



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

DEPARTMENT ORDER

IN THE MATTER OF

CENTRAL MAINE POWER CO.) SITE LOCATION OF DEVELOPMENT ACT
NECEC TRANSMISSION, LLC) NATURAL RESOURCES PROTECTION ACT
See Attached) FRESHWATER WETLAND ALTERATION
NEW ENGLAND CLEAN) SIGNIFICANT WILDLIFE HABITAT
ENERGY CONNECT) WATER QUALITY CERTIFICATION
L-27625-26-Q-M (approval))
L-27625-TB-R-M (approval)) MINOR REVISION
L-27625-2C-S-M (approval))
L-27625-VP-T-M (approval))
L-27625-IW-U-M (approval))

Pursuant to the provisions of 38 M.R.S. §§ 481–489-E, the Department of Environmental Protection has considered the submission of CENTRAL MAINE POWER COMPANY (CMP or permittee) and NECEC TRANSMISSION, LLC (NECEC, LLC or permittee) (collectively permittees) with the supportive data, public comments, and other related materials on file and finds the following facts:

1. In Department Order # 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 dated May 11, 2020 (Department Order), the Department approved the New England Clean Energy Connect project. The project involves 145 miles of high voltage direct current (HVDC) transmission line from Beattie Township to Lewiston, a converter station in Lewiston, a new substation in Pownal, additions to several other substations, and upgrades to existing transmission lines. In Department Order #L-27625-26-K-T, dated December 4, 2020, the Department transferred a portion of the permit for the project from CMP to NECEC, LLC.
2. On December 15, 2020 the permittees submitted a Condition Compliance request to comply with Site Location of Development Act (Site Law) Standard Condition A, Natural Resources Protection Act (NRPA) Standard Condition #1, and Stormwater Management Law Standard Condition #1 of the Department Order. On December 22, 2020, the Natural Resources Council of Maine (NRCM), a party to the original proceeding, submitted comments on the submission. NRCM commented, among other things, that the permittees' submission should not be processed as a condition compliance. On December 23, 2021, CMP and NECEC, LLC submitted a response to NRCM's comments. On January 15, 2021, the Department asked additional questions of the permittees to clarify the scope of the request included in the Condition Compliance submission. The permittees responded on January 20, 2021. Following initial review of the permittees' Condition Compliance submission, public comments, and the permittees' response to questions, the Department determined the Condition Compliance submission

is more appropriately categorized as a proposed Minor Revision to the Department Order. Accordingly, on January 15, 2012, the Department requested the permittees submit a Minor Revision application form, which the permittees completed and submitted on January 21, 2021. The entirety of the Condition Compliance submission record, including the public comments, was incorporated into the record for this Minor Revision application. Except for the two-page Minor Revision application form, the record for the Condition Compliance submission and the record for the Minor Revision is the same.

3. The permittees anticipate having to make certain adjustments to the approved plans based on conditions in the field, safety concerns, and project constructability. The permittees divide the anticipated field adjustments into two categories – Category I and Category II – and submitted a proposed Field Adjustment Request (FAR) process that would be used to ensure any adjustment fits within one of these two categories. Changes outside of these two categories would not qualify as a field adjustment and would require a minor revision or amendment.

The permittees state that during construction of the project permitted in the Department Order field conditions and safety concerns will necessitate minor adjustment to the approved plans, proposals, drawings and supporting documents provided to the permitting agencies as part of the original application process. For example, environmental conditions may have changed from the time of permitting as a result of flooding, natural erosive processes, or water impounded by beaver activity. This could necessitate the relocation of the crossing of a waterbody or wetland. The permittees note field adjustments of the location of temporary access roads can allow avoidance of areas that present a higher risk of erosion and help avoid and minimize potential impact to protected natural resources. Where changes are de minimus, the permittees state allowing these changes to be made as field adjustments enable construction to proceed in reasonable and sequential fashion, and in alignment with coordinated outages on existing transmission lines.

In their January 20, 2021 response to Department questions, permittees elaborate on the potential need for field adjustments to avoid potential health and safety issues, such as the temporary installation of guard poles to prevent the conductor from contacting other infrastructure or from interfering with road traffic during conductor pulling. In addition, permittees note the potential need to park, repair, or refuel equipment within resource buffers or within resources, when the equipment is otherwise authorized to be in these locations, due to a lack of practical alternatives. For example, a conductor puller/tensioner and associated equipment may need to be set up in a single location for seven to 10 days as the transmission line is installed. With the line under tension this equipment cannot practicably be moved, necessitating refueling in place, which in some instances may be in or within the buffer of a resources where refueling otherwise is prohibited under the Plan for Protection of Sensitive Natural Resources During Initial Vegetation Clearing (VCP).

In their request for this Minor Revision, the permittees identify the changes they propose to be eligible for field adjustment as being limited to changes that a) will have temporary

impacts only, b) will not increase the need for additional mitigation (e.g., in-lieu fees), and c) will comply with the conditions of approval contained in the Department Order. (Permittees' Submission, December 15, 2021, p. 2.) The permittees further state that changes eligible for field adjustment will be:

- (1) those that avoid or minimize environmental impact through the reduction of permanent, temporary, or secondary impacts; (2) those that reduce the risk of adverse environmental effects (e.g., erosion and sedimentation) associated with unfavorable environmental conditions; or (3) those addressing significant health and safety issues encountered in the field.

(Permittees' Submission, December 15, 2021, p. 3.) Piecing this together, as proposed by the permittees, any increase in impacts would be temporary (not permanent). Additionally, any adjustment that would result in equivalent temporary impacts, or that would result in an increase in temporary impacts, only would be associated with the second and third types of changes listed in the paragraph above – adjustment that reduce the risk of adverse environmental effects and adjustments addressing significant health and safety issues.

4. In response to questions from the Department, the permittees provided added clarity on the scope of the FAR process and about the types of changes that would qualify as Category I and Category II adjustments. Beyond allowance for refueling, maintenance, or overnight parking within setbacks from resources established in the VCP when there are no practicable alternatives, Category I adjustments are limited to those that are located in non-jurisdictional upland areas¹ or, if located in a protected natural resource, those that would result in either no change in impact or avoidance, elimination, or reduction of impacts. Another characteristic of Category I adjustments is that they must be reviewed by the third party inspector and the inspector must agree that the adjustment qualifies for Category I. This agreement would be documented on a completed FAR form. Potential Category I adjustments include, for example:

- Adjustments to temporary access roads to avoid areas flooded by beaver activity or to ensure a reduction in temporary impact where wetland boundaries have changed since completion of the field work conducted in support of the application approved in the Department Order;
- Adjustments to temporary access roads to avoid steep, uneven, or unstable slopes, primarily during winter conditions, but also during other periods, when needed to mitigate safety concerns associated with heavy equipment operation on slippery surfaces;

¹ The Department understands “non-jurisdictional upland areas” to refer to those areas outside the resources identified on the Natural Resource Maps prepared by the permittees in conjunction with their original application that was approved in the Department Order or any updates to those maps subsequently approved by the Department. The use of the word “upland” here refers to more than just the area outside of a wetland or waterbody.

- Adjustments to the requirements in the VCP to allow refueling within established setbacks from resources, but not within these resources, where no practicable alternative exists because accessing the nearest reasonable alternative location would require traveling a long distance through multiple additional resources or would result in multiple trips through the same resource;
- Adjustments to permitted stream crossing locations on water bodies where there are no rare, threatened, or endangered species, necessitated by changes in stream bank stability or stream channel location at the originally permitted location;
- Adjustments in the location or number of guy or ground wires due to soil conditions in non-jurisdictional upland areas; and
- Adjustments in vegetation management practices to allow “lop and drop” where access with heavy equipment is difficult and allowing cut vegetation to remain in place would minimize environmental impact by avoiding soil disturbance associated with winching or cable skidding logs.

Category II adjustments are limited to those that would not have any permanent impacts. The permittees state Category II adjustments are intended to address minor adjustments that result in *de minimus* additional temporary impacts or the addition of previously unidentified permanent features in non-jurisdictional uplands.² Refueling, maintenance, and overnight parking of equipment in resources identified in the VCP where necessary because equipment must remain stationary and operational for an extended period or because there are no practicable alternative sites also may be allowed as a Category II adjustment. To qualify as a Category II field adjustment, after initial review by the third party inspector Department staff must agree that the adjustment fits within this category. This third party inspector review and staff agreement would be document on a completed FAR form. Potential Category II adjustments include, for example:

- Adjustments that minimize or mitigate health or safety issues through the temporary installation of guard poles in a wetland to prevent the conductor from coming into contact with other infrastructure or interfering with traffic;
- Allowance of refueling in a wetland where removal of the equipment is not practical, such as during a continuous concrete pour, or would result in multiple trips through the wetland or waterbody;

² While the permittees do not propose to limit the size of temporary or secondary impacts that might be allowed under a Category II field adjustment in their submission, as discussed below the Department finds such a limitation is necessary. Also as discussed below, the Department finds the proposed placement of “unidentified permanent features in non-jurisdictional uplands” or the placement of any permanent structures should not qualify as field adjustments. The Department does not consider guy or ground wires to be unidentified permanent features or structures.

- Adjustments to the location of the access road in Segment 1 from the 54-foot center line, where, for example, topography or obstacles make construction of the access road impractical or where the vegetation in the adjusted location is going to be cleared for construction; and
- Adjustments in the location or number of guy or ground wires due to soil conditions in protected natural resources.

Finally, the permittees proposed to catalog all field adjustments, both Category I and Category II, through completion of FAR forms and submission of these forms to the Department. Permittees also propose to submit as-built plans within 90 days of completion of each segment. The as-built plan submission for each segment would include all completed FAR forms and a table summarizing the amount of impacts that were avoided, as well as any temporary impacts that resulted from field adjustments.

5. The Natural Resources Council of Maine (NRCM) submitted comments on the proposed FAR process. NRCM argues that any adjustments are material changes to the project and must be reviewed through an amendment application. NRCM also argues that approval of the condition compliance submission and authorization of field adjustment would give the applicant carte blanche authority to make changes without approval or oversight. Finally, NRCM argues that the Department cannot approve field adjustments or changes that do not state what land will be affected.
6. The permittees responded stating that the field adjustment only have temporary or secondary impacts and no new direct impacts. The permittees argue the field adjustments for which they seek approval are *de minimis* and that some changes will result in a reduction of impacts.
7. The Department reviewed the proposed categories of field adjustments and related FAR process, along with NRCM's comments, the permittees' response to these comments, and the permittees response to Department questions. Based on experience reviewing and permitting large infrastructure projects, including transmission line projects, the Department recognizes it is not possible to design, permit, and construct a 145-mile-long transmission project without needing to make minor adjustment to the approved plans based on circumstances in the field. The types of minor changes that will be needed can be anticipated, but the precise changes and precise locations of the changes can be difficult, if not impossible, to identify until construction is underway. Additionally, once a project is under construction it is important for permit holders to be able to make minor adjustments in real time to avoid frequent delays and to facilitate rational construction sequencing. A field adjustment process has been used by the Department for other projects, such as for the Maine Power Reliability Program transmission line upgrades and for wind power projects. The Department's experience is that such a process can ensure protection of the environment in accordance with the controlling statutes, while allowing construction to proceed in a reasonable manner. The Department finds the same results may be achieved here with an appropriately tailored FAR process and delineation of Category I and Category II field adjustments.

8. While the Department finds providing for filed adjustments is both rational and necessary for larger-scale projects, consistent with NRCM's comments, the FAR process cannot be used *cart blanche* to make any changes, in real time, desired by the permittees. The Department does not read the permittees' submission as seeking such sweeping authority, but finds it important to define the bounds of the FAR process and identify the types or characteristics of adjustments that fall into Category I and Category II.

Permittees propose allowing the addition of previously unidentified permanent features in non-jurisdictional uplands, such as gates and permanent rock pads, through the field adjustment process. The Department finds, however, that these types of changes may reasonably be planned for in advance and need not be accommodated through adjustments made in the field. Additionally, the Department finds the addition of permanent features is inconsistent with the three, overarching characteristics of all field adjustments, both Category I and Category II, set out by the permittees, that the adjustment reduce permanent or temporary impacts, reduce the risk of environmental risk because of conditions encountered in the field, or minimize or mitigate significant health and safety issues encountered in the field. Therefore, the Department concludes the addition of previously unidentified permanent features does not fit within either Category I or Category II field adjustments authorized in this order.

Another type of field adjustment proposed by the permittees is adjustment of the location of stream crossings, for example, if necessitated by changes in stream bank stability or stream channel location. All such crossings would be temporary and associated with construction access. In the proposed FAR forms included with the December 15, 2020 submission, field adjustments in stream crossings are provided for on the Category II form. In the January 20, 2021 submission, field adjustments in stream crossing locations with certain characteristics are identified as Category I adjustments. The Department recognizes the potential need for this type of adjustment, with only temporary impacts and within the corridor, to be made as a field adjustment. While temporary impacts could be reduced through an adjustment in the location of a crossing, making such an adjustment consistent with other Category I adjustments that result in a reduction in impacts to a protected natural resource, rather than bifurcate stream crossing adjustments the Department finds it more appropriate to include all adjustments in the location of stream crossings within Category II. This is consistent with the permittee's proposal as reflected in the proposed FAR forms and result in both the third party inspector and Department staff reviewing the proposed change and having an opportunity to agree or disagree that the change possesses the characteristics of the field adjustment authorized in this order. Finally, the permittees' FAR forms included with their December 15, 2020 submission identify additional stream crossings as another type of field adjustment. Such a crossing would necessarily result in an increase in temporary impact. As with all field adjustments that would increase temporary impacts to a protected natural resource, which would include temporary impacts to streams, these would be limited to those adjustments that minimize or mitigate a significant health and safety issue, or reduce the risk of adverse environmental effects associated with unavoidable conditions encountered in the field. Although not anticipated to be common, the Department recognizes that field

conditions and the location of various environmental features could come together to necessitate and justify a field adjustment to construction access that would result in the addition of a temporary crossing, consistent with Category II field adjustment criteria.

Permittees also included “other” activities within both Category I and Category field adjustments. In their January 20, 2021 submission they elaborate on types of adjustments that might fall into the other category and provide limiting characteristics for both Category I and Category II “other” activities. The Department understands the permittees’ intent here based on its own experience with field adjustment processes for other projects – to accommodate for unanticipated circumstances that arise in the field in the course of construction with the potential for *de minimus* temporary impacts and no permanent impacts. Absent more defining characteristics for the other activities in both Category I and Category II, however, that more clearly define for the third party inspectors and Department staff what characteristics a change must have to fit as a field adjustment, the Department finds inclusion of the “other” activities as field adjustments premature.

In the Department Order, the Department reviewed the New England Clean Energy Connect (NECEC) project under the applicable laws, including Site Law and NRPA, and found the project satisfied the permitting standards, subject to the conditions of that order. Here, the Department finds the proposed FAR process and requested approval of Category I and Category II changes are consistent with the conditions of the Department Order. The Department also finds the FAR process and both categories of changes would neither significantly expand the NECEC project nor change the nature of the project. Even with the allowance of Category I and II field adjustments, the same transmission line would carry the same power through the same parts of Maine on the same transmission structures in the same location. No changes with permanent impacts could be made as a field adjustment as established in this order. Additionally, those adjustments that could be made would reduce impacts, or, if they would result in new temporary impacts, those temporary impacts would be limited in their extent and location, through conditions of this order, to ensure the NECEC project would continue to satisfy all applicable permitting standards. Finally, with respect to field adjustments that themselves do not result in any impact, but rather bear on the potential risk of impact, specifically parking, repairing, or refueling equipment in or near protected natural resources, the FAR process is structured to ensure these adjustment from standard operating procedure established in the VCP are not done for convenience, but only if a practical alternative does not exist.

The Department finds that the findings in the Department Order that the NECEC project satisfies the applicable permitting standards remain unchanged by the proposed FAR process and requested approval of Category I and Category II changes, and that this process and associated changes themselves satisfy the applicable permitting standards, including that they will not have an undue adverse impact on existing uses, scenic character, air quality, water quality, or other natural resources and will not unreasonably impact protected natural resources, provided the FAR process is applied and the Category I and Category II changes are limited as set forth below.

A. Field Adjustments Generally. Any field adjustment must:

- Reduce permanent or temporary impacts;
- Reduce the risk of adverse environmental effects (e.g., erosion and sedimentation) associated with unavoidable conditions encountered in the field; or
- Minimize or mitigate significant health and safety issues encountered in the field.

Further, any field adjustment must not:

- Result in new, not previously permitted permanent impacts, including, the placement of fill; or
- Involve placement, relocation, or construction of permanent features or structures, including, but not limited to, gates.

B. Category I Field Adjustments. In addition to the limiting characteristics listed in paragraph A above, Category I field adjustments, are further limited to:

- Allowance of refueling, maintenance, or overnight equipment parking within the setback from a resource (but not within the resource) established in the VCP when there is no practical alternative;
- Adjustments in the construction access road layout or location in non-jurisdictional upland areas;
- Adjustments in construction access road layout or location resulting in reduction or elimination of wetland impact;
- Adjustments in construction access road layout or location resulting in no change in wetland impact when the adjustment is necessary to:
 - Minimize or mitigate a significant health or safety issue; or
 - Reduce the risk of adverse environmental effects associated with unavoidable conditions encountered in the field;
- Adjustments to allow “lop and drop” where access with heavy equipment is difficult and allowing cut vegetation to remain in place would minimize environmental impact by avoiding soil disturbance associated with winching or cable skidding logs; and
- Adjustments in the location or number of guy or ground wires due to soil conditions in non-jurisdictional upland areas.

Additionally, to qualify as a Category I field adjustment the third party inspector must agree that the proposed adjustment possesses the necessary characteristics and sign a completed Category I FAR form. The form that must be used is included as Attachment A to this Order. After the completed form is signed by the third party inspector the permittees may proceed with construction in accordance with the Category I field adjustment and must adhere to any qualifications specified by the third party inspector. If the third party inspector does not agree that the proposed field adjustment possesses the characteristics of a Category I adjustment, the permittees may request Department staff review the proposed adjustment. Only if the

Department staff agrees that the proposed adjustment possesses the necessary characteristics and signs the completed Category I FAR form may the permittees proceed with construction in accordance with the Category I field adjustment, including any qualifications specified by the Department staff.

C. Category II Field Adjustments. In addition to the limiting characteristics listed in paragraph A above, Category II field adjustments, are further limited to:

- Allowance of refueling, maintenance, or overnight equipment parking within a resource identified in the VCP when there is no practical alternative;
- Adjustments to the location of permitted stream crossings within the corridor necessitated by changes in stream bank stability or stream channel location where there are no threatened or endangered species;
- Adjustments resulting in increased temporary impact to a protected natural resource, where a practicable alternative does not exist, in order to:
 - Minimize or mitigate a significant health or safety issue; or
 - Reduce the risk of adverse environmental effects associated with unavoidable conditions encountered in the field;
- Relocation of the access road in Segment 1 within the corridor, but outside the 54-foot wide center line; and
- Adjustments in the location or number of guy or ground wires due to soil conditions in protected natural resources.

Additionally, if a Category II adjustment results in an increase in impacts of less than 4,300 square feet of temporary impact to a protected natural resource, the area must be restored within 12 months of the initial disturbance. If an adjustment results in an increase of more than 4,300 square feet of temporary impact to a protected natural resource, but less than 30,000 square feet of temporary impact, those areas must be restored within 3 months. In no case, may an adjustment result in an increase of more than 30,000 square feet of temporary impact to a protected natural resource.

Finally, all proposed Category II field adjustments must be identified on a completed Category II FAR form. The form that must be used is included as Attachment B to this order. The form must be reviewed and signed by the third party inspector. To qualify as a Category II field adjustment, Department staff must agree that the proposed adjustment possesses the necessary characteristics and sign the completed Category II FAR form. After the completed form is signed by the Department staff, the permittees may proceed with construction in accordance with the Category II field adjustment and must adhere to any qualifications specified by the third party inspector or Department staff.

D. Documentation. Within 90 days of completion of each segment, the permittees must submit as-built plans, including all FAR forms for that segment, and a table summarizing the amount of permanent and temporary impacts avoided and the amount of temporary impacts associated with field adjustment.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S. §§ 480-A–480-JJ and Section 401 of the Clean Water Act:

- A. The proposed activity will not unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses.
- B. The proposed activity will not cause unreasonable erosion of soil or sediment, provided any field adjustments are made in accordance with the requirements in Finding 8 above.
- C. The proposed activity will not unreasonably inhibit the natural transfer of soil from the terrestrial to the marine or freshwater environment.
- D. The proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater, estuarine, or marine fisheries or other aquatic life, provided any field adjustments are made in accordance with the requirements in Finding 8 above.
- E. The proposed activity will not unreasonably interfere with the natural flow of any surface or subsurface waters.
- F. The proposed activity will not violate any state water quality law including those governing the classifications of the State's waters.
- G. The proposed activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties.
- H. The proposed activity is not on or adjacent to a sand dune.

BASED on the above findings of fact, and subject to the conditions listed below, the Department makes the following conclusions pursuant to 38 M.R.S. §§ 481–489-E:

- A. The permittees have provided adequate evidence of financial capacity and technical ability to develop the project in a manner consistent with state environmental standards.
- B. The permittees has made adequate provision for fitting the development harmoniously into the existing natural environment and the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities, provided any provided any field adjustments are made in accordance with the requirements in Finding 8 above.
- C. The proposed development will be built on soil types which are suitable to the nature of the undertaking and will not cause unreasonable erosion of soil or sediment nor inhibit the natural transfer of soil.

- D. The proposed development meets the standards for storm water management in 38 M.R.S. § 420-D and the standard for erosion and sedimentation control in 38 M.R.S. § 420-C, provided any field adjustments are made in accordance with the requirements in Finding 8 above.
- E. The proposed development will not pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur.
- F. The permittees has made adequate provision of utilities, including water supplies, sewerage facilities and solid waste disposal required for the development and the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services.
- G. The activity will not unreasonably cause or increase the flooding of the alteration area or adjacent properties nor create an unreasonable flood hazard to any structure.

THEREFORE, the Department APPROVES the application of CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION, LLC to make field adjustments as described above, SUBJECT TO THE FOLLOWING CONDITIONS and all applicable standards and regulations:

1. The Standard Conditions of Approval, a copy attached.
2. In addition to any specific erosion control measures described in this or previous orders, the permittees shall take all necessary actions to ensure that their activities or those of their agents do not result in noticeable erosion of soils or fugitive dust emissions on the site during the construction and operation of the project covered by this approval.
3. Severability. The invalidity or unenforceability of any provision, or part thereof, of this License shall not affect the remainder of the provision or any other provisions. This License shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.
4. Any field adjustment must meet the criteria identified in Finding 8(A); additionally:
 - a) A Category I field adjustment must meet the criteria identified in and be made in accordance with Finding 8(B).
 - b) A Category II field adjustment must meet the criteria identified in and be made in accordance with Finding 8(C).
5. Within 90 days of completion of each segment, the permittees must submit as-built plans, including all FAR forms for that segment, and a table summarizing the amount of permanent and temporary impacts avoided and the amount of temporary impacts associated with field adjustment.

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

DONE AND DATED IN AUGUSTA, MAINE, THIS 7TH DAY OF MAY, 2021.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: 
For: Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

JB/L27625QMRMSMTMUM/ATS#86905/86906/86907/86908/86909

FILED
May 7th, 2021
State of Maine
Board of Environmental Protection

NECEC – Category II Field Adjustment Request Form

DEP #: 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
USACE NAE-2017-01342

**Category II Field Adjustment Request
(reviewed by 3PI, as well as MDEP and USACE)**

Adjustment Requested (check boxes that apply):

- Refueling, maintenance, or overnight parking in resource identified in vegetation clearing plan (wetland, stream, vernal pool habitat, etc.) when no practical alternative
- Adjustment to location of permitted stream crossing within corridor necessitated by changes in stream bank stability or channel location; no threatened or endangered species
- Adjustment resulting in increased temporary impact to a protected natural resource, where a practicable alternative does not exist, in order to:
 - Minimize or mitigate a significant health or safety issue, or
 - Reduce risk of adverse environmental effects associated with unavoidable field conditions
- Relocation of access road from non-tapered 54' center line area
- Adjustments in the location or number of guy or ground wires due to soil conditions in protected natural resources
- Adjustment that results in new temporary impacts to a protected natural resource (must include justification and evaluation of alternative) and involve:
 - Less than 4,300 sq. ft. of impact and be restored w/in 12 months of initial impact
 - Between 4,300 and 30,000 sq. ft. of impact and be restored w/in 3 months of initial impact

Location and Description:

3PI Comments:

Project Representative Requesting Change:

Printed Name	Signature	Date
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3PI: Agree
 Disagree

Printed Name	Signature	Date
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DEP/ACOE: Agree
 Disagree

Printed Name	Signature	Date
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DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: November 2018

Contact: (207) 287-2452

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner: (1) an administrative process before the Board of Environmental Protection (Board); or (2) a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S. §§ 341-D(4) & 346; the *Maine Administrative Procedure Act*, 5 M.R.S. § 11001; and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 C.M.R. ch. 2.

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed more than 30 calendar days after the date on which the Commissioner's decision was filed with the Board will be dismissed unless notice of the Commissioner's license decision was required to be given to the person filing an appeal (appellant) and the notice was not given as required.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017. An appeal may be submitted by fax or e-mail if it contains a scanned original signature. It is recommended that a faxed or e-mailed appeal be followed by the submittal of mailed original paper documents. The complete appeal, including any attachments, must be received at DEP's offices in Augusta on or before 5:00 PM on the due date; materials received after 5:00 pm are not considered received until the following day. The risk of material not being received in a timely manner is on the sender, regardless of the method used. The appellant must also send a copy of the appeal documents to the Commissioner of the DEP; the applicant (if the appellant is not the applicant in the license proceeding at issue); and if a hearing was held on the application, any intervenor in that hearing process. All of the information listed in the next section of this information sheet must be submitted at the time the appeal is filed.

INFORMATION APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time the appeal is submitted:

1. *Aggrieved Status.* The appeal must explain how the appellant has standing to maintain an appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions, or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions regarding compliance with the law, license conditions, or other aspects of the written license decision or of the license review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the license decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific licensing requirements that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for public hearing must be filed as part of the notice of appeal, and must include an offer of proof in accordance with Chapter 2. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the application, the request and the proposed evidence must be submitted with the appeal. The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered in an appeal only under very limited circumstances. The proposed evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Specific requirements for supplemental evidence are found in Chapter 2 § 24.

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made easily accessible by the DEP. Upon request, the DEP will make application materials available during normal working hours, provide space to review the file, and provide an opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a license holder may proceed with

a project pending the outcome of an appeal, but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge receipt of an appeal, and will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, any materials submitted in response to the appeal, and relevant excerpts from the DEP's application review file will be sent to Board members with a recommended decision from DEP staff. The appellant, the license holder if different from the appellant, and any interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant and the license holder will have an opportunity to address the Board at the Board meeting. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, the license holder, and interested persons of its decision.

II. JUDICIAL APPEALS

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court (see 38 M.R.S. § 346(1); 06-096 C.M.R. ch. 2; 5 M.R.S. § 11001; and M.R. Civ. P. 80C). A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452, or for judicial appeals contact the court clerk's office in which your appeal will be filed.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.
