STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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	**NRCM'S MEMORANDUM IN SUPPORT OF APPEALS BY NEXTERA AND GROUPS 2 AND 10**

The Natural Resources Council of Maine ("NRCM") respectfully submits this memorandum in support of the appeals of the above-referenced permits by NextEra Energy, Inc. ("NextEra") and Groups 2 and 10.[1] As outlined in those appeals, the Department's May 2020 Order[2] granting permits to Central Maine Power Company ("CMP")[3] failed to comply with the Natural Resources Protection Act at 38 M.R.S. §§ 480-A – 480-JJ ("NRPA"), the Site Location of Development Act at 38 M.R.S. §§ 481 – 490 ("Site Law"), Section 401 of the Federal Water

[1] Groups 2 and 10 include West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Tony DiBlasi, Mandy Farrar and Carrie Carpenter, all of whom were Intervenors in the joint proceedings before the Maine Department of Environmental Protection ("DEP" or the "Department") and the Land Use Planning Commission ("LUPC" or "Commission").

[2] NRCM refers herein to the May 2020 Order as the "Permit Order."

[3] The Department also issued an order transferring the permits to NECEC Transmission LLC ("NECEC LLC") that is also before the Board on appeal.

Pollution Control Act at 33 U.S.C. § 1341 et. seq. ("WQC"), and Chapters 2 and 310 of the Department's Rules.[4]

As an initial matter, the Board already determined that these appeals will be consolidated with consideration of the appeal of the Department's approval of the transfer of these permits from CMP to NECEC LLC. *See* January 19, 2021 Letter from Chairman Draper. The administrative record of the transfer order proceedings should therefore be combined with the administrative record of the transfer application. Following issuance of the appealed Department permit, NECEC LLC filed an application which, if it were a freestanding project would itself require NRPA and Site Law review. Yet, NECEC LLC filed this in the form of a request for a minor revision, thereby avoiding the procedural and notice requirements of Chapter 2 of the Department's Rules. Review of that Project amendment must be undertaken by the Board, both because it requires review of the entirety of the NRPA impacts associated with the Project and cannot be separated from the Project and for efficiency reasons. As the Board is well aware, the Board possesses original jurisdiction over projects of statewide significance. The NECEC is such a project. Even if it were not, here Board review is also simply most efficient. It makes little sense for the Board to review appeals of a permit that is simultaneously being amended by the Commissioner only to potentially result in conflicting decisions that will then come back before the Board or go on to court. The sensible thing to do is also consistent with the statute mandating Board original jurisdiction. The Board should assume jurisdiction over all pending amendments and revisions to the Project permits and hold a *de novo* hearing regarding the Project as required by 38 M.R.S § 341-D.[5] In any case,

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[4] NRCM also appealed the Permit Order, which should be vacated for all the reasons stated herein and in NRCM's appeal.

[5] NECEC clearly meets at least three, if not all four, of the statutory criteria for a project of statewide significance set forth in 38 M.R.S. § 341-D(2):

for the reasons stated in the various appeals, the Board must vacate the Department's Permit Order and deny CMP's permit application.

ARGUMENT

I. The Permit Order Does Not Comply with Maine's Environmental Statutes and Is Not Supported by the Department Record

As outlined in the appeal filed by NextEra, in granting the Permit Order, the Department erred because it failed to require CMP to delineate and assess, as part of its Application or through an amendment to its Application, alternative construction methodologies and routes to avoid NRPA impacts or to reduce Site Law environmental impacts or risks to public health or safety.[6] NRPA requires CMP to establish that there is no "practicable alternative to the activity that would be less damaging to the environment." 06-096 CMR Ch. 310 (hereinafter "Ch. 310") § 5(A); 38 M.R.S. §§ 480-A *et seq.* To make this showing, "[t]he applicant shall provide an analysis of alternatives . . . to demonstrate that a practicable alternative does not exist." Ch. 310 § 5(A). NRPA defines "practicable" as "[a]vailable and feasible considering cost, existing technology and

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1. First, the NECEC will have environmental or economic effects across many more than one municipality, territory, or county.
2. Second, the NECEC involves an activity not previously permitted or licensed in the State. Unlike other transmission line projects contemplated by the Department and the Land Use Planning Commission in the past, NECEC is the first proposed high-impact transmission line that does not meet any reliability need for Maine and that will primarily benefit consumers in other jurisdictions.
3. Third, the NECEC has undoubtedly come under significant public scrutiny. The sheer number of parties to, and the length of, the underlying Department proceeding evidence the hotly contested nature of the project, as do the number of parties who have submitted comments supporting the appeals over the past several weeks
4. Fourth, as described above, the project is located across multiple municipalities and counties. *See* Permit Order at 3.

The NECEC is the very definition of a project of statewide significance and accordingly the Board must assert its original jurisdiction over it.

[6] In addition, the Department's imposition, as a condition of approval, of a new corridor width and vegetation management conditions (which the Department finds necessary for Site Law and NRPA compliance), without any findings on whether those conditions are consistent with the federally mandated clearance requirements for such corridors was also in error.

logistics[7] based on the overall purpose of the project." Ch. 310 § 3(R). Thus, the Department cannot allow impacts to protected natural resources if there are practicable alternatives that meet the project purpose. The NECEC's project purpose "is to deliver up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Areal via a High Voltage Direct Current (HVDC) transmission line, at the lowest cost to ratepayers." CMP Application at 2-1. Because undergrounding would not increase the cost to ratepayers, it should have been, but was not, considered as a technically feasible alternative that meets the project purpose. Permit Order at 72-74.[8]

a. The Failure to Adequately Consider Alternatives Does Not Comply with NRPA or Site Law

As both NextEra (at 5-7) and Groups 2 and 10 (at 5-7 and 9-13) demonstrate, the environmental effects of the NECEC will be unreasonable as compared to practicable alternatives, and the mitigation requirements imposed by the Department are insufficient to address these concerns. The Permit Order describes the significant impacts to natural resources, including: 110 acres of wetlands; 674 river/stream crossings, including 471 with coldwater fisheries and 5 outstanding river segments; 15 acres of Inland Waterfowl and Wading Bird Habitat; 31.5 acres of Significant Vernal Pools; 83.5 acres of Deer Wintering Areas; 13 protected species; and 15 rare plant species. Together, these impacts are referred to here as the "Preferred Route NRPA Impacts." Permit Order at 61-62. The Permit Order also details careful review by the Maine Department of

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[7] As NextEra explains, undergrounding is technically and logistically feasible, and is actually the norm world-wide (with few to no exceptions) for these types of lines. *See* NextEra Appeal at n.3.

[8] The Project Purpose should preclude considering the cost to those other than rate payers. But even if such costs were considered, the costs were low enough that undergrounding remained available and feasible. The estimates of these costs in different sections were $43, $13, $28, and $30 million, *see* Tr. Day 6, 394:10-25, 395:1-4, 395:5-10, which are lower than CMP's contingency budge of $150 million, *see* Tr. Day 6, 389:1-2, 15-18. It therefore would not have been unreasonable for the Department to mandate undergrounding portions of the NECEC, yet CMP did not even provide any assessment of the costs that would avoid individual Preferred Route NRPA impacts.

Inland Fisheries and Wildlife, Permit Order at 62-64, and the Maine Natural Areas Program, Permit Order at 64-65, and the avoidance and mitigation measures required by those entities for the rare plants and species flowing from the Preferred Route NRPA Impacts. Yet, the Permit Order and the record are silent regarding any CMP analysis of NRPA practicable alternatives (such as undergrounding) to the Preferred Route NRPA Impacts. Given that CMP performed no analysis of alternatives to the Preferred Route NRPA Impacts and that such analysis is required by NRPA, the Permit Order is inconsistent with the NRPA. Ch. 310 § 5(A).

In addition to NRPA, the Site Law also specifies that "[t]he department shall receive evidence regarding the location, character and impact on the environment of the proposed transmission line or pipeline." 38 M.R.S. § 487-A(4). "[T]he department... shall consider whether any proposed alternatives to the proposed location and character of the transmission line or pipeline may lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost." *Id.* In this context, "[t]he department may approve or disapprove all or portions of the proposed transmission line or pipeline and shall make such orders regarding its location, character, width and appearance as will lessen its impact on the environment, having regard for any increased costs to the applicant." *Id.*

The DEP's Permit Order does not properly address this Site Law standard. Instead it summarily accepted CMP's conclusory assertions (made, not through testimony subject to cross-examination, but instead in conclusory statements filed in post-hearing briefs), that "[n]o further project modification or conditions regarding the transmission line's location, character, width, or appearance, beyond what is required by this Permit Order, are warranted, under 38 M.R.S. § 487-A(4) or otherwise, to lessen the transmission line's impact on the environment or risk to public health or safety." Permit Order at 108; *compare* CMP Post Hearing Brief at 20-21. This is no

evidentiary record supporting NECEC compliance with this section of the Site Law. Such conclusory allegations are insufficient to comply with the legal requirement that the Permit Order's findings and conclusions be based on substantial evidence. *See* 5 M.R.S. § 11007(4)(C)(5) (providing that a court may reverse an administrative decision if it is "[u]nsupported by substantial evidence on the whole record"); *Lewiston Daily Sun v. Unemployment Ins. Comm'n,* 1999 ME 90, ¶ 7, 733 A.2d 344 (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support the resultant conclusion") (internal quotes omitted); *Griswold v. Town of Denmark*, 2007 ME 93, ¶ 9, 927 A.2d 410 (same).

b. The Environmental Effects of the NECEC Are Unreasonable and Do Not Comply with NRPA or Site Law

In addition to the failure to consider alternatives, the impacts that were approved are unreasonable and do not comply with NRPA or Site Law.[9] Segment 1 of the NECEC slices across one of the State's most important regions, the Western Maine Mountains, with devastating consequences. The Department itself recognized the importance of this region (Permit Order at 75-76), yet nevertheless granted permits that will allow the permanent fragmentation of the largest contiguous forest east of the Mississippi. The Department did this without requiring any documentation of alternatives as required by NRPA and the Site Law. The Department's failure to require such documentation conflicts with NRPA and the Site Law, and they fail to address the unreasonable effects of the NECEC established by testimony that was largely unrebutted and was accepted by the Department as credible. For example:

[9] Remarkably, as part of its so-called "minor revision" application, CMP and NECEC LLC submitted a "full set of revised natural resource maps," which is "intended to replace the full set of maps [previously filed with the Department] in its entirety." *See* CMP Minor Revision Application at 3. The Board may take administrative notice of administrative filings within the Department. *See infra* FN 10. This type of wholesale replacement of NRPA impact maps demonstrates that the record on the original Permit Appeal is insufficient. This would be an independent basis for the Board to reverse the Permit Order, but it also serves as a reason why, procedurally, the Board should assume jurisdiction and hold a hearing on the entire project, including all pending changes thereto.

- The record is replete with testimony about the permanent forest fragmentation that the NECEC will cause, and the devastating effects such fragmentation will have on the wildlife and ecological diversity in this region. *See, e.g.*, Testimony of Janet McMahon, David Publicover, Andy Cutko (on behalf of The Nature Conservancy), and Roger Merchant. The Department acknowledged this testimony and did not discredit it, *see* Permit Order at 68-70, but did not address it or consider mitigation measures sufficient to address the negative effects of this fragmentation. For example, Erin Simons-Legaard testified that pine martens avoid cleared areas where they are vulnerable to predators, yet the Department nevertheless authorized clearing of a swath through the pine marten's territory without implementing sufficient mitigation measures. *See* Permit Order at 77.
- The record further demonstrates that buffering and reduction of the corridor width to 54' of cleared scrub in Segment 1 is insufficient to address the fragmentation the NECEC will cause, because the proposed tapering actually results in a clearing of 150', with 54' of cleared area directly underneath the wires and the remaining 96' on either side remaining in a permanent state of semi-clearing with no trees allowed to grow higher than 35' feet. *See* Permit Order, Appendix C. This state of semi-permanent clearing is insufficient to address the fragmentation concerns raised by appellants and results in an unreasonable impact. These mitigation measures were imposed by the Department after the close of the hearing without an evidentiary record, nor due process to test that record, supporting the conclusion that these measures suffice to make reasonable the suffered impacts.
- The Department similarly erred by agreeing that CMP could destroy the lands affected by the permit if it preserved unidentified lands elsewhere. *See* Permit Order at 80-81. This attempt at mitigation is entirely insufficient, particularly where the record testimony

demonstrates the unique characteristics of the land the NECEC will cross, and the devastating consequences of that crossing if the line is built. Without any evidence about the mitigation parcels, the Department and the parties cannot assess the sufficiency of the mitigation parcels in offsetting the harms of the NECEC. These areas were not included in CMP's application for the NECEC, were not referenced until after the close of the record, and are unsupported by any process or substantial evidence.

- The Permit Order itself establishes the unreasonable impacts the NECEC will have on wildlife habitat, particularly deer. *See* 06-96 C.M.R. ch. 375, § 15 (requiring Department to "protect wildlife and fisheries by maintaining suitable and sufficient habitat and the susceptibility of certain species to disruption and interference of lifecycles by construction activities"). The Department noted the "credible witness testimony from Joseph establish[ing] the recent challenges for the deer population and the habitat value of [Deer Wintering Areas," Permit Order at 87, yet nevertheless determined that the NECEC "will not unreasonably impact significant wildlife habitat." *Id.* The basis for this conclusion lacks substantial evidence.
- The Permit Order is similarly replete with findings that demonstrate the unreasonable adverse effect the NECEC will have on the scenic character of the region in violation of the Site Law and NRPA. *See* 06-96 C.M.R. chs. 315, 375; 38 M.R.S. § 484(3); 38 M.R.S. § 480-D(1). The discussion in the Permit Order (at 41-54) delineates the visual impacts and notes the particular concerns about scenic impacts raised by members of the public (Permit Order at 40). For example, numerous intervenors raised concerns about the visual impacts of the NECEC on Coburn Mountain and the Department found "compelling the evidence that the project, as originally proposed, would have an adverse impact," yet it

nevertheless authorized the NECEC to move forward with a tapered corridor. Permit Order at 43-44. The Department further found that "given the length of the project, it will be visible from multiple viewpoints and multiple scenic resources." Permit Order at 53-54. The Department failed to find, as required by 38 M.R.S. § 480-D(1), that CMP demonstrated that the NECEC will not unreasonably interfere with scenic or aesthetic uses of protected natural resources. Instead, the Department amended the NECEC by requiring tapering—but these fundamental changes to the NECEC were not part of the application nor reviewed as part of the Department's public processing of the NECEC application. Instead, these changes were implemented in the Permit Order after the close of the record.

The Department found that the NECEC, as presented by CMP, posed unreasonable adverse impacts under NRPA and the Site Law. The Department then itself amended the Project after the close of the record and without any substantive public process. This is an error of law and it also leaves the Departments findings unsupported by substantial evidence.

c. **CMP Does Not Have Sufficient Title, Right, or Interest**

CMP does not have sufficient right, title, or interest to proceed with the NECEC for all the reasons outlined in the appeal filed by Groups 2 and 10. DEP rules require that an applicant "maintain sufficient title, right, or interest throughout the entire application process," and when a lease is relied on, the "lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care." 06-96 CMR ch. 2 § 11(D)(2). CMP based its TRI for the West Forks and Johnson Mountain public reserved lots (the "Public Lots") on a 2014 lease with the Bureau of Parks and Lands ("BPL" or "Bureau"). The 2014 Lease was void as a matter of law because (i) the State signed it prior to the issuance of a certificate of public

convenience and necessity ("CPCN"), and (ii) it lacked the constitutionally mandated 2/3 vote of approval of the State Legislature. Me. Const. art. IX, § 23; 12 M.R.S. §§ 598-598-A. The Department was required to, but did not, make its own determinations as to whether the 2014 Lease complied with 06-96 CMR ch. 2 § 11(D)(2) and was facially valid and of sufficient term and duration throughout the life of the Permit. Instead, the Department deferred to its sister agency, the BPL. *See* Permit Order at 8. This was clear error, particularly in light of testimony provided by now-BPL Director Andy Cutko and BPL employee David Rodrigues to the Legislature in 2020, which testimony indicated that BPL did not know CMP's plans to build a high-impact transmission line when it entered the 2014 lease. *See An Act To Require a Lease of Public Land To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes:* Working Session on L.D. 1893, 129th Legis. (2020) (testimony of Rodrigues) ("Me, when I was working [on the 2014 lease], I believed that it was for renewable energy and possibly windmills to be built in that region.").[10] BPL has since acknowledged that it entered the 2014 Lease prior to the issuance of a CPCN and without a 2/3 vote of the Legislature, and terminated the 2014 Lease. Consequently, CMP lacked TRI throughout its Department permitting proceedings.

[10] The audio files maintained by the Legislature, are available at the following links: http://sg001-harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200121/-1/13889; http://sg001harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200218/-1/14054; and http://sg001-harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200305/-1/14177. NRCM asked that these files and the transcribed excerpts that NRCM provided to the Department be included in the record on appeal as supplemental evidence, but the Board Chair denied that request by letter dated February 12, 2021. NRCM appealed that evidentiary determination to the Board by letter dated February 22, 2021. CMP has objected to that appeal. Regardless of whether these statements are included in the record as supplemental evidence, the Board may take administrative notice of these facts. 5 M.R.S. § 9058 (Agencies may "take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records."). *See also Friedman v. Pub. Utilities Comm'n*, 2016 ME 19, ¶ 11, 132 A.3d 183, 187 (PUC "took administrative notice of several documents and exposure regulations in the United States and beyond"); *Middlesex Mut. Assur. Co. v. Maine Superintendent of Ins.*, No. CIV.A. AP-02-80, 2003 WL 22309109, at *1 (Me. Super. Sept. 26, 2003); *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) ("We note, moreover, that courts normally can take judicial notice of agency determinations"); *accord Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 412 n.1 (1st Cir. 2000).

Deferring to BPL was also clear error where the Department's rules require a lease of at least 40 years for this project, while the Bureau's lease is for only 25 years. The useful life of the project is established as at least 40 years. *See* April 1, 2019 DEP Hearing Transcript at 97, 134, 221-224 (Thorn Dickinson, now CEO and President of NECEC Transmission LLC, saying "we're expecting a 40 year life related to this project" and otherwise discussing 40 year expected lifespan).[11] This is further evidenced by the findings of the Maine Public Utilities Commission, which explained that three of the seven transmission service agreements are "for years 21-40 of the expected life of the NECEC line" while the fourth "is a 40-year agreement." *See* CPCN Order of the MPUC at 12 (May 3, 2019). And the Department's Permit Order implicitly adopted this same expected life of the NECEC when it adopted findings of the Maine Public Utilities Commission with regard to greenhouse gases, *see* Permit Order at 105, and when it adopted decommissioning requirements based on testimony about the 40 year life, *see* Permit Order at 106, April 1, 2019 DEP Hearing Transcript at 273 (discussing the lack of a decommissioning fund following a 40 year life of the project). Because the Department's own rules require that any "lease or easement" used for TRI "must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including" the decommissioning requirements imposed by the Department, 06-96 CMR ch. 2 § 11(D)(2), any lease of the Maine Public Lots used for TRI would require a term of more than 40 years. Of course, BPL has no authority to grant a lease of that term. *See* 12 M.R.S. § 1852(4) ("The bureau may lease the right, for a term not exceeding 25 years, to . . . [s]et and maintain or use poles [and] electric power transmission [facilities]."). Accordingly, the 2014 Lease of the Public Lots cannot

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[11] The transcript is part of the underlying DEP record and is available on the DEP's website at the following link: https://www.maine.gov/dep/ftp/projects/necec/hearing/transcripts/2019-04-01%20full%20transcript%20day%201CMP.pdf.

establish TRI "of sufficient duration and terms" to meet the requirements of 06-96 C.M.R. Ch. 2 § 11(D)(2).[12] This failure of TRI is a failure of administrative standing, which is a jurisdictional failure that bars application review and must void the Permit Order.

CONCLUSION

For the foregoing reasons, NRCM respectfully supports the appeals submitted by NextEra and Groups 2 and 10 and asks that the Board vacate the Permit Order and order CMP to cease all work on the NECEC and dismantle any work that has already been completed.

Dated at Portland, Maine
this 12th day of March 2021

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[12] This same flaw is fatal to the 2020 Lease on which CMP and NECEC base TRI for their Transfer Application, which appeal has been consolidated before the Board.