited value for wild brook trout. Flagstaff Lake is primarily warm water habitat with some stocked salmonids.
3. The Pooler Ponds Tract has some limited value for brook trout habitat, all of it in the mainstem Kennebec River. The Pooler Ponds tract protects only one shore of the Kennebec River, so habitat in the 0.8 miles of Kennebec River that abuts the parcel is not fully protected. This is habitat that provides seasonal angling opportunities, but studies on the Kennebec River have shown that all brook trout spawning and rearing occur in tributaries. This parcel is more valuable for recreation and water access than for fisheries habitat.

4. The Grand Falls Tract, like the Pooler Ponds Tract, primarily provides river access and angling opportunity. It contains only 0.7 miles of streams, the mainstem of the Dead River. Like the Kennebec, the Dead River serves primarily as seasonal habitat for adult trout. The river is stocked with both landlocked salmon and brook trout. There is a wild component to the fishery, but it is supported from habitat in tributaries, not in the mainstem of the Dead River.
5. The Lower Enchanted Tract provides 3.6 miles of river frontage, but most of that is along the northern shore of the Dead River, where the fishery is supported in part by stocking. Like the Pooler Ponds Tract, by protecting only one shoreline the habitat conservation benefits of the parcel are limited. There is approximately 1 mile of Enchanted Stream protected on the parcel. Enchanted Stream is an important tributary for spawning and rearing of wild brook trout. However, without protection of the watershed above this habitat, it is not protected future land use impacts upstream.
6. The Basin Tract has 4.8 miles of stream, almost all of it on the mainstem Dead River where the fishery is largely supported by stocking. Like the other protected sections of the Dead and Kennebec Rivers, this is habitat primarily for adult brook trout and landlocked salmon, with any production of wild brook trout relying on tributary habitat which is not protected, and the conservation land encompasses only one shore of the river.

In summary, most of the river and stream habitat protected on these compensation parcels is unlike the streams that are impacted by the NECEC's inadequate buffers. The impacted streams are mostly cold, high elevation, headwater streams that are highly productive of wild brook trout. The streams "protected" on the compensation parcels are mostly large mainstem rivers

that warm significantly in the summer, are protected on only one shoreline, have a recreational fishery at least partially supported by stocking, and have limited or no potential to produce wild brook trout. The one exception is the short reach of Enchanted Stream, but even this is quite unlike most impacted waters.

I would add that even if the parcels contained large amount of valuable and vulnerable coldwater habitat—and they don't—the extent to which the coldwater habitat values, or any other important resources values on the property, will be protected will depend entirely on the terms of the deed restriction, conservation easement, or other durable instrument negotiated for protection. We would recommend specific terms to protect all riparian vegetation from any cutting except that needed to fisheries or wildlife habitat improvement, or to control invasive species if necessary. Any cutting in the riparian zone should require consultation with ME DIFW. Finally, the quality of the easement holder is critical. The easement should be held by either the state of Maine, or by a land trust accredited by the Land Trust Alliance.

A better strategy for coldwater habitat conservation would have been to protect headwater streams like those that are impacted. This would have provided far more brook trout habitat value, particularly if the compensation parcels include long stream reaches where both shorelines and important tributaries are protected. A project of the scale of the Cold Stream Forest Project—which protected 15 miles of stream habitat in the Cold Stream watershed, would be more appropriate.

**19. Have you reviewed the proposed NECEC Culvert Replacement Program? Do you think it will result in meaningful benefits to instream habitat for brook trout and salmon?**

I have reviewed CMP's proposal. With respect to the fund for off-corridor culvert

replacements, I believe CMP's estimate that the \$200,000 fund will be sufficient to replace approximately 20-35 culverts is wildly optimistic. My own experience with several culvert projects suggests that cost estimates of \$50,000 to \$100,000 per culvert are conservative. Costs may be somewhat lower if the culverts to be replaced are on logging roads and need not meet DOT standards. However, some of the most important culverts we identified in surveys of the Kennebec and Dead River watersheds were on tributaries to the Kennebec River that crossed Route 201. A single Route 201 culvert would almost certainly cost more than the entire fund. It is impossible to say how much habitat benefit might accrue from the \$200,000 fund, because it depends on the numbers of sites and their habitat impact. My best professional assessment is that with \$200,000, it's likely that access to less than 10 miles of additional habitat would be restored.

It is much harder to estimate the potential value of the Culvert Replacement on CMP Controlled Lands. This would be a very meaningful commitment if CMP were to replace or upgrade all of its culverts on all CMP-owned lands in Somerset and Franklin Counties. However, CMP's commitment is qualified. They will replace or remove all culverts on "CMP controlled lands associated with the NECEC." This appears to be a much more limited commitment, particularly given the very small number of streams—and therefore few culverts—on the mitigation parcels. Based on my review of the stream networks on the mitigation parcels, I believe there are likely fewer than 10 culverts on the mitigation parcels.

**20. How much coldwater habitat restoration could be completed with the \$180,000 contribution to the Maine Endangered and Nongame Wildlife Fund "to protect coldwater fishery habitat"?**

First, it's not clear to me that funds from that source would be used for fisheries restoration.

I've worked on restoration projects for coldwater fish in Maine for almost 25 years, and I cannot recall a project that used the Maine Endangered and Nongame Wildlife Fund. However, if the funds were allocated to a specific purpose, \$180,000 is likely enough funding to accomplish one or two meaningful fish passage (culvert) or instream restoration (rock structures, barrier removal, or large wood additions) on streams that are accessible by equipment.

Notarization

I, Jeffrey Reardon, being first duly sworn, affirm that the above testimony is true and accurate to the best of my knowledge.

Jeffrey Reardon                      7/27/2019  
Name                                      Date

Maine Brook Trout Project Director  
Title

Personally appeared the above-named Jeffrey Reardon and made affirmation that the above testimony is true and accurate to the best of his knowledge.

Date: 7/27/2019                      Notary: Deborah Southere

DEBORA SOUTHERE  
NOTARY PUBLIC  
KENNEBEC COUNTY  
MAINE  
MY COMMISSION EXPIRES APRIL 2, 2022

**EXHIBIT 6**

State of Maine, Department of Environmental Protection and Land Use Regulatory  
Commission

**CENTRAL MAINE POWER COMPANY  
NEW ENGLAND CLEAN ENERGY CONNECT**

Application for Site Location of Development Act permit, and Natural Resources Protection Act permit for the New England Clean Energy Connect ("NECEC") Project in 25 municipalities, 13 Townships or Plantations and 7 Counties from Beattie Township to Lewiston and Wiscasset to Windsor.

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

Pre-filed Testimony of Todd Towle,  
Kingfisher River Guides  
Kingfield, ME  
P  
Witness for Trout Unlimited

**Qualifications and Purpose of Testimony**

**1. State your name, address and current occupation:**

Todd Towle Registered Maine Guide, Photographer and Millwright.  
P.O. Box 442, Kingfield, ME 04947.

**2. What is your personal background?**

I was born in Maine and my family has lived in Somerset County for four generations. I grew up in Smithfield and since 1999 have lived in Kingfield, ME. My family on my wife's side has worked in the area in the timber business since 1947. My family owns property on Coburn Mountain and a family owned camp on Grace Pond. I have been fishing, hunting, hiking, climbing, and rafting in Somerset County for more than 30 years. I particularly enjoy fishing in remote areas, far from roads or other signs of human disturbance. Cold Stream and the Kennebec River in the Kennebec Gorge are favorite streams for me to fish.

**3. What is your professional experience?**

I worked as a full-time whitewater river guide licensed on the Kennebec, Dead, and West Branch Penobscot Rivers for six seasons, and as a climbing and backcountry ski guide for three seasons throughout New England and the intermountain west. I have worked in the Forks region for



more than two decades. Since 2000 I have worked as a full-time fishing guide in the region from Jackman to the Forks to Madison. I guide on the Kennebec River, Dead River, and numerous small tributaries to the Kennebec and Dead. I also work as a professional photographer. In these jobs and in my personal recreation I have spent time on most streams in Somerset County.

**4. Have you previously testified before the Maine Department of Environmental Protection (DEP) or the Maine Land Use Planning Commission (LUPC)?**

No.

**5. Are you familiar with the application for the New England Clean Energy Connect (NECEC)?**

I have reviewed the Google Earth Map of the proposed “Greenfield Route” from Beattie Township to Moxie Gore and have considered how the construction of the NECEC will affect places I know well.

**6. What is the purpose of your testimony?**

My testimony focuses on my intimate knowledge of the landscape and fisheries resources that will be impacted by the “greenfield” section of the NECEC from Beattie Township to Moxie Gore. It addresses existing uses of the region where the NECEC is proposed to be constructed, particularly angling, including my personal use, use by friends and family members, and use by clients I guide in the region; the impact the proposed project will have on the remote experience that is important to me, other users, and my clients; and on how the presence of new man-made corridor and its associated structures will affect users of the affected area.

**7. Are you familiar with recreational uses of the region through which the NECEC will pass?**

I have been recreating in Somerset County all my life. My family owns two properties located within two miles of the NECEC right-of-way. My entire professional life—more than 20 years—has been spent guiding clients who choose to come to this region for recreation. I am intimately familiar with the region and how I, my family and friends, and my clients use it.

**8. How many clients have you guided in this region?**

I have guided an estimated 500 fishing clients over the past 20 years. I have also fished with dozens of friends and acquaintances. I am very familiar with what anglers are looking for when they come to this region.

**Unique Character of the Region for Recreation**

**9. What is special about this region for recreation?**

This region offers three things that make it different from other places people travel to fish.

First, there is abundant habitat for wild, native trout. This is rare. Even in other parts of the country famous for trout fishing, many of the trout are either stocked regularly, or are the wild offspring of non-native species that were introduced here generations ago. I've fished extensively in the Rocky Mountain west, and most of the famous trout rivers there are filled with brown trout that are native to Europe or brook trout that are native to the east or rainbow trout that are native to watersheds farther west. Here in Somerset County, and especially in the region that will be crossed by the Greenfield section of the NECEC, almost all the streams, rivers and remote ponds still have wild brook trout. Anglers like me prefer that. My business caters to clients who want that experience.

Second, the fish resource is diverse. We can chase brook trout in streams that range from tiny trickles to large rivers with Class IV whitewater. We can chase brook trout in ponds that range from 1-acre beaver flowages to 75,000-acre Moosehead Lake. And we do have some waters where non-native species, primarily landlocked salmon and rainbow trout, offer excellent fisheries for those who want some species diversity.

Third, it's remote. From the Forks, Route 201 heads northwest to the Canadian border, and there is not another paved road between Route 201 and the border. It is not untouched wilderness, because it's been logged many times, but it is part of the largest piece of uninterrupted forest land east of the Rockies. Once you leave Route 201, you see very few buildings. You see no lights at night. Other than logging roads and logging equipment, there are no signs of development. It's easy to spend a day in the woods or on the water and not see anyone else all day. It's the wildest place you can go in the east, and in some ways it's wilder than much of the Rocky Mountain west.

The combination of excellent native trout habitat and diverse fishing opportunities in a region that is almost completely undeveloped outside the Route 201 corridor is unique.

**10. Are you familiar with what people are looking for when they come here to fish?**  
Every angler is different. Some only care about the number or the size of fish they catch. But many of the people I fish with and guide want a remote experience. The fish are important, but so is getting to a place that is different from what they are used to and feels wild. Some anglers are looking for a removed-from-normal trip. Small stream clients especially appreciate the work to get to these places and the wild brook trout—no matter the size—are the prize. The feeling of remoteness and away from other people is important.

### **Concerns About Impacts on Wild Brook Trout Fisheries**

**11. How important is the presence of wild brook trout to you, the people you fish with, and your clients?**  
It's essential. People can fish anywhere for stocked trout. What's special here is the wild brook trout. That's the draw that brings someone to fish here instead of someplace else.

**12. Are you concerned about habitat impacts?**

My own fishing and my guiding business both depend on high quality habitat to produce wild brook trout. Without cold water and good habitat, the brook trout and my business both die. Spending every day on the water, I see the day to day and year to year variability in brook trout populations. Streams with intact canopy cover and clean water are important. This is where I see juvenile trout come from, and these are the streams that provide cold water where I can still find trout in late summer. Spawning habitat and coldwater water refuge habitat are essential. Without them, we can lose an entire watershed as a trout fishery. I see the variation between high water years (good for trout survival and reproduction) and low water years (bad). I don't want to see those cycles get worse. I have already seen these kinds of impacts on Spencer Stream—another Dead River tributary important for spawning since the construction of the Kibby Wind Project. I am afraid I'll see the same impacts with this project.

**13. Are there places you are particularly worried about the habitat impacts of the NECEC Project?**

All the stream crossings concern me, but I'm especially worried about the long section where the NECEC parallels the lower end of Cold Stream. The construction here is immediately adjacent to the Wilson Hill Road and at the top of a steep slope that runs directly into Tomhegan Stream and Cold Stream at the bottom of the slope. Sediment from construction, included associated access roads, could harm habitat in the stream at the bottom of the slope.

**Impacts of the NECEC on Recreational Experience**

**14. Do you avoid areas where existing development (dams, powerlines, roads, buildings) is visible in your fishing and guiding?**

It depends on what I and the people with me are looking for, but for myself and with some clients, yes. Bushwhacking into a remote place to find trout is special. It would feel different if we could see something large and industrial.

**15. How would construction of the NECEC affect your recreational experience?**

I am frequently looking to get away from the crowd and away from signs of development. I would actively avoid fishing in places where the NECEC is nearby or visible. Seeing a large, manmade structure changes the experience. Even if the fish are still there, it won't feel the same.

**16. Do you anticipate changing areas you choose to fish and guide if the NECEC is constructed?**

I'll deliberately avoid areas where the NECEC structures or right of way are visible. It's

a large visual impact. The NECEC line has essentially the same footprint as the Maine Turnpike—150 feet wide. That's 3 times the footprint of the Route 201 corridor, which I already avoid.

**17. Can you describe particular places that are important to your fishing where you think NECEC will change the character of the areas and therefore your use or use by other people?**

There are several places where I have specific concerns.

1. Cold Stream, including its tributaries, is a very important resource for me. It has cold water, so it holds trout all summer. It's a spawning tributary to the mainstem Kennebec River, so it supports large adult fish during times of the year when fishing is tough elsewhere. It's a—you have to want to get there, but when you do, you've gotten someplace worth getting—stream. I fish and guide there a lot. I'm worried about the number of crossings—on Cold Stream, and on Tomhegan Stream where we know some Kennebec River brook trout go to spawn. Cold Stream is especially remote, difficult to access, and has excellent fishing in the 3.5 miles from the mouth of Tomhegan Stream to the Kennebec. The NECEC line will parallel the stream about ½ mile away along this entire stretch. It gets even closer near the confluence with the Kennebec.

This raises two concerns. The first is the logging road I use to access spots from which I and my clients bushwhack down to Cold Stream. This access currently involves about seven miles of gravel logging road from we leave pavement—2+ miles along the Capital Road, then 4.3 miles down a rough road from the Capital Road through the woods to the crossing of Tomhegan Stream, and then further to reach points where I leave the road to bushwhack to Cold Stream. Along this route today, the only sign of human activity other than logging operations is the existing powerline crossing about one mile south of the Capital Road.

In the future, the NECEC Route will be visible and directly adjacent to more than 1 mile of this route where the NECEC parallels the Capital Road. It will again be visible—within 500 feet or less of my route—from the Tomhegan Stream crossing for the next 2 miles, with the centerline of the corridor as close as 160 feet from the road. This will fundamentally change the experience. Today, it's a long drive into the woods, parking in a remote spot miles from the last man-made structure, and then a bushwhack down to the stream. In the future, two long stretches of what today is a "long drive into the woods"—more than 3 miles of a 7-mile drive on logging roads—will be in the shadow of the NECEC structures and within view of the cleared corridor. (Exhibit 1)

2. Gold Brook, near Rock Pond, is also important. This whole area is special, with Gold Brook collecting the outlets from Rock Pond and Iron Pond, then flowing downstream into Baker Pond. Rock, Iron and Baker Ponds are all designated State Heritage Fish Waters for brook trout. Gold Brook is an excellent trout stream. The NECEC crosses Gold Brook, parallels it closely for about a half mile, then crosses it

again and then passes along the north shore of Rock Pond, less than 1,000 feet from the shore of the pond. I believe line here will be visible from multiple places I fish, including from Rock Pond, from Iron Pond, and at multiple places along Gold Brook. This is an excellent area for late summer fishing due to its high altitude (~1600 feet) and therefore cold water. It will become a much less attractive place to fish, and I am also concerned about the multiple crossings in their area. In addition to two crossings of Gold Brook, the NECEC also crosses the inlet to Rock Pond and multiple small tributaries to Gold Brook. (Exhibit 2)

3. Horse Brook, a tributary to the Moose River. My family has owned a camp on Grace Pond for years. Grace Pond is an excellent trout pond, also a State Heritage Fish Water for brook trout. It's outlet, Horse Brook, flows through a steep gorge, then crosses the Spencer Road. The NECEC crossing is about 1000 feet downstream of where Horse Brook crosses the Spencer Road. The NECEC also crosses another permanent stream that is a tributary to Horse Brook, entering just above where Horse Brook flows into the Moose River. From years of fishing around the Grace Pond area, I know that Horse Brook is a coldwater tributary to the Moose River, which warms in the summer. This coldwater refuge is important for Moose River brook trout and provides a reliable summer fishery. I am concerns about both habitat impacts, especially on water temperature, from the crossings, and about the changed experience of fishing Horse Brook with the NECEC lines visible. (Exhibit 3)

4. Salmon Stream, a tributary to the Dead River. Salmon Stream is an important coldwater tributary to the Dead River. It drains from the high elevations of Johnson Mountain, where multiple small tributary streams flow into the headwater of Salmon Stream and the East Branch of Salmon Stream. This cold water is sustained all the way down to the Dead River, where the mouth of Salmon Stream is an important cold water refuge in mid-summer. Brook trout from the Kennebec and Dead Rivers swim into Salmon Stream to spawn, and the cold water is also critical for juvenile production. As the NECEC line runs across the south side of Johnson Mountain, it will create new cleared crossing across multiple headwater tributaries of Salmon Stream and East Branch Salmon Stream. (Exhibit 4)

5. Austin Stream Tributaries near Bingham. The Kennebec River in Bingham offers a unique Maine fishery for wild rainbow trout, some of them of trophy size. It is the only such fishery in the state. This area is less remote than the new section of the NECEC from Beattie Township to Moxie Gore. It's closer to home for me, and shorter trip for me to meet friends or clients. My concern is that most of the rainbow trout spawning occurs in the spring in Austin Stream and its tributaries. The NECEC will run parallel to an existing powerline that already crosses two important spawning tributaries to Austin Stream—Mink Brook and Chase Stream. The new clear right of way will

essentially double the impact of the existing powerline crossing. I'm concerned about the impacts on rainbow trout spawning in these critical tributaries. The Maine Department of Inland Fisheries and Wildlife has long kept these streams closed to fishing during the spring rainbow trout spawning season because they are so important to maintaining the fishery. (Exhibit 5)

**15. Do you anticipate these changes will impact use by people like you and the clients you guide in these areas?**

I believe the combination of visual impacts, a different experience in accessing these areas (for example, crossing under or along the new NECEC line while accessing these areas, seeing the NECEC structures from the water, or having it cross overhead at places I fish today) and the potential for habitat and water temperature impacts of multiple crossings in some watersheds will degrade the recreational experience.

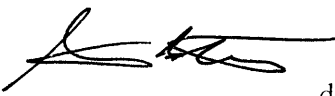
**16. Are you concerned about increased ease of access to some of these areas?**

I am concerned that trails that provide increased access, especially by ATV, will follow the corridor and make access to places that are now quite remote and accessible only by bushwhacking much more accessible. Specific examples that I am familiar with include Beattie Pond, an LUPC-designated Remote Pond, where the NECEC ROW will be about ¼ mile from water's edge (Exhibit 6); and Horse Brook, an important tributary providing cold water to the Moose River, where the NECEC ROW would provide an additional access to the brook at a crossing closer to the Moose River than the existing Spencer Road bridge. (Exhibit 3)

**List of Exhibits**

1. Exhibit 1, Map of NECEC Route along lower Cold Stream.
2. Exhibit 2, Map of NECEC Route near Gold Brook and Rock Pond.
3. Exhibit 3, Map of NECEC Route near Horse Brook and Moose River.
4. Exhibit 4, Map of NECEC Route near Salmon Stream headwaters.
5. Exhibit 5, Map of NECEC Route near Austin Stream tributaries where rainbow trout spawn.
6. Exhibit 6, Map of NECEC Route near Beattie Pond.

Notarization

I, , being first  
duly sworn, affirm that  
the above testimony is  
true and


accurate to the best of my knowledge.

Date: 2/26/19

Name Todd Towle  
Title Owner of Kingfisher River Guides

Personally appeared the above-named Todd Towle and made affirmation that the  
above testimony is true and accurate to the best  
of her knowledge.

Date: 2/26/2019

Notary 



**EXHIBIT 7**



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

PRE-FILED TESTIMONY OF  
RON JOSEPH

ON BEHALF OF INTERVENOR GROUP 4  
(APPALACHIAN MOUNTAIN CLUB,  
NATURAL RESOURCES COUNCIL OF  
MAINE AND TROUT UNLIMITED)

February 28, 2019

## **The Fragmenting Effect of NECEC on Deer Yards**

My name is Ron Joseph and I live in Sidney, Maine. I earned a B.S degree in Wildlife Management at the University of New Hampshire in 1974. I earned an M.S. degree in Zoology at Brigham Young University in 1977. From 1978 through 2010 I worked as a wildlife biologist for the Maine Department of Inland Fisheries and Wildlife and the U.S. Fish and Wildlife Service.

Born and raised in rural Maine, I lived my dream of working in Maine as a wildlife biologist. In 1978, I began my career as a deer yard biologist for the Maine Department of Inland Fisheries and Wildlife (IFW) office in Ashland, Maine. From 1988 through 1990, I worked as the state's regional wildlife biologist in Greenville. My assistant and I spent 90 percent of our time documenting deer yards in the Moosehead Lake region and in western Maine. Our data was submitted to the Land Use Regulation Commission (LURC), which then zoned each deer yard as a P-FW (protection for fish and wildlife) on LURC maps. Now retired after a 33-year career, I can truthfully say that fighting to protect deer yards was THE single most controversial program I ever worked on. Twice timberland owners in Maine sued the State over deer yards. One case advanced to the Maine Supreme Court.<sup>1</sup> In both suits, the courts ruled in favor of the State.

Ninety-six percent of Maine is considered deer habitat but only five percent is suitable as winter deer yard habitat, and much of that has been destroyed. This knowledge comes from the many years I have spent working as a wildlife biologist in Maine. It is important to note that there is not extensive scientific literature about deer yards in Maine, so I have based much of my testimony on firsthand experience and the many conversations I have had during my lengthy career with colleagues, wardens, and guides.

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<sup>1</sup> 1982. SEVEN ISLANDS LAND COMPANY v. MAINE LAND USE REGULATION COMMISSION. Supreme Judicial Court of Maine (450 A.2d 475). Accessed at <https://law.justia.com/cases/maine/supreme-court/1982/450-a-2d-475-0.html>.

Simply stated, a deer yard (also called a “deer wintering area” or “DWA”) is habitat—mainly stands of spruce, fir, and cedar (softwood species)—where deer seek shelter from deep snows, which are half the depth of snow in hardwood stands. Dense stands of mature softwoods protect deer from severe cold winds; nighttime temperatures in deer yards are several degrees warmer than in open hardwood stands due to the “blanketing” effect of overstory softwood boughs. In short, deer yards are critical because they help deer conserve energy during Maine’s long winters when food quality and abundance are limited.

According to CMP’s Compensation Plan submitted to DEP and the U.S. Army Corps of Engineers,<sup>2</sup> the proposed transmission line would cross 22 deer yards.<sup>3</sup> Of those, CMP’s proposal would increase deer yard fragmentation in 11 deer yards by clearing multiple acres of trees.

There are numerous examples of the detrimental effect of forest conversions and fragmentation in and around deer yards. The Chub Pond deer yard, a few miles south of Whipple Pond where the transmission line would pass, has undergone numerous timber harvests within and adjacent to the deer yard. We do not know if the deer died or moved elsewhere. We do know, however, that the deer yard no longer supports wintering deer. The Mud Pond deer yard in Parkman serves as a stark reminder of their critical importance. Timber harvests within and adjacent to the Mud Pond deer yard during the winter of 1979-80 killed between 90-100 deer, according to the Maine Warden Service. Surrounded by deep snows in clear-cuts, the stranded deer died of starvation.

My point in mentioning these examples is to stress that the loss of deer wintering areas and the fragmentation and loss of habitat connectivity between deer wintering areas and surrounding forestland

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<sup>2</sup> 2019. Central Maine Power. Compensation Plan New England Clean Energy Connect (NECEC). P. 22. January 30

<sup>3</sup> For a list of 21 of the deer yards, minus the Upper Kennebec Deer Wintering Area, see: 2017. Central Maine Power. Site Law Application, Final. Chapter 7 – Fisheries and Wildlife, Exhibit 7-2. September 27. Accessed at [https://www.maine.gov/dep/ftp/projects/necec/applications/SiteLocation/Site%20Law%20Application\\_Final\\_9.27.17%20-%20Chapter%207-%20Wildlife%20and%20Fisheries.pdf](https://www.maine.gov/dep/ftp/projects/necec/applications/SiteLocation/Site%20Law%20Application_Final_9.27.17%20-%20Chapter%207-%20Wildlife%20and%20Fisheries.pdf). P. 139.

are THE major limiting factors for deer populations in northern, western, and eastern Maine. In northern Somerset County, a few miles west of Parlin Pond, the proposed transmission line would cross the Spencer Road in an area so depleted of deer yards, radio-collared deer summering there spend their winters at a deer yard at Harlow Pond in Guilford—a distance of about 50 miles. It is a sad commentary on the state of deer yards when the best remaining ones in the Jackman-Moose River area are in backyards of urban and suburban settings. CMP's proposed project further contributes to deer yard degradation and fragmentation.

Please bear in mind that the continued loss of our remaining deer yards has a significant economic impact on traditional Maine sporting lodges and rural communities that depend on income from deer hunters. Across western and northern Maine, sporting lodges are going out of business, in part because deer numbers are so low, hunters are turning away from Maine and traveling to NY, VT, PA, and elsewhere to hunt deer. For example, Claybrook Mountain Lodge is located in Highland Plantation in western Maine. It opened in the mid-1970s. For 20 years, the owners—Pat and Greg Drummond—earned the bulk of their yearly income from deer hunters. By the mid-1990s, as the deer population plummeted following a series of hard winters combined with the loss of deer yards, deer hunters stopped coming to the lodge. To survive economically, the couple reinvented themselves by transitioning from a hunting lodge to a cross-country skiing, moose watching, and bird watching lodge. Cobb's Camps on Pierce Pond—one of Maine's most renowned sporting lodges—located across the river from The Forks is no longer open in November due to a lack of deer following a significant loss of deer yards.

Protecting deer yards ensures healthy deer populations and boosts incomes of men and women who make a living either guiding hunters or operating sporting lodges. CMP's transmission line would further contribute to the economic decline of rural Mainers dependent on nature-based businesses. The

Sportsman’s Alliance of Maine (SAM) conducted a survey of its members, and the “overwhelming majority” of its members opposed CMP’s power line proposal. This caused SAM to withdraw its support for NECEC. One of the reasons for the opposition was concern about the power line’s impacts on deer yards.<sup>4</sup>

CMP’s impacts to the deer yard near The Forks (called the Upper Kennebec Deer Wintering Area) would be especially significant because it would occur in a region of Maine already suffering from low deer densities due to difficult winters and dearth of deer yards. In fact, this deer yard is the only remaining substantial deer yard in the entire length of CMP’s proposed new stretch of corridor. That makes it incredibly important to the low numbers of deer still hanging on in the region and to the remaining guides and sporting camps that count on these deer as an economic resource. The deer yard is also critically important to support recreational deer hunting for the residents of the region.

The lack of deer yards has forced residents of The Forks to operate an emergency deer feeding station to help the animals survive the winter. A recent University of Maine study<sup>5</sup> found that forest fragmentation in deer yards breaks up habitat connectivity to the surrounding landscape and that loss of mature conifer forest is a major limiting factor on efforts to increase the numbers of deer in western, northern, and eastern Maine.

According to CMP’s Compensation Plan, 39.209 acres of tree clearing would occur in the large Upper Kennebec River Deer Wintering Area.<sup>6</sup> In a June 5, 2017, letter from IFW to Lauren Johnston of Burns & McDonnell, IFW wrote “any clearing within the project area corridor could severely limit deer’s ability to

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<sup>4</sup> 2018. Letter from SAM executive director David Trahan to CMP and the Maine Public Utilities Commission. November 20. Accessed at [https://www.facebook.com/permalink.php?story\\_fbid=1953413778076856&id=110003532417899](https://www.facebook.com/permalink.php?story_fbid=1953413778076856&id=110003532417899)

<sup>5</sup> 2018. Erin Simons-Legaard et al. Ineffectiveness of local zoning to reduce regional loss and fragmentation of wintering habitat for white-tailed deer. *Forest Ecology and Management*: 427(78-85). November.

<sup>6</sup> 2019. Central Maine Power. Compensation Plan New England Clean Energy Connect (NECEC). P. 22. January 30.

get across the right-of-way (ROW) to the other side of the DWA and could be a complete barrier during significant snow.”<sup>7</sup>

IFW guidelines underscore the importance of protecting deer yards from fragmentation.<sup>8</sup> CMP’s transmission line proposal does not avoid or minimize impacts to the Upper Kennebec River Deer Wintering Area. The transmission line would fragment the forest, running right through the deer yard instead of avoiding it, and will act as a deep snow barrier for deer accessing the entire softwood cover. It would also enhance access by coyotes and create a wind tunnel that would result in blowdowns, further degrading the deer yard. Blowdowns occur when deer yards are fragmented because spruce and fir growing in the interior of the stand have developed shallow root systems. Trees in the interior of the stand have been protected from strong winds by neighboring trees. Conversely, trees on the edge of the stand have more extensive root systems. Fragmenting a deer yard stand would result in additional tree losses even after the harvesting is over because the harvesting exposes more interior trees with shallow root systems to high winds. This would continue to degrade a deer yard even after harvesting is over.

The company proposes to mitigate impacts to the Upper Kennebec River Deer Wintering Area by preserving the remainder of the deer yard and by implementing eight deer travel corridors in the proposed right of way. However, these “corridors” will not have older stands of softwood trees because CMP will cut all trees that encroach on the overhead line, stating that its management of tree height will vary based on the height of the power line.<sup>9</sup> There is no guarantee these “corridors” would function as

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<sup>7</sup> IFW. 2017. Information Request - Quebec-Maine Interconnect Project. June 5. Pp. 4-5. Accessed on page 63 of pdf file at [http://www.maine.gov/dep/ftp/projects/necec/applications/SiteLocation/Site%20Law%20Application\\_Final\\_9.27.17%20-%20Chapter%207-%20Wildlife%20and%20Fisheries.pdf](http://www.maine.gov/dep/ftp/projects/necec/applications/SiteLocation/Site%20Law%20Application_Final_9.27.17%20-%20Chapter%207-%20Wildlife%20and%20Fisheries.pdf)

<sup>8</sup> 2012. Maine Department of Inland Fisheries and Wildlife. Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW Projects.

<sup>9</sup> 2018. Maine IFW. Additional Clearing Restrictions within the Upper Kennebec Deer Wintering Area. Attached as Exhibit X. Pp. 1-2. December 7.

replacements for the deer yards that would be destroyed or allow effective deer movement to an intact deer yard.

In all 11 deer yards where CMP plans to clear trees, they are proposing to revegetate disturbed soils with a wildlife seed mix. CMP fails to recognize that its wildlife seed mix (which will create “food plots”) will be buried in open areas beneath 3-4 feet of snow during long Maine winters and thus will provide no benefit to the deer. In summer, when CMP’s seed mix would be available to deer, natural food is not a limiting factor.

CMP downplays the deer yard impacts in the sections of its proposed corridor that it plans to widen by claiming that “corridor construction will only widen existing, non-forested transmission line corridors by an average of approximately 75 feet.”<sup>10</sup> In its compensation plan, CMP then makes a giant leap by concluding that construction “will not significantly affect the habitat functional attributes of the DWAs intersected by the Project.”<sup>11</sup> And that after construction, deer yards “will function similarly to the way they currently do.”<sup>12</sup> This claim is preposterous. We know from University of Maine research<sup>13</sup> and my own deer yard work that the loss of deer yards and the loss of connectivity between deer yards and surrounding habitat are detrimental to deer survival. Wide, non-forested strips in deer yards are barriers to deer and the additional width of 75 feet would make them an even greater barrier. Deer can’t walk or bound through deep snows without burning precious fat reserves needed to survive until snow depths decrease in April.

In summary, as IFW’s regional biologist in Greenville from 1988 through 1990, I’m well acquainted with the habitat requirements of deer in CMP’s proposed transmission line corridor. The greatest threat to deer in western Maine continues to be the fragmentation and cumulative loss of deer yards from timber

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<sup>10</sup> 2019. Central Maine Power. Compensation Plan New England Clean Energy Connect (NECEC). P. 23. January 30.

<sup>11</sup> *Ibid.*, P. 23.

<sup>12</sup> *Ibid.*, P. 23.

<sup>13</sup> Erin Simons-Legaard et al. *Op. Cit.*

harvesting and utility rights of way. Unlike timber harvesting, the fragmentation and loss of deer yard habitat from utility line corridors is essentially permanent. This project, if approved, would be a significant and permanent additional burden to a struggling deer population in western Maine. It would cause extensive negative impacts to deer wintering areas. Given the fact that this corridor will fragment one of the few remaining deer wintering areas in the Forks region, and the lack of adequate mitigation for this and overall deer yard impacts throughout the length of the corridor, I do not believe this project meets the no undue adverse impact to fisheries and wildlife standard in the Site Law and Site Law rules (38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), and DEP rule Chapter 375 § 15).



Notarization

I, Ron Joseph, being first duly sworn, affirm that the above testimony is true and accurate to the best of my knowledge.

Date: February 27, 2019



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Ron Joseph

The above-named Ron Joseph made affirmation that the above testimony is true and accurate to the best of his knowledge.

Date: February 27, 2019



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Catherine B. Johnson, Attorney-at-law