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March 12, 2021

VIA ELECTRONIC MAIL AND U.S. MAIL

Mark C. Draper, Chair
Board of Environmental Protection
c/o Ruth Ann Burke
17 State House Station
Augusta, ME 04333-0017

RE: Central Maine Power Company, New England Clean Energy Connect
Department Order L-27625-26-A-N, L-27625-TG-B-N, L-27625-2C-C-N, L-27625-VP-D-N, L-27625-IW-E-N, and L-27625-26-K-T

Dear Chair Draper:

On behalf of Licensees Central Maine Power Company and NECEC Transmission LLC, please find enclosed a Response to the Consolidated Permit Order Appeals.

Please let me know if you have any questions.

Sincerely,

Matthew D. Manahan

Enclosure
cc (via email only): Service List (rev. October 19, 2020)

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY	)
NEW ENGLAND CLEAN ENERGY CONNECT	)
L-27625-26-A-N/L-27625-TG-B-N/	)
L-27625-2C-C-N/L-27625-VP-D-N/	)
L-27625-IW-E-N and L-27625-26-K-T	)

CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC'S RESPONSE TO THE CONSOLIDATED PERMIT ORDER APPEALS

These consolidated appeals seek to overturn one of the most extensive and thorough permitting processes ever conducted by the DEP. The DEP and its professional and expert staff analyzed the NECEC Project's impacts and carefully crafted conditions that reduce those reasonable impacts. The culmination of this years-long analysis is the Commissioner's May 11, 2020 Order (the Permit Order), a comprehensive, 236-page document that specifically sets forth the arguments, and the DEP's reasoned findings and conclusions, on the issues the Natural Resources Council of Maine (NRCM), NextEra Energy Resources, LLC (NextEra) and the West Forks Petitioners (West Forks) (collectively, Appellants[1]) raise in these consolidated appeals.

[1] Central Maine Power Company (CMP) and NECEC Transmission LLC (NECEC LLC) (collectively, Licensees) object for the record to any responses to the merits of these consolidated appeals of the Permit Order filed (1) by an Appellant or (2) by persons who did not comment on the underlying September 2017 Site Law and NRPA applications. Neither is a respondent in these consolidated appeals, and their comments should be disregarded. DEP Regs. Ch. 2 § 24(C) ("A written response to the merits of an appeal may be filed by a licensee (if the licensee is not the appellant) and any person who submitted written comment on the application (hereafter collectively referred to as the respondents)."); Chair Draper ruling on supplemental evidence at 9 (Feb. 12, 2021) (setting March 12, 2021 as the deadline for written responses by Appellees and respondents); Combined Order on Motions at 6, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Aug. 11, 2020) (Murphy, J.) (consolidating the appeals of West Forks and NextEra and remanding them to the BEP).

Licensees further object to any responses that exceed the scope of the merits of the appeal of the Permit Order, including those that address the appeal of the December 4, 2020 Transfer Order, responses to which were due by February 18, 2021. Chair Draper letter on NRCM appeal of the Transfer Order and ruling on proposed supplemental evidence and stay request at 2 (Jan. 19, 2021). Any such responses should be disregarded.

This Permit Order carefully describes how and why the Project meets all applicable Site Location and Development Act (Site Law) and Natural Resources Protection Act (NRPA) standards, as well as the DEP's rules implementing those standards. Appellants disagree with the Commissioner's determinations on those standards. But that mere disagreement is no basis to challenge, let alone modify, a thoughtful and thorough permitting decision. In fact, the robust record, including testimony and cross-examination at six days of hearings and tens of thousands of pages of testimony and evidence, demonstrates that each of Appellants' claims is without merit:

(1) BEP Jurisdiction. As the Maine Superior Court determined, NRCM waived its claim that the Board should have assumed original jurisdiction over the September 2017 Site Law and NRPA permit applications (permit applications) by not raising that issue until more than two and one-half years after the deadline to do so, at significant prejudice to all parties who participated in the years-long permitting proceeding. Furthermore, Title 38 Section 341-D(2) does not require the Board to make determinations that every project is or is not of statewide significance.

(2) TRI. CMP had sufficient title, right, or interest (TRI) in the property the Project will cross throughout the application processing period. The PUC's requirement that CMP transfer the Project to NECEC LLC at some point in the future has no bearing on CMP's property rights during the pendency of its permit applications. Nor does a subsequent (and unresolved) challenge to the legality of CMP's lease of lands from the Bureau of Parks and Lands (BPL) affect CMP's demonstration of TRI during the application processing period, as the Maine Superior Court recently determined.

(3) Environmental Impact. The Project does not unreasonably impact the environment because its impacts are relatively minor and the avoidance, minimization, mitigation, and compensation the Commissioner ordered is over-protective of brook trout habitat, on which the Project will have no direct impact, and mitigates any potential habitat fragmentation, consistent with federal standards. Furthermore, the DEP did allow and consider evidence of the Project's impact on greenhouse gases (GHGs), contrary to NRCM's claims otherwise, and reached the same conclusion that two other state agencies (affirmed by two state courts), two federal agencies, and one federal court have reached – the Project will reduce GHG emissions. So too does the record support the Commissioner's decommissioning requirements, which go above and beyond any statutory or rule requirement.

(4) Alternatives Analysis. CMP performed a thorough alternatives analysis, which demonstrates that undergrounding alternatives are not practicable and which explicitly considered impacts to natural resources.

While the Project necessarily results in some impact – as all projects that trigger DEP permitting do – this reasonable and fully compensated impact pales in comparison to the climate crisis facing Maine, the United States, and the world. Due speed is essential because, as the DEP recognized, the Project will mitigate the threat climate change poses to Maine's natural environment by helping to reduce GHG emissions:

> As described in detail above, construction and maintenance of the project will cause some adverse environmental effects on habitat, scenic character, and existing uses. *Climate change, however, is the single greatest threat to Maine's natural environment.* It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts. The Maine Public Utilities Commission (PUC), which has jurisdiction necessary to assess GHG emissions from the project in light of its impact on the electricity grid, concluded that, "the NECEC [project] will result in significant incremental hydroelectric generation from existing and new sources in Quebec and, therefore, will result in reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region."[2]

DEP recognized that the Project's relatively minor impacts pale in comparison to the urgent need to address this threat.

The Appellants had ample opportunity to present testimony and evidence over the course of six days of hearings before the DEP, as well as outside the hearing itself. DEP thoroughly considered all that evidence, and concluded that the Project meets all applicable standards, as conditioned by the Permit Order. Appellants don't like that conclusion, either because they don't like hydropower, or they don't like market competition, or they want to keep this development

[2] DEP Order at 105 (emphasis added).

out of their "backyard," but they can't point to any error in the Permit Order. So they try to make process arguments and hope something sticks. The Board should reject those transparent efforts and affirm the Commissioner's Permit Order with due speed and without a further duplicative hearing.

I. NRCM waived its claim that the Board should have assumed original jurisdiction over the 2017 permit applications, which is meritless.

Contrary to the clear and logical applicable rules of procedure, NRCM asserts that the Board must now, long after the conclusion of the application processing period, determine that it should have assumed jurisdiction in 2017 when the applications were first made. NRCM wants the Board to re-start the entire permitting process, throwing out the years-long public proceedings undertaken by the DEP's expert staff that generated a record in the tens of thousands of pages, six days of public hearings, and the comments of hundreds of Maine citizens. This makes no sense, and is a particularly bold request given that NRCM never requested Board jurisdiction at any point while the DEP was processing the permit applications. Instead, NRCM explicitly requested that the Commissioner – not the Board – should hold a hearing on the applications.[3] Its belated argument now that the reverse should have occurred clearly has nothing to do with process and everything to do with strategic delay. By lying in wait until the entire permitting process was complete, NRCM has waived its argument that the Board should have assumed jurisdiction in 2017, which is in any event meritless for the reasons described below.

[3] NRCM, Conservation Law Foundation, and Appalachian Mountain Club Petition for a Public Hearing (Nov. 2, 2017).

A. NRCM waived its original jurisdiction claim.

NRCM's claim that the Board must assume original jurisdiction over CMP's September 2017 Site Law and NRPA applications has already been rejected by the Commissioner, the Chair, and the Maine Superior Court.[4] NRCM Appeal at 4-7. While these decisions demonstrate that there is no mandatory Board jurisdiction here, as further explained below, NRCM has waived its claim by waiting to raise Board jurisdiction until the years-long and robust public proceedings concerning the applications closed.[5] The Superior Court agrees, determining this January that NRCM waived its argument that the Board should have assumed jurisdiction over the underlying permit applications. Order on NRCM's Motion to Stay DEP Commissioner's Order at 6-7, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.) ("Even assuming movants are correct that the Board *should* have been the entity to decide CMP's permit application, any such argument was waived because it was not raised in the several-year process before the Commissioner until after the Commissioner issued the conditional approval of the permits.").[6]

[4] Letter from Commissioner Reid denying stay requests at 5 (Aug. 26, 2020) (finding that NRCM cannot show that the Board was required to assume jurisdiction over the application); Letter from Chair Draper denying stay requests at 2 (Oct. 23, 2020) (declining to revisit and reconsider the Commissioner's August 26, 2020 decision); Order on NRCM's Motion to Stay DEP Commissioner's Order at 5, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.) (concluding that "neither scenario invoking mandatory referral from the Commissioner to the Board occurred here.").

[5] The DEP's rules provide that "Any person may request that the Board assume jurisdiction over an application by submitting the request to the Department in writing no later than 20 days after the application is accepted as complete for processing." DEP Regs. Ch. 2 § 17(A); *see also* DEP Regs. Ch. 2 § 16. The DEP accepted CMP's applications as complete for processing on October 13, 2017. The deadline for any person to request that the Board assume jurisdiction therefore was November 2, 2017, well over three years ago.

[6] The Superior Court further noted that a request for Board jurisdiction is "akin to a claims-processing rule that can be waived if not timely raised, as compared to a jurisdictional prescription that cannot be waived." Order on NRCM's Motion to Stay DEP Commissioner's Order at 5-6, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.). Accordingly, a request for Board jurisdiction "may be forfeited if the party asserting the rule waits too long to raise the point." *Id.* at 6 (citing *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (internal quotation marks omitted). Certainly three years is too long to wait to raise the point here.

Like the Superior Court, it is imperative that the Board not "endorse such an extended delay in raising the issue, particularly when it would unfairly prejudice CMP, DEP, and the 2-plus-year process engaged in by numerous individuals and entities to reach the ultimate conditional approval."[7] Even if there were some validity to NRCM's original jurisdiction claim – which there is not – assuming original jurisdiction of the 2017 permit applications now, nearly 42 months after they were submitted to the DEP and after the DEP held six full days of hearings and considered tens of thousands of pages of record evidence, would be an incredible waste of the Board's, the parties', and the public's time and resources. That is why the DEP's rules do not permit parties like NRCM to lie in wait, holding back to make the Board jurisdiction argument until very late in the process to try to derail that process, and instead require that requests for Board jurisdiction must be made at the start of the permitting process, no later than 20 days after an application's acceptance for processing. DEP Regs. Ch. 2 § 17(A); *see also* DEP Regs. Ch. 2 § 16. The Board should summarily deny NRCM's attempt to delay the Project by hitting the restart button.[8]

[7] *Id.* at 7.

[8] In any event, NRCM's argument is beside the point, as former Commissioner Reid recognized, because "[e]ven 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." Letter from Commissioner Reid denying stay requests at 5 (Aug. 26, 2020). The Superior Court agreed, noting that "the relief requested by [NRCM] for this alleged error is similar to what the Board will be doing as it reviews the Commissioner's conditional approval. Compare NRCM Mot. 7 ('[T]he Board should review the previously created record, treat the NECEC Order as a recommendation, and allow focused testimony on that Order before it makes a determination.') with 38 M.R.S. §341-D(4)(A) ('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. Any changes made by the board under this paragraph must be based upon the board's review of the record, any supplemental evidence admitted by the board and any hearing held by the board . . . .')." Order on NRCM's Motion to Stay DEP Commissioner's Order at 7, n.9, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.).

B. NRCM's claim that the Board should have assumed original jurisdiction is meritless.

Even if NRCM had not waived its original jurisdiction argument, NRCM's argument is without merit and, in fact, turns the statute on its head. Title 38 Section 341-D(2) does not require the Board to make determinations that every project is or is not of statewide significance, nor does it establish that the Board is the only entity authorized to consider the permit applications, as NRCM claims. NRCM Appeal at 6. Rather, the Board retains significant discretion under the statute.

Section 341-D(2) states that the Board "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). That section provides clear standards for how and when the Board is called upon to exercise its judgment regarding whether a project is of statewide significance, which standards NRCM ignores. *Id.*; DEP Regs. Ch. 2, § 17.[9] The Board is required to assume jurisdiction over licensing applications in only two instances:

> 1. *Referral by Commissioner and Applicant.* The Board must assume jurisdiction without a vote when the Commissioner and the applicant request Board jurisdiction. 38 M.R.S. § 341-D(2) ("The board shall decide each application for approval of permits and licenses that is referred to it jointly by the commissioner and the applicant.").
>
> 2. *Commissioner Recommendation or Public Request*. The Board must assume jurisdiction on license applications after a vote if it makes a finding that at least three of the four criteria set out in Section 341-D(2) have been met, following referral to the Board by (a) recommendation of the Commissioner, or (b) request of an interested person. *Id.* § 341-D(2) ("The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A when it finds that at least 3 of the 4 criteria of this subsection have been met."); *see id.* § 344(2-A) (providing for requests by the commissioner or by interested persons).

[9] *See also* BEP Information Sheet: Guidance on Requests for Board Jurisdiction over an Application, *available at* https://www.maine.gov/dep/bep/Guidance%20Information%20Sheets/Information%20Sheet%20BEP%20Jurisdiction%20October%202020.pdf.

Otherwise, the Board need not assume jurisdiction over a project of statewide significance, though it may in its own discretion decide to exercise jurisdiction. As Section 341-D(2) states, apart from the mandatory jurisdiction and the mandatory vote on jurisdiction outlined above, the Board "*may* vote to assume jurisdiction of an application." 38 M.R.S. § 341-D(2) (emphasis added). Thus, the Board need not always vote to make findings regarding whether an application fits the Section 341-D(2) criteria.

Accordingly, regardless of whether the Project met the criteria for determining that a project is of statewide significance, the Board was not required to assume jurisdiction. First, the prerequisite for triggering mandatory jurisdiction without a vote did not occur because CMP and the Commissioner did not jointly request jurisdiction. Second, the prerequisite for triggering mandatory jurisdiction following a Board vote did not occur. The Commissioner did not, on his own initiative, recommend that the Board assume jurisdiction. Further, no person – including NRCM – requested Board jurisdiction prior to the November 2, 2017 deadline to do so.[10] In short, CMP's application was not referred to the Board under circumstances that would have made it mandatory for the Board to exercise jurisdiction either with or without a vote by the Board.[11]

It was therefore entirely within the Board's discretion to determine whether to vote to assume jurisdiction over CMP's permit applications when it was presented with those applications in 2017. The Board chose not to do so. The permit applications were accepted as

[10] As noted by former Commissioner Reid, "[t]he 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." Letter from Commissioner Reid denying stay requests at 5 (Aug. 26, 2020). *See also* DEP Regs. Ch. 2 § 17(A); DEP Regs. Ch. 2 § 16; *supra*, n.5.

[11] Order on NRCM's Motion to Stay DEP Commissioner's Order at 5, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.).

complete for processing on October 13, 2017 and included in the October 20, 2017 list of applications accepted for processing that was in the Board packet for the November 2, 2017 Board meeting.[12] The minutes of the Board meeting on November 2, 2017 reflect that the Board did not assert jurisdiction over the applications.[13] The Board in 2017 did not identify the Project as one that rose to the level of significance that would warrant a vote on the § 341-D(2) factors. Accordingly, the DEP continued to process the applications and, at the conclusion of the multi-year proceeding in which the Appellants were heavily involved, issued the Permit Order.

C. The Board may not now assume original jurisdiction over the underlying applications.

Even if NRCM had not waived its original jurisdiction argument, and even if it were appropriate for the Board to vote now – 42 months after the applications were submitted – on the § 341-D(2) factors, the Board cannot assume jurisdiction because the Project was not of statewide significance in 2017, when it was timely for the Board to consider the § 341-D(2) factors.

A determination that a project is of statewide significance is a determination that must be made at the outset of the licensing proceeding and not, as NRCM attempts here, after the DEP has issued the permit. In any event, the Project did not and still does not meet two of the four significance factors: (F) involves an activity not previously permitted or licensed in the State, and (G) is likely to come under significant public scrutiny. Regarding factor (F), transmission lines are routinely permitted in Maine, and are specifically addressed in the Site Law. *See, e.g.,* 38 M.R.S. § 487-A, which governs "Hazardous activities; transmission lines."

[12] *See* Applications Accepted for Processing, Accepted applications for: LAND at 7-8; BEP Meeting Minutes at Item I.E (Oct. 20, 2017).

[13] *See* BEP Meeting Agenda and Applications Accepted for Processing, Accepted applications for: LAND at 7-8; BEP Meeting Minutes at Item I.E (Nov. 2, 2017).

Regarding factor (G), public scrutiny, that factor contemplates a determination in the early stages of a proceeding of whether the application is "likely to come" under significant public scrutiny – not based on manufactured opposition drummed up by a few vocal Project opponents over the years after the applications were submitted. NRCM cites the number of parties to the underlying proceeding as evidence of significant public scrutiny. But not one of those parties requested Board jurisdiction during the timeframe set forth in the DEP's Chapter 2, section 17, rules, nor at *any* point during the two and one-half years-long proceeding. Instead, NRCM requested within the applicable timeframe that the *Commissioner* hold a public hearing, and the Commissioner granted that request on November 17, 2017.[14] It is the height of hypocrisy for NRCM now to complain that the Board should have assumed jurisdiction and held a hearing when the Commissioner actually granted the hearing request NRCM made at that time – that *the Commissioner* hold a hearing.

It is illogical and contrary to the DEP's rules for NRCM to make its belated arguments of statewide significance long after the conclusion of the processing of the applications. The DEP's rules require that any request that the Board assume jurisdiction must be made "in writing no later than 20 days after the application is accepted as complete for processing." DEP Regs. Ch. 2 § 17(A); *see also* DEP Regs. Ch. 2 § 16. This allows the Commissioner and the Board to assess the likelihood of statewide significance at the outset of a permitting proceeding, and not nearly 42 months after-the-fact.[15] Doing so now, as NRCM requests of the Board, would turn the

[14] NRCM, Conservation Law Foundation, and Appalachian Mountain Club Petition for a Public Hearing (Nov. 2, 2017).

[15] The DEP's deadline for requests for Board jurisdiction also prevent the prejudice to the Licensees and great inconvenience to all parties that NRCM suggests the Board should inflict here by restarting the entire licensing process in a new venue. *See* Order on NRCM's Motion to Stay DEP Commissioner's Order at 6-7, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.).

DEP's procedures on their head, allowing the Board to assume original jurisdiction at the same time it assumes appellate jurisdiction.[16] This makes no sense, and demonstrates that NRCM's request has nothing to do with process and everything to do with delay.

Again, it is imperative that the Board not endorse NRCM's strategy to lie in wait and then spring its original jurisdiction argument on the Board and the parties after the Commissioner held the hearing NRCM requested. In an effort to inflict maximum damage to the process, and on the Project, NRCM waited until after the Commissioner issued the Permit Order to claim that the Commissioner lacked authority to issue that order (even though NRCM requested that the Commissioner – not the Board – hold a hearing). That was strategic, and NRCM should not be rewarded for abusing the process in this manner. NRCM's strategy of obfuscation and delay should be rejected and the Board should continue to consider Appellants' consolidated appeals of the Permit Order in its appellate capacity, relying on the very robust record developed by the DEP over the course of its multi-year review.

II. CMP maintained TRI throughout the entire processing period.

DEP correctly determined that CMP properly made a sufficient showing of TRI during the application processing period. DEP Regs. Ch. 2 § 11(D). The Maine Law Court has made clear that, even when there is doubt about an applicant's TRI – which there was not here – the permitting authority should process the permit application if the applicant has provided a *prima*

[16] The Maine Superior Court and former Commissioner Reid recognized the fallacy of NRCM's request. *See supra*, n.8. Board assumption of jurisdiction over a project that has received the permit at issue makes no sense, because the Board can have a hearing on an appeal and, if it chooses, render a new permitting decision. For this reason, and because of the prejudice that would result from the Board assuming jurisdiction after permit issuance, the Section 17 rules do not permit the Board to take original jurisdiction over an application for which the Commissioner has already issued a permit; rather, they require that the Commissioner refer an application to the Board if the Commissioner determines during an application processing period – prior to issuance of the permit – that the project is of statewide significance. Once that process is complete the Board does not have authority to assume "original" jurisdiction.

facie TRI showing, and that the DEP is not required or authorized to act as an adjudicatory body to determine title.[17] In any event, NRCM's and West Forks' purported challenges have no bearing whatsoever on CMP's TRI. Instead, NRCM's claim (which West Forks echoes) that CMP's TRI "materially changed" during the DEP's proceedings because the PUC required that CMP at some point in the future must transfer the Project, and that CMP's TRI was deficient because the 2014 Bureau of Parks and Lands lease (2014 BPL lease) was "illegal" (a claim rejected by the Maine Superior Court), are irrelevant to CMP's demonstration of interest in "all of the property that is proposed for development or use . . . throughout the entire application processing period." DEP Regs. Ch. 2 § 11(D).

A. <u>The January 4, 2021 transfer of the Project has no bearing on CMP's showing of TRI throughout the DEP's processing of the 2017 permit applications.</u>

NRCM's and West Forks' claim that CMP lacked TRI because at some point in the future CMP would transfer the Project is a red herring. NRCM Appeal at 8-9; West Forks Appeal at 13-15. First and foremost, as NRCM is aware because it was a party to the PUC Certificate of Public Convenience and Necessity (CPCN) proceeding[18] and as both NRCM and West Forks are aware because they were parties to the DEP's Transfer Order proceeding, no

[17] *See Murray v. Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (finding that an applicant need only have a "legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permit or license he seeks"); *Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345, 348 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit).

[18] Central Maine Power Company, Request for Approval of CPCN for the New England Clean Energy Connect, Docket No. 2017-00232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation (May 3, 2019) (CPCN Order), *aff'd*, *NextEra Energy Resources v. Public Utils. Comm'n*, 2020 ME 34, 227 A.3d. 1117 (Mar. 17, 2020). In his January 19, 2021 letter at 2, the Chair stated that the May 3, 2019 PUC Order is "already in the Department's underlying administrative record for the NECEC Order, which was considered by the Department in the processing of the Transfer Order." The Chair further admitted the February 21, 2019 Stipulation, which required that CMP transfer the Project to a special purpose entity to shield Maine ratepayers from Project costs and which is discussed in the CPCN Order, into the administrative record here. Chair Draper ruling on supplemental evidence at 5 (Feb. 12, 2021).

transfer of the Project or any of its underlying property occurred during the pendency of CMP's Site Law and NRPA permit applications. Nor could it, because additional regulatory processes were required before the transfer of the Project could occur.[19] Before the Project transfer could occur, the PUC needed to authorize the creation of NECEC LLC as a Maine public utility pursuant to 35-A M.R.S. § 708 and grant the necessary approvals to effectuate the Project transfer pursuant to Maine's public utility affiliated interest transaction statute, 35-A M.R.S. § 707, and CMP and NECEC LLC needed to finalize and execute the Transfer Agreement.[20] Such PUC authorization did not occur until October 20, 2020 when the PUC Commissioners unanimously authorized the creation of NECEC LLC as a public utility and granted the affiliate transaction approvals required to effectuate the transfer of the Project to NECEC LLC.[21] Transfer of the Project occurred on January 4, 2021, at which time CMP conveyed the Project property interests and transferred its land use permits to NECEC LLC.[22] Accordingly, CMP maintained TRI in all Project property throughout the entire application processing period, as required by Chapter 2. The PUC's requirement that CMP transfer the Project at some point in

[19] Indeed, the Stipulation to which CMP agreed and which the PUC approved is forward-looking, requiring "that CMP *will convey* the Project to NECEC Transmission LLC (NECEC LLC)" and "*[u]pon the transfer*, CMP and NECEC LLC will enter into a Service Agreement which contains the provisions under which CMP will provide various services to NECEC LLC, including accounting, legal, information technology, other corporate support, supply chain and engineering services." CPCN Order at 75 (emphasis added); NRCM Appeal Appendix D at §§ V.B.1 and V.B.1.c.

[20] Application for Partial Transfer of MDEP Site Law and NRPA Permits and Water Quality Certification at Attachment D, #L-27625-26-K-T (Sept. 25, 2020).

[21] *See* Response to CMP to NRCM's Request for Board Jurisdiction over CMP's Application for Partial Transfer of its NECEC Permits and Certification at 8, n.8 (Oct. 27, 2020).

[22] CMP Certification of Partial Transfer, #L-27625-26-K-T (Jan. 5, 2021).

the future has no bearing on CMP's TRI in the property up to the date of the Commissioner's May 11, 2020 Permit Order.

B. NRCM's challenge to the legality of the BPL lease has no bearing on the sufficiency of CMP's showing of TRI or the Commissioner's findings on TRI.

NRCM's next claim is that CMP's TRI was deficient because the 2014 Bureau of Parks and Lands lease (2014 BPL lease) was "illegal." NRCM Appeal at 9-11. Like NRCM's original jurisdiction argument, this claim also was rejected by the Commissioner[23] and the Maine Superior Court. Addressing NRCM's identical challenge to the validity of the 2014 Lease, the Court noted that NRCM is challenging the validity of that lease in parallel litigation,[24] and found

[23] Appellants have already raised, and the DEP has already considered, the allegation that the 2014 Lease is void. In its November 13, 2018 letter to the Department, NextEra stated that it is "unclear whether the Transmission Line Lease between Department of Agriculture, Conservation and Forestry Bureau of Parks and Lands and Central Maine Power Company dated December 2014 is statutorily permissible." The Presiding Officer responded on November 16, 2018, stating as follows:

> Further, Nextera questions whether the Transmission Line Lease between CMP and the Department of Agriculture, Conservation, and Forestry, Bureau of Public Lands (the Bureau), dated December 15, 2014, is "statutorily permissible." The Bureau entered into that lease with CMP pursuant to 12 M.R.S. § 1852(4), which authorizes the Bureau to "lease the right, for a term not exceeding 25 years, to," among other things, "[s]et and maintain or use poles, electric power transmission and telecommunications facilities." CMP's lease with the Bureau, a copy of which CMP provided to the Department, demonstrates to the Department's satisfaction sufficient title, right, or interest to the lands subject to that lease. 096 C.M.R. ch. 2, § 11(D)(2) (2018). Legal challenges to the Bureau's authority to enter a transmission line lease pursuant to 12 M.R.S. § 1852(4) would be for the courts—not the Department—to adjudicate.

Despite this unequivocal directive from the Presiding Officer, NRCM persisted, arguing in the permitting proceeding as they do now that the leases in question do not demonstrate TRI because they were not approved by a two-thirds vote of the Legislature. This issue therefore was fully briefed, and considered and addressed by the DEP. *See, e.g.,* Group 4 Initial Brief at 4-6; CMP Reply Brief at 1-6; Permit Order at 8. NRCM's allegation that there is "no rational basis" for the DEP's treatment of the 2014 Lease rings hollow. NRCM Appeal at 11.

[24] *Black v. Cutko*, Dkt. No. BCD-CV-20-29 (Me. Super. Ct.).

that "[t]he fact that an applicant's TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP."[25]

Pending litigation on the validity of the 2014 Lease does not affect CMP's showing of or the DEP's findings on CMP's TRI because an applicant need only make a colorable showing of TRI during the "application processing period." DEP Regs. Ch. 2 § 11(D); *see also Murray v. Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (finding that an applicant need only have a "legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permit or license he seeks"). Maine law is clear that, even when there is doubt about an applicant's TRI, the permitting authority should process the permit application unless the applicant clearly lacks TRI. *Id.* The DEP is not required or authorized to act as an adjudicatory body to determine title. *Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345, 348 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit).

Thus, even if the 2014 Lease were ultimately found to be infirm, that eventuality would not mean that CMP failed to make the required colorable showing of TRI during the processing of the application. *See Southridge Corp.*, 655 A.3d at 348. Neither CMP nor the BPL have conceded that the 2014 Lease was invalid, and Justice Murphy has noted that "[t]hat case is still in its relative infancy, and the issue will be decided on the merits after further factual development and argument."[26] But whatever the outcome of the lease litigation, it does not

[25] Order on NRCM's Motion to Stay DEP Commissioner's Order at 7-8, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Ct. Jan. 11, 2021) (Murphy, J.) (citing *Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345, 348 (Me. 1995)).

[26] *Id.* at 8.

affect the Permit Order itself because, again, "[t]he fact that an applicant's TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP."[27]

Here, CMP made the requisite *prima facie* showing by providing the DEP with the 2014 Lease, and the DEP appropriately accepted that lease as establishing TRI. *See* Permit Order at 8 (accepting "the decision of its sister agency to enter into the leases" and concluding that the leases established sufficient TRI).[28] The 2014 Lease remained in effect throughout the entirety of the DEP application process. Developments after May 11, 2020 – the date of issuance of the permit – are quite simply irrelevant to the validity of the permit.[29] NRCM's assertion that the 2014 Lease is "illegal" is insufficient grounds to overturn the Permit Order.[30] NRCM Appeal at 9.

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[27] *Id.* Thus, even if the 2014 Lease is ultimately found to be infirm, and that DEP had erroneously relied on the validity of that lease, that would not be a basis to reverse the Permit Order because CMP had sufficient administrative standing to pursue its permits. A mistake in concluding that an applicant has sufficient TRI does not necessitate reversal of a DEP permit, after that permit has issued, because TRI has nothing to do with the DEP's Chapter 2 approval standards. *See Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit). It would be merely a procedural error, which does not undermine the validity of the Permit Order itself. Again, TRI is intended to avoid a waste of the agency's resources. Thus, when the permit has been issued, any issues regarding TRI are moot.

[28] As former Commissioner Reid rightly recognized in denying NRCM's request for stay, "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." Letter from Commissioner Reid denying stay requests at 6 (Aug. 26, 2020).

[29] Even if developments after the application processing period were relevant to the DEP's findings on TRI, which they are not, on June 23, 2020 CMP and the BPL amended and restated the 2014 Lease, at which time CMP *did* have a CPCN for the Project. NRCM's argument that CMP's TRI is invalid because its lease with the BPL pre-dated the PUC's issuance of the CPCN therefore is moot. NRCM Appeal at 11.

[30] Regarding NRCM's allegation that any BPL lease requires a Legislative vote, NRCM misunderstands the law. The Legislature that drafted and passed Article IX, Section 23 of the Maine Constitution also passed legislation defining the term "substantially altered" in such a way that made clear the Legislature's judgment that leases for utility facilities do not "substantially alter" the lands at issue and, thus, do not require a two-thirds vote of the Legislature. *See* "An Act to Designate Certain Lands under the Constitution of Maine, Article IX, Section 23," P.L. 1993, ch. 639 § 1 (Designated Lands Act), codified at 12 M.R.S. Ch. 202-D (containing sections 598, 598-A, and 598-B). The Designated Lands Act defined "substantially altered" to mean "changes in use" that would frustrate the "protection, management and improvement of those lands" for the "multiple use objectives" then set forth in 12 M.R.S. § 585. In other words, the Legislature determined that a "substantially altered" use consisted of significant

III. The Project does not unreasonably impact the environment.

The Permit Order – the culmination of nearly three years of intensive and iterative work by the DEP's expert staff in coordination with the Maine Department of Inland Fisheries and Wildlife (MDIFW) that built a record of tens of thousands of pages – goes above and beyond the mandates of the Site Law and NRPA. Despite the extensive avoidance, mitigation, and compensation measures that the Commissioner ordered to reduce the reasonable Project impacts, and without pointing to any errors in the Permit Order, NRCM and West Forks claim that the Permit Order is somehow insufficiently protective of the environment simply because they do not like the Project. They allege that, notwithstanding the Commissioner's order of "an unprecedented level of natural resource protection for transmission line construction in the State of Maine,"[31] the Project (A) will unreasonably impact brook trout habitat (NRCM Appeal at 12-20), (B) will unreasonably fragment wildlife habitat (NRCM Appeal at 20-26; West Forks

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deviations from the existing multiple use standard governing public reserved lands. Notably, the Designated Lands Act expressly pointed to both the BPL's general multiple use standard and its specific leasing authority as within the "multiple use objectives" which, if adhered to, would not constitute a substantial alteration for purposes of Article IX, Section 23. *See* 12 M.R.S. § 585.

The Legislature's judgment in this regard has endured across revisions to the Maine code. For instance, in 1997, the Legislature enacted P.L. 1997, ch. 678, "An Act to Reorganize and Clarify the Laws Relating to the Establishment, Powers and Duties of the Bureau of Parks and Lands" (BPL Act), which, among other things, revised the Designated Lands Act and provided the statutory framework that governs the BPL today. The BPL Act maintained the multiple use concept set forth in 12 M.R.S. § 1852 and again authorized the BPL to lease public reserved lands to those who would "[s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities." P.L. 1997, ch. 678 § 13 (codified at 12 M.R.S. § 1852(4)). The BPL Act enacted 12 M.R.S. § 1851 to authorize the BPL to sell public reserved lands in certain circumstances and expressly stated that such transactions would be subject to 12 M.R.S. § 598-A, which incorporated and implemented the two-thirds voting requirement of Article IX, Section 23. By contrast, 12 M.R.S. § 1852 does not make the leasing authority set forth therein subject to 12 M.R.S. § 598-A or Article IX, Section 23. This omission again reflects the Legislature's judgment that leases of the kind identified in 12 M.R.S. § 1852 did not require legislative approval under Article IX, Section 23.

In short, NRCM's allegation, and request for conditional approval of TRI, ignores the statutory authority that the Maine Legislature granted to the BPL to enter into its lease agreements without legislative approval. NRCM Appeal at 11; *see also* CMP's Reply Brief at 1-5 (June 28, 2019). Indeed, in the more-than-25 years since the adoption of Article IX, Section 23, CMP is not aware of even one occasion where the BPL sought two-thirds legislative approval for a lease granted under 12 M.R.S. § 1852, such as the one at issue here.

[31] Permit Order at 1.

Appeal at 5-7, 9-10), (C) will not achieve the greenhouse gas benefits that no fewer than three state agencies[32] affirmed by two state courts,[33] two federal agencies,[34] and one federal court[35] have found will be achieved (NRCM Appeal at 32-34), and (D) is subject to decommissioning requirements not supported by the record (West Forks Appeal at 15-17). The record demonstrates otherwise, as former Commissioner Reid has already found:

> 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. [Commissioner Decision on Stay at 5 (Aug. 26, 2020).]

Indeed, the Permit Order is a comprehensive document that specifically sets forth the arguments of the parties, echoed in this appeal, and the DEP's reasoned findings and conclusions on those

[32] *Id.* at 105 (May 11, 2020); Massachusetts Department of Public Utilities Order D.P.U. 18-64; 18-65; 18-66 at 65 (Mass. D.P.U. June 25, 2019) ("[T]he Department finds that the firm hydroelectric power delivered . . . will create steady GHG emissions reduction benefits to Massachusetts."), *aff'd*, *NextEra Energy Resources, LLC v. Dept. of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48 (2020); Maine PUC CPCN Order at 71 ("The Commission concludes that the NECEC will result in significant incremental hydroelectric generation from existing and new resources in Québec and, therefore, will result in reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region."), *aff'd*, *NextEra Energy Resources v. Public Utils. Comm'n*, 2020 ME 34, 227 A.3d. 1117 (Mar. 17, 2020).

[33] *NextEra Energy Resources, LLC v. Dept. of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48 (2020); *NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117 (2020).

[34] U.S. Department of Energy, New England Clean Energy Connect Environmental Assessment, DOE/EA-2155 at 120-21 ("operation of the Proposed Project would reduce emissions of GHGs in New England to the extent that the hydropower generated by Hydro-Québec and supplied via the Proposed Project would displace electricity generated by combustion of fossil fuels. . . . Since Hydro-Québec is predicted to have excess hydropower generating capacity, and so could maximize its revenue by supplying electricity via the Proposed Project without diverting the electricity from other markets, it is unlikely that GHG emissions produced by combustion of fossil fuels would increase."); U.S. Army Corps of Engineers, Memorandum for Record at 56 (July 7, 2020) ("NECEC would likely result in a reduction in greenhouse gas (GHG) emissions, specifically carbon dioxide emissions, in New England and neighboring markets," and "it is likely that Hydro-Québec would be able to meet the energy delivery requirements for the NECEC with its current and planned incremental supply without diverting hydropower from other areas that it would otherwise serve.").

[35] Order on Motion for Preliminary Injunction, *Sierra Club, et al. v. U.S. Army Corps of Eng'rs, et al.*, Case No. 2:20-cv-00396-LEW, Order at 49, ECF No. 42 (D. Me. Dec. 16, 2020) ("the Project will benefit Maine in a variety of ways, including by . . . reducing greenhouse gas emissions.").

arguments. Based on conditions developed in large part by Appellants' own witness testimony, the DEP found that the mitigation ordered sufficiently assuaged the harm they allege again here (to the extent it would exist).[36] NRCM's and West Forks' allegations that the Project impacts nevertheless remain unreasonable are not supported by the record and are plainly incorrect.

A. The Project does not unreasonably impact brook trout habitat.

NRCM takes issue with the Commissioner's determinations on (1) riparian filter areas, (2) vegetation management, and (3) compensation where impacts are unavoidable, claiming that the Project as permitted does not include adequate riparian filter buffers for brook trout (NRCM Appeal at 13), the vegetation management ordered is insufficient to mitigate impacts to brook trout habitat or its effects are unknown (NRCM Appeal at 14-18), and the compensation ordered does not address adverse impacts to brook trout habitat (NRCM Appeal at 14, 19-20). These claims do not comport with the record.[37]

1. Riparian filter areas avoid and minimize impact to brook trout habitat.

First, the record clearly demonstrates that the riparian filter areas (buffers) adequately protect brook trout habitat. NRCM cites no evidence to the contrary, because it cannot. Instead, the record shows that CMP carefully and thoughtfully designed and sited the Project in a manner that avoids and minimizes impacts to brook trout habitat after extensive consultation with the

[36] *See, e.g.,* Permit Order at 76-92.

[37] Licensees note that brook trout have no special legal or regulatory protections in Maine. Hearing Day 4 Transcript 144:7-23 (Reardon). Nor is brook trout habitat "significant wildlife habitat," 38 M.R.S. § 480-B(10), given that brook trout are pervasive in the Project area, and the populations in some of the streams over which the Project passes are natural and self-supporting (particularly those populations associated with the smaller, colder streams that are sustained by groundwater input). Permit Order at 84; Goodwin Direct at 14. NRCM's own evidence shows that nearly the entire state of Maine has intact sub-watersheds supporting brook trout populations despite the presence of human activity and disturbance on the landscape. Reardon Direct Exhibit 4. Nevertheless, as detailed below, NRCM's and West Forks' impact claims have all been thoughtfully and comprehensively addressed in the Commissioner's Permit Order.

DEP and MDIFW, the agency charged with preservation, protection, and enhancement of inland fisheries. In fact, with the exception of the ordered culvert replacements that will *enhance* fish habitat by facilitating passage, reducing erosion, and improving water quality, the Project will have *no* direct impact (*i.e.*, in-stream construction) on brook trout habitat.[38]

CMP's and the DEP's iterative work with MDIFW was extensive. MDIFW provided comments on wildlife and fisheries impacts on March 15, 2018; June 29, 2018; December 7, 2018; February 1, 2019; and March 18, 2019,[39] during which time CMP and MDIFW continued to meet and discuss the Project's various impacts to fish and wildlife and the field surveys for several wildlife species.[40] As a result of these consultations, during a January 22, 2019 meeting of CMP, DEP, and MDIFW, DEP recommended that for CMP to adequately protect cold water fisheries, riparian buffers for vegetation management and maintenance activities should be expanded to 100 feet for coldwater fishery habitats, outstanding river segments, threatened or endangered species water bodies, and all perennial streams in the Project's Segment 1.[41] CMP incorporated these changes into Exhibit 10-1 and Exhibit 10-2 of CMP's Site Law application, filed with the DEP as part of its revised Compensation Plan on January 30, 2019.[42] After doing so, CMP requested that MDIFW comment on its revised Compensation Plan, including riparian buffers, to ensure it addressed "all of MDIFW's remaining concerns, and that MDIFW is satisfied that the latest (January 30, 2019) NECEC Project Compensation Plan . . . provides

[38] Goodwin Direct at 2; Permit Order at 2.

[39] Permit Order at 63.

[40] *Id.*; Johnston Rebuttal at 7-9; Exhibit CMP-4.1-A.

[41] Goodwin Direct at 19.

[42] Permit Order at 64, 76, 84-85; Goodwin Direct at 11, 19-21; Johnston Rebuttal at 7-9.

satisfactory mitigation of the NECEC Project's impacts."[43] In its March 18, 2019 response, MDIFW concurred with the Compensation Plan, noting its appreciation for CMP's "willingness to work with us to finalize the complex fish and wildlife resource issues."[44]

The 100-foot buffer, in fact, is an added protective measure for trout habitat, on which the Project will have *no* direct impact and only a *de minimis* indirect impact, as demonstrated by peer reviewed studies,[45] because stream crossings that represent a short linear distance compared to the overall watershed result in a negligible impact on coldwater fisheries. One study on the impacts of power line rights-of-way (ROWs) on forested stream habitat found that despite the open canopy condition in the ROW, the water quality was not significantly different between the on-ROW and off-ROW study areas.[46] In that study, the author further concluded that "it is likely that the streams intersected by rights-of-way have recovered from their initial disturbances."[47] A second study on the effects of electric transmission line ROWs on trout in forested headwater streams found that trout were more abundant in stream reaches within ROWs and concluded that the increase in incident sunshine resulted in a denser forb and shrub root mass, which further stabilized stream banks, resulting in less stream bank erosion, deeper channels, and higher

[43] Exhibit CMP-4.1-A.

[44] *Id.*

[45] Goodwin Direct at 13-14; Johnston Rebuttal at 2-4.

[46] Johnston Rebuttal at 3; Gleason, N.C. 2008. *Impacts of Power Line Rights-of-Way on Forested Stream Habitat in Western Washingto*n. Environmental Symposium in Rights-of-Way Management, 8th International Symposium, pages 665-678.

[47] *Id.*

populations of trout.[48] The author concluded that electric transmission line ROWs do not constitute an adverse effect on headwater trout population densities in forested basins.[49]

Furthermore, the avoidance, minimization, and best management practices DEP ordered for coldwater fisheries habitat on the Project ROW go above and beyond accepted practices. For example, they are more restrictive than the proposal that DEP and the U.S. Army Corps of Engineers approved in 2010 for the Maine Power Reliability Program (MPRP) to protect fisheries.[50] These MPRP minimization measures and best management practices satisfied the United States Fish and Wildlife Service, which concluded that there would be no adverse effect to Atlantic salmon coldwater fisheries.[51] It follows that the *more* restrictive minimization measures for the NECEC will adequately protect coldwater fish habitats, like brook trout habitat.

2. <u>The vegetation management ordered mitigates impact to brook trout habitat.</u>

Second, the record shows that the vegetation management ordered sufficiently mitigates impacts to brook trout habitat, despite NRCM's stated doubts as to its effectiveness. NRCM Appeal at 14-18. NRCM complains individually and in a vacuum about the vegetation management methods ordered to avoid and minimize impacts in Segment 1: full-height vegetation at Gold Brook and Mountain Brook (NRCM Appeal at 14-16), 35-foot tall vegetation in the remaining portions of the 12 Wildlife Areas identified in Permit Order Table C-1 that cross The Nature Conservancy's (TNC's) 9 priority areas for habitat connectivity in Segment 1[52]

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[48] Johnston Rebuttal at 3-4; Peterson, A.M. 1993. *Effects of Electric Transmission Rights-of-Way on Trout in Forested Headwater Streams in New York*. North American Journal of Fisheries Management, vol. 13 pp. 581-585.

[49] *Id.*

[50] Johnston Rebuttal at 5.

[51] *Id.*

[52] TNC Exhibit 7. Wildlife Area 1 includes part of TNC area 1; Wildlife Area 2 includes all of TNC area 2; Wildlife Area 3 includes all of TNC area 3; Wildlife Area 4 includes part of TNC area 4; Wildlife Area 5 includes all of TNC area 5, plus several additional structures, including the crossing of an unnamed stream where 35-foot tall vegetation

(NRCM Appeal at 16-17), and tapering of vegetation across the remainder of Segment 1 (NRCM Appeal at 17-18). Isolating these vegetation management requirements, NRCM claims that each mitigates alleged brook trout habitat impacts across an insufficient percentage of the Project. What NRCM fails to note, however, is that these highly restrictive mitigation methods collectively cover the entirety of Segment 1. Viewing these mitigation methods – which were "identified and developed through the public process," in large part through the testimony of NRCM's own witnesses – in context, it is clear that they "provide an unprecedented level of natural resource protection for transmission line construction in the State of Maine," [53] particularly with regard to protection of brook trout habitat.

NRCM's suggestion that the DEP considered full-height vegetation only at Gold Brook and Mountain Brook, and only for the purposes of protecting Roaring Brook Mayfly habitat, is false.[54] NRCM Appeal at 14-16. To the contrary, DEP considered NRCM's assertions that full-height vegetation is required elsewhere along the Project route to protect brook trout habitat, but determined that no such additional measures were required.[55] DEP's conclusion is the result of the consultation between CMP and MDIFW, during which time MDIFW identified an extensive list of its priority resources but identified no resources or particular areas that would require taller vegetation to address brook trout or coldwater fishery concerns.[56] Instead, and as a result

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likely can be retained without taller poles (3006-708 to 3006-707); Wildlife Area 7 includes the crossing of Cold Stream; Wildlife Area 8 includes an unnamed stream crossing where 35-foot tall vegetation likely can be maintained without taller poles; Wildlife Area 9 includes Tomhegan Stream and part of TNC area 8; and Wildlife Area 10 crosses Moxie stream and is within TNC area 9; and Wildlife Area 11 and most of Wildlife Area 12 are within TNC area 9. Permit Order at 79, n.31-32.

[53] Permit Order at 1.

[54] NRCM Appeal at 14-15; Reardon Direct at 14; Permit Order at 69.

[55] Permit Order at 69.

[56] Johnston Rebuttal at 6-7.

of its consultation with MDIFW, CMP revised its proposal to incorporate taller structures and avoid clearing by allowing full height canopy vegetation within the 250-foot riparian management zone for Mountain Brook and Gold Brook[57] and, at the request of DEP, identified *additional* streams that require no structure height increases to accommodate 35-foot-tall vegetation.[58]

While NRCM claims that 35-foot tall trees provide insufficient shade and instream habitat for brook trout, it ignores the fact that the Commissioner's ordering of taller vegetation in 12 Wildlife Areas will maintain existing conditions and, in some instances, allow greater growth than presently exists. NRCM's own witness testified that the Segment 1 area "contains a fairly limited amount of mature forest."[59] Commercial forest land adjoining the Project ROW in Segment 1, if not clear-cut within the last 10 years, has been cut within the last 15 to 35 years and therefore is not mature forest.[60] This is particularly true in certain areas NRCM identifies as "high value brook trout streams - some of the 'best of the best' of the state's headwater brook trout water."[61] Where the Project crosses Tomhegan Stream, for example, the existing vegetation is "fairly low" – DEP staff estimated it to be "less than 35 feet tall."[62] This area "consists of one primary channel and a

[57] Mirabile Direct at 9; Goodwin Direct at 13; Exhibit CMP-2-G; Exhibit CMP-3-F.

[58] "Department staff, in questions to CMP at the May 9, 2019 hearing, identified five areas (including nine stream or river crossings) where taller vegetation with a minimum height of 35 feet could be maintained due to existing topography with poles only minimally taller, or no taller, than proposed." Permit Order at 78 and Appendix C. *See also* CMP's May 17, 2019 Response to DEP May 9, 2019 Additional Information Request Attachment B. These areas "include the crossing of numerous coldwater streams." Permit Order at 85.

[59] Hearing Day 4 Transcript at 79:10-16 (Publicover). *See also* Giumarro Supplemental at 2-13 (explaining that the Segment 1 region is continuously shifting cover types, because of rotational forest harvest); Hearing Day 6 Transcript at 237:21-240:11 (Giumarro); Hearing Day 6 Transcript at 128:17-129:17 (Simons-Legaard); Hearing Day 6 Transcript at 146:2-25 (Wood); Hearing Day 6 Transcript at 102:12-103:8 (Publicover).

[60] Giumarro Supplemental at 4.

[61] Reardon Direct at 11-12, 15-17.

[62] Hearing Day 6 Transcript at 457:21-24 (Beyer).

number of braided channels flowing through an area with sparse tree cover."[63] Allowing 35-foot vegetation in this area, as the Permit Order requires, "would provide good cover."[64]

The location where the NECEC corridor crosses Cold Stream, which NRCM recognizes as "one of the most intact and highest value watersheds for native brook trout in Maine,"[65] also is very open.[66] The entire stream channel is visible on aerial imagery due to sparse tree coverage,[67] as the Project crossing location here is in a developed area, with Capital Road on the south side of the corridor and the former location of Capital Road on the north side of the corridor. As NRCM recognized, "one of the reasons that there is not a lot of vegetation there is there is still gravel in the roadbed."[68] Even without the taller vegetation ordered by the Commissioner, the elevation change at Cold Stream aids in preservation of vegetation.[69] Nor will this area be cleared, as NRCM suggests. The unnamed feeder stream on the east side of Cold Stream, while on CMP land, is not in the Project corridor and will not be cleared.[70] The "feeder stream" on the west side of Cold Stream is a wetland with no stream channel present.[71] Accordingly, in "some of the 'best of the best' of the state's headwater brook trout water,"[72] the Permit Order allows vegetation heights in excess of current conditions.

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[63] Freye Rebuttal at 12.

[64] Hearing Day 6 Transcript at 458: 1-11 (Freye).

[65] Reardon Direct at 15.

[66] Freye Rebuttal at 11.

[67] *Id.*

[68] Hearing Day 6 Transcript at 96:10-19 (Beyer and Reardon).

[69] Hearing Day 6 Transcript at 164:10-15 (DeWan).

[70] Freye Rebuttal at 11; Hearing Day Transcript at 98:18-99:2 (Reardon).

[71] Freye Rebuttal at 11.

[72] Reardon Direct at 11-12, 15-17.

Compounding the benefits of 100-foot buffers, full-height vegetation, and taller vegetation is the Commissioner's ordering of tapering across the remainder of Segment 1. The record shows that tapering benefits "those areas having higher value wildlife features and [that] are known to be used specifically as travel corridors for wildlife, i.e., riparian buffers."[73] Indeed, CMP's witness specifically recommended tapering to protect brook trout habitat.[74] While riparian buffers provide significant shading through lower-growing vegetation that overhangs streams 10 feet wide or less – the majority of streams in Segment 1[75] – the addition of tapered vegetation management in these areas supplements that shade and provides additional woody debris input, contrary to NRCM's claims. NRCM Appeal at 18. Indeed, as NRCM's witness admits, "you can layer multiple things that are compensating for the losses that you will have and so tapering adds a couple of trees to the corridor."[76] That is precisely what the DEP has done, ordering that in areas where tapering *and* where taller vegetation is required, "the applicant must leave trees that have been cut during routine maintenance unless it would be a violation of the Slash Law or create a fire or safety hazard. This will provide for large woody debris imports into the streams, which helps create pools and provides nutrients and more closely mimics natural forest succession."[77]

NRCM's conclusion that the full-height and taller vegetation ordered across much of Segment 1 protects an insufficient number of stream crossings, and that tapered vegetation

[73] Goodwin Supplemental at 4; Hearing Day 6 Transcript at 233:15-234:8 (Goodwin).

[74] *See, e.g.,* Goodwin Supplemental at 5 (recommending tapering in the following brook trout habitat: Spencer Stream and tributaries, Whipple Brook, Piel Brook, Tomhegan Stream, and tributaries to Cold Stream).

[75] Goodwin Supplemental at 6; Hearing Day 6 Transcript at 235:3-12 (Goodwin).

[76] Day 6 Hearing Transcript at 106:19-23 (Reardon).

[77] Permit Order at 85. *See also* Goodwin Supplemental at 6 (explaining that tapering within the 100-foot buffers around streams would provide adequate large woody vegetation for streams in Segment 1).

provides insufficient shade and woody debris input, ignores the cumulative benefit of those mitigation methods. The Commissioner's ordering of taller vegetation in multiple areas across Segment 1 – and in particular those streams that NRCM's witness identified as exceptionally valuable, such as Gold Brook, Tomhegan Stream, and Cold Stream – "will benefit brook trout by providing shading, buffering runoff, and providing large woody debris to the streams." [78] The Commissioner's ordering of tapering across the remainder of Segment 1 – and in particular at the smaller streams that constitute the majority of Segment 1 – completes this benefit, as "the addition of tapered vegetation management practices in the riparian buffers of perennial coldwater streams would provide adequate large woody vegetation."[79] NRCM's strategy of compartmentalizing – isolating each vegetation management method to give the impression of minimal effect – does not do justice to the Commissioner's comprehensive Permit Order, which achieves an unprecedented level of brook trout habitat protection despite the Project's *de minimis* impact.[80]

3. The compensation tracts and culvert replacement fees appropriately compensate for unavoidable impact to brook trout habitat.

Finally, NRCM claims that the ample compensation ordered where the Project's indirect impacts to brook trout habitat are unavoidable – three compensation tracts plus a $1,875,000

[78] Permit Order at 69, 85 (addressing the testimony of NRCM witness Reardon). Other areas where NRCM claims the Project will have significant impact on brook trout habitat, such as at the West Branch of the Sheepscot River (Reardon Direct at 18), are already impacted by a transmission line crossings and will benefit from the 100-foot riparian buffer. Johnston Rebuttal at 7. For example, at MDIFW's suggestion, CMP provided DEP and MDIFW a buffer planting plan for the West Branch of the Sheepscot River, on January 9, 2019. *Id.*

[79] Goodwin Supplemental at 6.

[80] In fact, as noted in the Gleason and Peterson studies cited in n.46-49, *supra*, water temperatures have been found to be lower in some cleared runs of streams within ROWs. Goodwin Direct at 13-14; Johnston Rebuttal at 2-4, 12. Organic matter and moderate sized woody debris will be contributed to streams from dense riparian zone herbaceous and woody non-capable vegetation that will remain and will be maintained on the NECEC Project ROW after construction. *Id.* Further, as also noted in the studies cited above, increased insolation in riparian zones cleared of tall trees increases stream bank vegetation and improves stream bank stabilization. *Id*.

culvert replacement fund – are insufficient. NRCM Appeal at 14, 19-20. These allegations ignore the record evidence, as well as the additional $180,000 fee to the Maine Endangered and Nongame Wildlife Fund that the Commissioner ordered to compensate for fishery habitat impacts. As noted above, CMP worked collaboratively and extensively with MDIFW to develop a robust compensation package, to the satisfaction of that agency (whose objective mission is to preserve, protect, and enhance inland fisheries).[81] At no point during this multi-year collaboration did MDIFW voice concerns over the proposed compensation parcels or the culvert replacement fund, which was proposed to be $200,000 but which DEP increased by almost $1.7 million.[82]

In fact, the preservation parcels – the Grand Falls Tract, Lower Enchanted Tract, and Basin Tract – do replace the functions and values of adversely impacted brook trout habitat. NRCM Appeal at 14. According to the NECEC Potential Compensation Tracts - Natural Resources Survey Results, these parcels, which were proposed for the purposes of coldwater fisheries impact mitigation and are located along the Dead River, contain perennial and intermittent feeder streams that support known brook trout populations.[83] The Grand Falls Tract, Lower Enchanted Tract, and Basin Tract are located in an area of the State with an abundance of valuable coldwater fisheries and collectively contain 63,440 linear feet or 12.02 miles of streams, including frontage on the Dead River and Enchanted Stream, in excess of the 11.02 linear miles

[81] Goodwin Direct at 11; Johnston Rebuttal at 7-9; Hearing transcript Day 1 at 291:16-292:25 (Goodwin/Johnston); Johnston Rebuttal Exhibit CMP-4.1-A.

[82] Johnston Rebuttal at 7-9, 11; Goodwin Direct at 23.

[83] Compensation Plan at 32 and Exhibit 1-9 (Jan. 30, 2019); Johnston Rebuttal at 10-11.

of forested conversion impact to streams (inclusive of all streams, not only coldwater fisheries) that will result from the Project.[84]

Importantly, these parcels connect to existing preservation lands, creating a comprehensive network of brook trout habitat in an area NRCM acknowledges is known for "extensive migrations of brook trout between the Kennebec and Dead River mainstems and multiple small tributaries."[85] The Grand Falls Tract is highly regarded for trout and salmon fishing opportunities and is linked, along the Dead River, to the 50,000-acre Bigelow Mountain-Flagstaff Lake-North Branch of the Dead River Focus Area of Statewide Ecological Significance via a 1,542-acre moderate value inland waterfowl wading bird habitat (IWWH).[86] The Lower Enchanted Tract abuts the Western Mountain Conservation Easement parcel on both sides (east and west),[87] and completes the protection of the north side of the Dead River.[88] The north end of the Lower Enchanted Tract extends along Enchanted Stream to the southern end of a 275 +/- acre IWWH zone that provides protection to Enchanted Stream and Lower Enchanted Pond, upstream of the Lower Enchanted Tract.[89] Lower Enchanted Stream and the Dead River are very popular for brook trout fishing. Preservation of the Basin Tract, located on the south side of the Dead River, also dovetails with existing preservation by the Western Mountains Charitable Trust conservation easement.[90] The preservation of the Basin Tract will complete the protection of

[84] Compensation Plan at 22 and Table 8-2 (Jan. 30, 2019).

[85] Reardon Direct at 3.

[86] Compensation Plan at 32 (Jan. 30, 2019).

[87] *Id.* at 33 (Jan. 30, 2019); Freye Direct at 10; Exhibit CMP-9-E.

[88] *Id.*

[89] *Id.*

[90] Compensation Plan at 33 (Jan. 30, 2019); Freye Direct at 10-11; Exhibit CMP-9-E.

both sides of the Dead River for 4.8 miles.[91] Approximately one mile south of the 697-acre Basin Tract are approximately 10,000 contiguous acres of Conserved Lands encompassing Pierce Pond, Grass Pond, Kilgore Pond, Split Rock Pond, Higher Pond, Dixon Pond, Fernald Pond, and Horseshoe Pond, and the Appalachian Trail.[92]

Regarding the compensation funding the Commissioner ordered, NRCM claims that there is no "nexus" between the culvert replacement funds and the Project's impact on brook trout habitat because the Project does not impede fish passage. NRCM Appeal at 19-20. But the rules require no such nexus. Instead, NRPA expressly allows the DEP discretion to approve the type[93] and location[94] of compensatory mitigation. Accordingly, the DEP "requires a compensation package that consists of a combination of preservation, enhancement, and/or ILF to offset the variety of project impacts including those impacts that are outside the purview of the ILF Program (38 M.R.S § 480-Z, e.g. indirect impact to rivers, streams or brooks, indirect impact to local and/or regional recreational values and outstanding river segments and wildlife habitat)."[95]

Such robust compensation for the Project's indirect impact to coldwater fisheries, which is outside the purview of DEP mitigation guidance,[96] is precisely what the Commissioner ordered – a combination of programmatic funding, fees, and preservation.[97] As compensation

[91] Compensation Plan at 33 (Jan. 30, 2019); Freye Direct at 11; Exhibit CMP-9-E.

[92] Compensation Plan at 33 (Jan. 30, 2019).

[93] 38 M.R.S § 480-Z ("Compensation must include the restoration, enhancement, creation or preservation of an area or areas that have functions or values similar to the area impacted by the activity, *unless otherwise approved by the department*.") (emphasis added).

[94] 38 M.R.S § 480-Z(1) ("A compensation project must be located on or adjacent to the project site, *unless otherwise approved by the department*.") (emphasis added).

[95] Compensation Plan at 2 (Jan. 30, 2019).

[96] Compensation Plan at 4, Table 1-2, and Exhibit 1-5B (Jan. 30, 2019).

[97] Permit Order at Appendix F, Table F-2.

for the Project's forested conversion in riparian buffers, and in consultation with DEP and MDIFW, CMP proposed a $200,000 culvert replacement fund in addition to a $180,000 fee to the Maine Endangered and Nongame Wildlife Fund and the preservation of 12.02 miles of streams in the Grand Falls, Lower Enchanted, and Basin Tracts in excess of the 11.02 linear miles of forested conversion impact to streams. At no point during its review of CMP's proposed compensation did MDIFW voice concerns over the use or amount of culvert funding as compensatory mitigation for Project impacts to coldwater fisheries.[98] And the record supports such funding; for example, TNC recognized the benefits of replacing undersized culverts using Stream Smart principles to improve habitat connectivity, as proposed by CMP.[99] CMP further committed to work with MDIFW and cooperating nongovernmental organizations to conduct a qualitative assessment to determine the most beneficial use of the proposed funding.[100] The Commissioner's determination that "replacing 25 culverts, *when viewed in light of the mitigation and conservation noted above*, would adequately compensate for project impacts to coldwater fisheries"[101] is well within the DEP's discretion under NRPA and provides diverse compensation for forested conversion in riparian buffers via fees and preservation, as contemplated under NRPA.

Nevertheless, and despite a nearly ten-fold increase in the culvert replacement fund from what CMP proposed, NRCM stubbornly maintains that the proposed amount is not sufficient. NRCM Appeal at 19. But the fee the Commissioner ordered is precisely the fee that NRCM recommended. In the underlying proceeding, NRCM's witness argued that culvert replacement

[98] Johnston Rebuttal at 11-12, 14-15; Goodwin Direct at 23.

[99] TNC Direct at 8; *see also* Reardon Direct at 23-24.

[100] Johnston Rebuttal at 11, 14-15.

[101] Permit Order at 85 (emphasis added).

projects "improve function in intact streams fragmented by culverts," but that CMP's proposed "$200,000 is an insufficient amount of money to address more than a few culverts."[102] NRCM's witness stated that a better cost estimate for culvert projects is $50,000 to $100,000 per culvert, and that such costs may be lower if the culverts to be replaced are on logging roads.[103] The DEP agreed, stating that it "finds the Reardon testimony on culvert replacement costs to be credible"[104] and ordering CMP to set aside $1,875,000 to fund approximately 25 culvert replacement projects.[105] NRCM now inexplicably back-peddles, arguing to the Board that on logging roads, which are the predominant road systems in Segment 1, "culvert replacement costs would almost certainly exceed the $50,000-$100,000 range cited" by its own witness. NRCM Appeal at 19. Despite NRCM's contradiction of its own record testimony, the Commissioner's ordered compensation for the Project's indirect impact to coldwater fisheries is supported by the record evidence.

B. The record supports mitigation of potential habitat fragmentation impacts with a narrower corridor, tapered vegetation, and taller poles.

1. The ordered vegetation management mitigates potential habitat fragmentation.

NRCM and West Forks allege that the mitigation the Commissioner ordered – vegetation management in Segment 1 and land conservation – is insufficient to address impacts to wildlife habitat, particularly resulting from habitat fragmentation.[106] NRCM Appeal at 20-26; West

[102] NRCM Initial Post-Hearing Brief at 63-64.

[103] Reardon Direct at 23-24; Permit Order at 69 and 86 (citing NRCM witness Reardon).

[104] Permit Order at 86.

[105] *Id.* at 2.

[106] Appellants' claims of habitat fragmentation resulting from the transmission corridor are overstated. The record shows that CMP employs integrated vegetation management (IVM) practices, which have been adopted by federal agencies as the best practices standard for utility rights-of-way, for vegetation management. "IVM is recognized as a

Forks Appeal at 5-7, 9-13. The Permit Order – a comprehensive and extensive document that specifically sets forth the arguments of the parties and the DEP's reasoned findings and conclusions addressing those arguments – belies this allegation.

Based on the testimony of NRCM's and other witnesses, the Commissioner found that mitigation additional to the project improvements to which CMP committed – maintaining taller vegetation in the Upper Kennebec Deer Wintering Area, maintaining full-height canopy at Gold Brook and Mountain Brook, maintaining tapered vegetation in the areas visible from Coburn Mountain and Rock Pond, and expanding to 100 feet riparian filter areas on coldwater fishery streams – was necessary to satisfy the Chapter 375 § 15 protection of wildlife and fisheries standards, stating that "This finding is supported by testimony from Group 4 [including NRCM] and Group 6 intervenors."[107] Accordingly, the Commissioner ordered tapering, taller vegetation, and conservation conditions developed in large part based on Appellants' own witness testimony, concluding that the mitigation ordered sufficiently mitigated the harm NRCM and West Forks continue to allege.[108]

practice that reduces impacts on land, water, habitat and wildlife while meeting the goals of providing reliable and safe electrical service. According to the EPA, 'the IVM approach can create natural, diverse, and sustaining ecosystems, such as a meadow transition habitat. These transition landscapes, in turn, reduce wildlife habitat fragmentation and allow species to be geographically diverse, remaining in areas from which they might otherwise be excluded. A variety of wildlife species (including threatened and endangered species) consider these habitats home, such as butterflies, songbirds, small mammals, and deer. These habitats also encourage the growth of native plant species and can increase plant diversity.' IVM optimizes wildlife habitat potential and produces a soft edge effect which lessens the impact of fragmentation." Goodwin Direct at 16-17 (quoting from https://www.epa.gov/pesp/benefits-integrated-vegetation-management-ivm-rights-way#benefit and citing Bramble, W.C., and W.R. Byrnes. 1996. Integrated vegetation management of an electric utility right-of-way ecosystem. Down to Earth 51(1):29-34).

[107] Permit Order at 76.

[108] *See, e.g., id.* at 75-82.

The mitigation methods of tapering and taller vegetation were thoroughly addressed in written and live testimony and filings before the DEP. In its Tenth Procedural Order, the DEP requested the filing of evidence relating to the appropriate mitigation methods:

> Whether undergrounding, tapering, or taller pole structures in areas identified during the hearing as environmentally sensitive or of special concern (for example, The Nature Conservancy's nine identified areas, Trout Unlimited's mention of Tomhegan Stream, and other specific wildlife corridors identified by parties) are technically feasible and economically viable minimization or mitigation measures. Also, whether any of these techniques would satisfy concerns raised at the hearing or be a preferred alternative.[109]

Specifically, the DEP requested evidence on (among other topics) whether taller poles and travel corridors could provide enough of a link between the habitat on both sides of the corridor for species like the pine marten, whether travel corridors must be located within a certain distance of the poles and what the minimum width would be of the travel corridors in order for species like the pine marten to use them, whether tapering would adequately reduce forest fragmentation, and identifying locations where tapering or taller poles would be preferred.[110] In response, Groups 3, 4 (which includes NRCM), and 6, as well as CMP, filed hundreds of pages of testimony and evidence on these topics.[111] The DEP further requested that the parties be prepared to discuss these topics at the May 9, 2019 hearing, which they did.[112] Also at the hearing DEP requested additional information on these topics, which Group 6 (TNC) and CMP filed on May 17, 2019.[113]

[109] Tenth Procedural Order at ¶ 2 and Appendix A.

[110] *Id.* at Appendix A.

[111] *See* Supplemental Testimony filed May 1, 2019.

[112] Tenth Procedural Order at ¶ 3; Hearing Day 6 Transcript.

[113] CMP's Response to DEP's May 9, 2019 Additional Information Request (May 17, 2019).

Contrary to the assertions of NRCM and West Forks, this substantial record demonstrates that tapering (and the resulting narrower corridor) and taller vegetation can mitigate impacts to wildlife habitat and address forest fragmentation. NRCM Appeal at 21; West Forks Appeal at 6. Indeed, tapering is used along powerline corridors to ease transitions "and thereby reduce edge effect."[114] NRCM's witness admitted that tapering "could have some limited benefit in reducing edge effects by reducing the penetration of light and wind into the adjacent forest."[115] CMP testified that tapering could be useful in areas having higher value wildlife features that are known to be used as travel corridors, and specifically analyzed the benefits of tapering in TNC's 9 priority areas.[116] Furthermore, the record established precisely how tapering would be achieved,[117] contrary to NRCM's suggestion otherwise. NRCM Appeal at 22. Tapering, which would consist of the maintenance of the wire zone, is described in Exhibits 10-1 and 10-2 of CMP's Site Law application with taller trees being allowed to grow outside the wire zone.[118] This record evidence supports the DEP's determination that "[t]he reduction in clearing and narrowing of the scrub-shrub area within the tapered corridor, and taller vegetation along the sides of the corridor, will substantially reduce the impacts on wildlife."[119]

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[114] Giumarro Supplemental at 6 (citing Gates, J. E. 1991. *Powerline Corridors, Edge Effects, and Wildlife in Forested Landscapes of the Central Appalachians*. Pages 12-32 in J. E. Rodiek, and E. G. Bolen, eds. *Wildlife and habitats in managed landscapes*. Island Press, Washington, D. C.).

[115] Hearing Day 6 Transcript at 77:10-13 (Publicover); *see also* Hearing Day 6 Transcript at 130:4-8 (Simons-Legaard) (noting that creating a softer edge through tapering could have a benefit to species that have small home ranges like forest interior birds).

[116] Goodwin supplemental at 5; Hearing Day 6 Transcript at 233:15-234:8 (Goodwin).

[117] Hearing Day 6 Transcript at 242:2-243:21, 283:4-284:8, 314:2-315:7 (Mirabile); Hearing Day 6 Transcript at 415:24-416:3 (Dickinson).

[118] Goodwin Supplemental at 2; Mirabile Supplemental at 1-3; *See* CMP Response to MDEP May 9, 2019 Additional Information Request Attachment B.

[119] Permit Order at 77.

So too does the record support the taller vegetation that the DEP ordered in the 12 Wildlife Areas.[120] TNC's (Group 6) witnesses testified as to the effectiveness of tapering with taller poles to mitigate habitat fragmentation.[121] Dr. Simons-Legaard, whom NRCM cites extensively (NRCM Appeal at 23-24), stated that both tapering and taller poles to allow for taller vegetation could be beneficial in some Project areas:

> Tapering, combined with wildlife travel corridors, could be somewhat beneficial for interior forest nesting birds-especially if applied in areas that are primarily coniferous-as well as for some amphibians. However, raising pole heights to allow for full forest canopy would be even more beneficial for these species. Tapering may be a reasonable alternative in areas with existing young forest coupled with scenic/visibility concerns. Standard pole heights and vegetation management may be appropriate in areas where the transmission line crosses open wetlands.[122]

Dr. Simons-Legaard went on to recommend that taller poles would be preferable, but that "the condition of the forest adjacent to the transmission lines is critical for species such as pine marten."[123] Accordingly, mitigation through taller poles should be "targeted to locations more likely to retain mature forest on either side of the corridor,"[124] such as TNC priority areas 8 and 9.[125] In response to the DEP's questioning at the hearing, Dr. Simons-Legaard filed a series of

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[120] *Id.* at Table C-1.

[121] Hearing Day 6 Transcript at 137:11-16 (Wood) (testifying that taller poles "to allow vegetation up over 30 feet under the wires and in conjunction with tapering the wildlife traveling corridors you could wind up with, you know, significant mature forests under the wires.").

[122] Simons-Legaard Supplemental at 2.

[123] *Id.* at 3.

[124] *Id.*; *see also* Hearing Day 6 Transcript at 143:4-11 (Simons-Legaard) (responding to Commissioner Reid's request for recommendations as to how the DEP should assess the optimal locations for travel corridors to benefit marten, that "considering where the larger remaining patches of mature forest are on other side [*sic*] would be the best place to start.").

[125] Hearing Day 6 Transcript at 145:11-25 (Simons-Legaard). CMP's witness Gino Giumarro agreed, testifying that the habitat benefit of taller poles "is predicated on there being habitat on both sides of the corridor for species like pine marten." Giumarro Supplemental at 2. The 12 Wildlife Areas identified by DEP overlap with TNC's 9 priority areas. *See supra*, n.52. Wildlife Area 9 includes Tomhegan Stream and part of TNC area 8; and Wildlife Area 10 crosses Moxie stream and is within TNC area 9; and Wildlife Area 11 and most of Wildlife Area 12 are within TNC area 9. Permit Order at 79, n.31-32.

maps that show such locations.[126] Because TNC testified that "vegetation 30 feet or higher ... obviously will provide some habitat benefit,"[127] and because TNC identified areas of forest in which such taller vegetation would mitigate habitat fragmentation,[128] the DEP's ordering of a minimum 35-foot vegetation height in 12 designated Wildlife Areas, that total approximately 14.08 miles along the Segment 1 corridor, is fully supported by the record.[129] NRCM's concerns as to the viability of taller vegetation in the 12 Wildlife Areas are contrary to the record evidence. NRCM Appeal at 23-26.

Furthermore, West Forks' confusing statement that "fragmentation cannot be buffered from the existing recreational uses and natural resources within the P-RR subdistricts" misstates the standard. West Forks Appeal at 6. The Maine Land Use Planning Commission's review standard relevant to buffering within its P-RR subdistrict is whether "the use can be buffered from those other uses and resources within the subdistrict with which it is incompatible." LUPC Regs. Ch. 10 § 10.23(I)(3)(d). Indeed, the Project as designed was adequately visually buffered from those other uses and resources within the LUPC's two P-RR subdistricts because no portion of the Project will be visible within or from the P-RR subdistrict on either side of the Kennebec river and because CMP proposed plantings at Joe's Hole (Moxie Pond) where the Appalachian Trail crosses the Project.[130] And the vegetation management the Commissioner ordered provides

[126] Simons-Legaard Supplemental Maps (May 17, 2019).

[127] Hearing Day 6 Transcript at 137:7-8 (Wood).

[128] Simons-Legaard Supplemental Maps (May 17, 2019).

[129] Permit Order at 79-80.

[130] Site Law Certification SLC-9 at 24-28.

more than ample buffer strips to allow for the movement of wildlife within its habitat, as the record demonstrates.[131]

Finally, NRCM's and West Forks' complaint that conservation of 40,000 acres of land in the vicinity of Segment 1 is insufficient and does not meet the requirements of the Site Law is unfounded. NRCM Appeal at 26; West Forks Appeal at 7, 12-13. First and foremost, the Site Law does not require any form of compensation, including land conservation. Instead, the land conservation ordered is above and beyond the compensatory mitigation required under NRPA. 38 M.R.S § 480-Z. The DEP ordered such land conservation at the recommendation of TNC, whose witness Dr. Simons-Legaard testified that "the cumulative impacts of the transmission line cannot be entirely mitigated by onsite actions," and thus, "[r]egardless of the avoidance and minimization measures utilized, there will be unavoidable impacts that should be compensated through a fund for land conservation in the region, and that compensation should include considerations for retaining large patches of mature forestland."[132]

As to the appropriate amount of such land conservation, TNC's witness Wood testified that, using the DEP's 8:1 compensation ratio for similar habitat impacts,[133] a "rough estimate" of 40,000 acres of additional land conservation to mitigate the impacts of habitat fragmentation is appropriate.[134] Notably, TNC recommended such amount only "if there were no additional mitigation," explaining that TNC prioritizes avoidance and minimization efforts and

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[131] *See, e.g.*, DEP Order at C-5 (ordering deer travel corridors); Goodwin Direct at 19; Exhibit CMP-3-G; Giumarro Supplemental at 6; Simons-Legaard Supplemental at 2; Hearing Day 6 Transcript at 130:4-8 (Simons-Legaard) (noting that creating a softer edge through tapering could have a benefit to species that have small home ranges like forest interior birds).

[132] Simons-Legaard Supplemental at 3.

[133] *See, e.g.,* Ch. 310, § 5(C)(5)(c) (requiring an 8:1 ratio for compensation for wetlands impacts) and Ch. 335, § 3(D)(3)(b) (requiring an 8:1 ratio for compensation for SWH impacts).

[134] Hearing Day 6 Transcript at 143:18-144:15 (Wood).

recommends land conservation "if there are residual impacts."[135] As to the appropriate location of such land conservation, TNC recommended that any such land conservation be "in the region"[136] and directed "toward where there is currently mature forests that could support marten populations and all of the species that fall under that umbrella."[137] The DEP's use of an 8:1 impact multiplier to determine the appropriate amount of land conservation, as well as its requirement that such land conservation be in the vicinity of Segment 1 in areas with large habitat blocks of at least 5,000 acres (unless adjacent to existing conserved land), is fully supported by the record evidence and supports the goal of compensation for the Project's potential fragmenting effect.[138]

2. The Commissioner's order of a narrower corridor, tapered vegetation, and taller poles is consistent with federal standards.

NextEra fabricates a DEP obligation to consider North American Electric Reliability Corporation (NERC) requirements that are well beyond the scope of DEP's statutory duties or the applicable approval standards. NextEra Appeal at 7-9. NextEra fails to include a citation to any DEP rule or law that requires compliance with NERC standards, because none exists. DEP in fact has no duty or authority to determine whether its conditions "conflict with federal law." NextEra Appeal at 8. Rather, DEP must apply the requirements of the applicable Maine laws and rules.

Nevertheless, CMP maintained throughout the entire permitting process a commitment "to remove woody vegetation capable of encroaching into the Minimum Vegetation Clearance

[135] *Id.*

[136] Simons-Legaard Supplemental at 3.

[137] Hearing Day 6 Transcript at 143:15-145:5 (Wood).

[138] Permit Order at 80-81.

Distance (MVCD) of the new transmission lines to facilitate construction and maintain the integrity and safe operation of the transmission line consistent with the standards of North American Electric Reliability Corporation's (NERC) Transmission Vegetation Management."[139] Accordingly, regardless of the vegetation management ultimately ordered, CMP committed to maintain the integrity and safe operation of the Project consistent with NERC standards. That is CMP's responsibility, not DEP's.

Nor is the record devoid of "record evidence showing whether these conditions are consistent with federal law, specifically North American Electric Reliability Corporation Reliability Standards FAC-003-4." NextEra Appeal at 8. To the contrary, the record shows that the Project was designed to exceed the NERC minimum clearance from vegetation to the energized wire zone, no pole height increases are required to satisfy the Permit Order's tapering requirement, and the vegetation management methods set forth in the Permit Order do not impact the energized wire zone.[140]

Accordingly, CMP can and will comply with both NERC FAC-003-4 and the Permit Order. NextEra's assertions to the contrary should be disregarded, and are not within the purview of the DEP in any event.

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[139] *See* Site Law Application Plan for Protection of Sensitive Natural Resources During Initial Vegetation Clearing (VCP), Exhibit 10-1 at 1; Site Law Application Post-Construction Vegetation Maintenance Plan (VMP), Exhibit 10-2 at 1-2 (Sept. 27, 2017); CMP Response to DEP Additional Information Request Attachment J, Revised Exhibit 10-1 at 2 (Dec. 7, 2018 and Jan. 30, 2019); *Id.* Revised Exhibit 10-2 at 2.

[140] Hearing Day 6 Transcript at 283:4-285:5, 314:17-315:7 (Mirabile) (explaining tapering and full-height canopy in the context of the energized wire zone); Hearing Day 6 Transcript at 452:3-456:2 (Achorn) (explaining the typical sag between two 100-foot structures and the feasibility of full-height and taller vegetation without requiring taller structures). *See also* CMP's Response to DEP's May 9, 2019 Additional Information Request at 2 and Attachment B (May 17, 2019).

C. The DEP allowed and considered evidence of the Project's impact on greenhouse gases.

NRCM's complaint that the DEP excluded evidence on and analysis of GHG impacts, and that the DEP relied on CMP's representations of climate benefits without independent assessment, is patently false. NRCM Appeal at 32-34. While NRCM's January 24, 2019 written request to include GHG emissions as a hearing topic was denied,[141] the Presiding Officer allowed the parties to submit written evidence on this issue into the record, determining that "[t]he issue can be adequately addressed through written submissions."[142] The Presiding Officer thus allowed the parties and the general public to submit evidence on GHGs, "which may include, for example, comments, data, and reports, until the close of the record."[143] NRCM availed itself of this opportunity, filing extensive comments on May 9, 2019, to which CMP responded on May 24, 2019.[144]

[141] DEP Third Procedural Order at 3-4.

[142] *Id.* at 4. The issue of whether GHGs should be included as a topic at the hearing was fully briefed in the underlying proceeding. Parties who requested the addition of greenhouse gases and climate change to the topics to be addressed at the hearing were provided until January 24, 2019, to submit such a request in writing, which NRCM did (later joined by West Forks). Parties who wished to respond to these requests were given until January 31, 2019 to file a response, which CMP did. The Presiding Officer declined to include GHGs as a hearing topic, reserving the hearing instead for "major" approval criteria: scenic character and existing uses, wildlife habitat and fisheries, alternatives analysis, and compensation and mitigation. Third Procedural Order at 3-4.

GHGs and climate change are not approval criteria and thus were appropriately addressed through written evidence. The Chapter 375, Sections 1 and 2, "air quality" and "climate" criteria, as concluded by Assistant Attorney General Bensinger, are limited to consideration of impacts from the specific development being proposed, and whether it would have climate impacts "in the vicinity of" the development's location. In other words, the rule limits consideration of climate impacts to any such impacts that result from the development itself, in its location – not from distant benefits or impacts attributable to a product that will pass through the development (such as electricity or goods sold at a store). Accordingly, GHG benefits are not an approval criterion but instead relevant only to the DEP's balancing of the reasonableness of impact, and in that balancing GHGs are but one of numerous considerations of reasonableness.

[143] DEP Third Procedural Order at 4.

[144] CMP provided additional evidence on the GHG emissions benefits of the Project on January 29, 2019, March 25, 2019 and April 24, 2019.

In its May 9 comments, NRCM argued that "the Department must include greenhouse gas emissions as part of its permitting decision" and that CMP has claimed that the Project will reduce carbon emissions "without providing proof that the reductions are real."[145] At the behest of NRCM, DEP did indeed include consideration of GHG emissions in its Permit Order[146] and weighed the substantial amount of evidence submitted by NRCM, CMP, and members of the public that overwhelmingly demonstrate the GHG emissions reduction benefits of the Project.[147] In fact, the Commissioner expressly stated that "[t]he Department reviewed documents in the PUC's proceeding," which include several independent studies and testimony discrediting the same arguments NRCM raises here.[148] The PUC's finding that the Project would result in a reduction of greenhouse gas emissions, which NRCM complains the DEP relies on too heavily,[149] was recently affirmed by the Maine Law Court. *NextEra Energy Res., LLC v. Maine PUC*, 2020 ME 34, ¶¶ 30, 36-38, 227 A.3d 1117, 1125-26 (2020) ("The Commission's conclusions regarding the NECEC project and Maine's Renewable Energy Goals were

[145] NRCM's Comments on the lack of carbon benefits from the New England Clean Energy Connect at 1 (May 9, 2019).

[146] Permit Order at 12, 35, 70, 104-105.

[147] *Id.*

[148] Permit Order at 105. The DEP, PUC, and the myriad other agencies and courts that have considered the Project's GHG impacts examined extensive evidence – on the same claims NRCM raises again before the Board – and uniformly rejected those claims. *See supra*, n.32-35; NRCM Appeal at 32-33. The record here mandates the same outcome. *See, e.g.,* PUC CPCN Order at 69-72 (May 3, 2019); Comments of CMP Regarding Greenhouse Gas Emissions at 2-11 (Mar. 25, 2019); Response of CMP to the Group 4 May 9, 2019 Comments Regarding Greenhouse Gas Emissions Reductions at 4-18 (May 24, 2019); Phillips, Bruce, *Fully Decarbonizing the New England Electric System; Implications for New Reservoir Hydro* (Jan. 31, 2019) (submitted by CMP on April 24, 2019). In fact, the GHG modeling analyses of NRCM's own consultant, Energyzt, demonstrate that the Project will reduce carbon emissions throughout the larger Northeast region if the NECEC energy is assumed to be incremental, which the PUC determined it is. Response of CMP to the Group 4 May 9, 2019 Comments Regarding Greenhouse Gas Emissions Reductions at 8-18 (May 24, 2019). NRCM never offered the Energyzt report containing these analyses as evidence in the PUC proceeding or the DEP proceeding, and instead continued in those proceedings to make its baseless claims that the Project has no GHG emissions benefits. *Id.*

[149] NRCM Appeal at 32.

reasonable and consistent with the law").[150] Disappointed with this result, NRCM claims that the DEP "excluded evidence on and analysis of the greenhouse gas impacts." NRCM Appeal at 33. The record shows otherwise.

D. The record supports the Commissioner's decommissioning requirements.

West Forks complains that the record does not support the Commissioner's condition requiring decommissioning of Segment 1 when this portion of the Project reaches the end of its useful life. West Forks Appeal at 15-17. This complaint is ironic, given that West Forks objected to precisely this type of evidence at the hearing.[151] In any event, no statute or rule requires a decommissioning plan or evidence of financial or technical capacity to ultimately decommission a transmission line project in a Site Law or NRPA application. West Forks extends the DEP's Chapter 373 requirement that an applicant must demonstrate financial and technical capacity to obtain a Site Law permit to the possible eventual dismantling of that Project. But the rules do not deal in such hypotheticals, and instead require demonstration of financial capacity and technical ability "to design, construct, operate and maintain the development"[152] – not to decommission the project at the end of its productive life. For this reason, typically transmission project proposals do not include a decommissioning plan.[153]

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[150] The U.S. District Court for the District of Maine reached the same conclusion. Order on Motion for Preliminary Injunction, *Sierra Club, et al. v. U.S. Army Corps of Eng'rs, et al.*, Case No. 2:20-cv-00396-LEW, Order at 49, ECF No. 42 (D. Me. Dec. 16, 2020) (**"the Project will benefit Maine in a variety of ways, including by . . . reducing greenhouse gas emissions."**). So too did the Massachusetts Department of Public Utilities and the Massachusetts Supreme Judicial Court reach that conclusion. Order of Massachusetts Department of Public Utilities, D.P.U. 18-64; 18-65; 18-66 at 65 (Mass. D.P.U. June 25, 2019) (**"[T]he Department finds that the firm hydroelectric power delivered . . . will create steady GHG emissions reduction benefits to Massachusetts."**), *affirmed, NextEra Energy Resources, LLC v. Dept. of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48 (2020).

[151] Hearing Day 1 Transcript at 97:23-98:19 (the Presiding Officer overruled West Forks counsel Boepple's objection to CMP witness testimony that "Eventually the project is going to be decommissioned, the poles will be taken up, the wire will be rolled up and . . .").

[152] DEP Regs. Ch. 373 § 1.

[153] Hearing Day 1 Transcript at 137:5-138:2 (Dickinson).

Nevertheless, CMP and NECEC LLC do not challenge the Commissioner's decommissioning condition, and the record demonstrates that NECEC LLC has the financial and technical capacity for decommissioning Segment 1.[154]

IV. CMP performed a fulsome and sufficient alternatives analysis.

It is important to understand that CMP was under no obligation to analyze alternatives that are too remote, speculative, or impractical to pass the threshold test of reasonableness. To the contrary, an applicant must determine the least environmentally damaging practicable alternative only among those alternatives that are reasonable. DEP Rule Chapters 310, 315, and 335 required CMP to demonstrate that there is no "practicable alternative to the activity" that "would be less damaging to the environment" or "will have less visual impact."[155] "Practicable" is defined as "[a]vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project."[156] It was and remains so obvious that undergrounding the Project would not be practicable that CMP did not initially include it as an alternative in its permit applications.[157]

Nevertheless, the record shows that the underground alternatives Appellants push – which were the subject of multiple days of hearing testimony, hundreds of pages of pre-filed testimony and evidence, and briefing by the parties – are not practicable and that there is no other practicable alternative that would meet the project purpose and have less environmental impact.

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[154] *See* Transfer Application Attachment A (listing decommissioning costs as an included operational expense), Attachment B (providing proof of availability and commitment of funds "for NECEC LLC to acquire the project from CMP and for construction and operation of the NECEC Project as approved"), and Attachment C (demonstrating NECEC LLC's technical ability to comply with the terms of the Permit Order).

[155] DEP Reg. Ch. 310 §§ 5(A), 5(D), 9; DEP Reg. Ch. 315 § 9; DEP Reg. Ch. 335 § 3(A).

[156] DEP Reg. Ch. 310 § 3(R); DEP Reg. Ch. 315 § 5(D); DEP Reg. Ch. 335 § 2(D).

[157] Bardwell Rebuttal at 3; Hearing Day 6 Transcript at 347:20-348:23 (Tribbet).

A. The record demonstrates that undergrounding alternatives are not practicable.

Just as they did in the underlying proceeding, Appellants focus their alternatives analysis complaints on the impracticable undergrounding alternative, relying on NextEra's discredited witness on transmission line undergrounding. NRCM Appeal at 27-32; NextEra Appeal at 4-7; West Forks Appeal at 7-9. The record shows, however, that the extremely high cost, logistical difficulties, visual impact, negligible environmental benefits, increased risk and adverse impacts during construction, and potential adverse impacts during operation render any additional undergrounding not practicable or appropriate.[158] Indeed, numerous intervenor witnesses testified that undergrounding is not a preferred alternative due to their concerns with the environmental and visual impacts of undergrounding.[159] Crucially, burying any additional portion of the NECEC HVDC line underground in the 54-mile new corridor of Segment 1 is not reasonable or feasible because the costs and logistics of doing so would defeat the purpose of the Project.[160]

Taking costs first, the alternative of burying the transmission line is not practicable because it would result in the Project not moving forward.[161] West Forks' jumbled argument that because no Maine ratepayers will bear the costs of the Project, the DEP inappropriately

[158] Bardwell Rebuttal at 3-16, 23-27; Tribbet Rebuttal at 5; Freye Rebuttal at 5-6; Bardwell Supplemental at 2-8; Hearing Day 1 Transcript at 265:16-266:12, 266:13-23, 289:20-290:9 (Mirabile); Hearing Day 3 Transcript at 192: 12-14 (Warren); Hearing Day 6 Transcript at 341:5-344:22, 431:7-432:4 (Bardwell); Hearing Day 6 Transcript at 346:23-347:1 (Tribbet); Hearing Day 6 Transcript at 432:5-12 (Achorn); Hearing Day 6 Transcript at 445:7-447:12 (Paquette); Exhibits CMP-11-A through CMP-11.1-G.

[159] Publicover Supplemental at 2-3; Hearing Day 5 Transcript at 94:13-95:14, 97:16-98:15 (Cutko); Hearing Day 6 Transcript at 61:4-25, 78:23 (Publicover); Hearing Day 6 Transcript at 72:12-14 (Reardon). *See also* Bardwell Rebuttal at 21-27.

[160] Dickinson Rebuttal at 2-3, 9-10, 13; Tribbet Rebuttal at 5; Tribbet Supplemental at 4-6; Hearing Day 1 Transcript at 285:13-287:3 (Dickinson).

[161] Dickinson Rebuttal at 13; Hearing Day 1 Transcript at 248:12-15 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

considered the costs of undergrounding in its alternatives analysis, has no merit. West Forks Appeal at 7-8. West Forks argues that "because the NECEC Project Purpose includes 'at the lowest cost to ratepayers' and CMP testified that no NECEC costs would be passed to ratepayers," the DEP should not have considered the cost of undergrounding in determining whether that alternative is practicable. *Id.* But the record clearly shows that while no costs will be passed on to *Maine* ratepayers, *Massachusetts* ratepayers will bear the costs of the Project, which the Commissioner recognized.[162]

It appears that West Forks is trying to argue that because the Project CMP bid into the Massachusetts Request for Proposals for Long-Term Contracts for Clean Energy Projects (RFP) is fixed, any Project costs that were not part of that fixed bid would not be borne by ratepayers. That is beside the point. Burial of additional portions of the Project would have rendered the Project so expensive for Massachusetts ratepayers that it would not have been selected by the Massachusetts Department of Energy Resources and Electric Distribution Companies of Massachusetts (EDCs) and would not have moved forward – it would not have met its overall purpose.[163] Because the excessive costs of undergrounding would not meet the Project purpose or otherwise be practicable, CMP did not consider undergrounding in its Project design bid submitted in response to the RFP.[164] Intervenor evidence provided at the hearing confirmed

[162] Permit Order at 15 ("the proposed project's costs will be recovered from Hydro-Quebec and Massachusetts electricity ratepayers in accordance with Federal Energy Regulatory Commission-approved transmission service agreements."). CMP had to propose a relatively low-cost option in order for the Project to be selected by the Massachusetts EDCs.

[163] Hearing Day 1 Transcript at 248:12-15 (Dickinson); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

[164] Bardwell Rebuttal at 3; Hearing Day 6 Transcript at 347:20-348:23 (Tribbet).

CMP's obvious conclusion that undergrounding is a "fruitless option" that would not have met the Project purpose from the get-go.[165]

Despite the impracticability of undergrounding, as the cost of doing so would mean that the Project would not have moved forward[166] and the logistics of doing so would render any analysis futile,[167] CMP conducted a thorough underground alternatives analysis in response to the testimony of West Forks' and NextEra's witnesses.[168] This analysis irrefutably confirmed CMP's initial determination that undergrounding the Project, or even portions of the Project beyond the proposed undergrounding at the upper Kennebec River, is not reasonable, and therefore also could not be "practicable," because the costs of doing so would have defeated the

[165] Paquette Surrebuttal at 3-4, 7, 16-17. Undergrounding the Project is cost-prohibitive even when factored into Project costs after the Project was selected in the RFP. "In general, underground construction costs five to seven times and much as overhead construction. Specific site conditions such as shallow rock and wetlands crossing can increase that price difference significantly." Bardwell 341:18-20. CMP determined that undergrounding the entire line utilizing the current route, undergrounding the entire line using an alternative route, and undergrounding only in Segment 1 would result in an incremental project cost of $750 million to $1.9 billion to the currently proposed $950 million NECEC Project. Bardwell Rebuttal at 11; Exhibit CMP-11-B, CMP-11-C, and CMP-11-D. "This would result in a total project cost of 1.6 to 2.8 billion dollars." Hearing Day 6 Transcript at 348:15-23 (Tribbet); Hearing Day 6 Transcript at 371:2-372:5 (Dickinson); Tribbet Rebuttal at 5.

[166] Hearing Day 1 Transcript at 248:12-15 (Dickinson); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

[167] Paquette Surrebuttal at 4 ("CMP was correct in not initially considering an underground alternative for Segment 1 from a legal perspective, i.e., doing a full-blown regulatory alternatives analysis, because based on initial engineering considerations it could reasonably be determined that undergrounding would not work for myriad reasons associated with practicability, including cost, transportation logistics, and construction challenges, many of which would increase negative environmental impacts compared to an overhead line. One of the most important criteria in determining the ability to install an HVDC cable underground is location. Segment 1's relative remoteness, topography, geology, hydrology, and long stretches of ROW between access points make it inherently unsuitable for burying an HVDC cable. Engineering and other power line construction professionals are or should be aware of these factors, especially as they present in Segment 1, and would not want to invest scarce time, money, and resources in analyzing a fruitless option.").

[168] *See* Bardwell Rebuttal; Tribbet Rebuttal; Bardwell Supplemental.

purpose of the Project.[169] For the same reason, undergrounding in the two other P-RR subdistricts that the Project will cross is not suitable or reasonably available to CMP.[170]

Putting cost aside, the underground proposals offered by the intervenors in this proceeding are not practicable for other reasons as well. For example, NRCM alleges that CMP could bury the NECEC transmission line along the edge of the Spencer Road. NRCM Appeal at 31-32.[171] But Spencer Road is not a public road, and its private owners specifically did not want a transmission line located along the Spencer Road because such a transmission line, whether overhead or underground, would limit the landowner's ability to ditch, blast, create, and use landings, operate heavy equipment, or relocate the road.[172] Despite NRCM's suggestion, Spencer Road is unavailable, whether or not the Project is buried.

NRCM's suggestion that CMP did not analyze the feasibility of co-location along Route 201 also is contradicted by significant evidence of record. NRCM Appeal at 31-32. While Route 201 is a public road, it also is a state and federally designated scenic byway. In any event, "the Maine Department of Transportation [MDOT] will not allow the line to be built in the travel lanes and there is insufficient room alongside the travel lanes to actually install the line."[173] In other words, Route 201 is unavailable due to lack of sufficient space within the highway

[169] Dickinson Rebuttal at 2-3, 9-10, 13; Tribbet Rebuttal at 5; Tribbet Supplemental at 4-6; Hearing Day 1 Transcript at 248:12-15, 285:13-287:3 (Dickinson); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

[170] Bardwell Rebuttal at 3-16, 23-27; Tribbet Rebuttal at 5; Freye Rebuttal at 5-6; Bardwell Supplemental at 2-8; Hearing Day 1 Transcript at 265:16-266:12, 266:13-23, 289:20-290:9 (Mirabile); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 3 Transcript at 192: 12-14 (Warren); Hearing Day 6 Transcript at 341:5-344:22, 431:7-432:4 (Bardwell); Hearing Day 6 Transcript at 346:23-347:1 (Tribbet); Hearing Day 6 Transcript at 432:5-12 (Achorn); Hearing Day 6 Transcript at 445:7-447:12 (Paquette); Exhibits CMP-11-A through CMP-11.1-G.

[171] *See also* Publicover Direct at 19-20.

[172] Freye Rebuttal at 5; Freye Supplemental at 5-6; Hearing Day 6 Transcript at 338:10-15 (Freye).

[173] Hearing Day 6 Transcript at 407:18-408:8, 409:10-23 (Freye); Hearing Day 6 Transcript at 487:14-19 (Bardwell).

limits,[174] the restrictions MDOT places on such burial and the installation of splicing vaults,[175] safety constraints associated with co-locating with the existing overhead distribution line,[176] and other cost, safety, and environmental issues of doing so.[177] The presence of the existing overhead distribution line in Route 201, "rather than indicating a potential pathway actually means much of the available space is currently occupied."[178] Furthermore, given that the roads in the area of Segment 1 are not straight, cross terrain changes, and are largely privately owned by forest management companies and re-routed frequently, overhead transmission is not practicable.[179]

Furthermore, there is no other corridor available that connects to Québec in the upper Kennebec River area, other than the proposed route.[180] While there is a distribution line from Harris Dam to the village of Jackman (the Jackman Tie Line or JTL), the JTL is entirely roadside

[174] Freye Supplemental at 4; Hearing Day 6 Transcript at 337:22-338:10 (Freye); Hearing Day 6 Transcript at 342:5-343:3, 487:1-19 (Bardwell).

[175] Bardwell Rebuttal at 10; Bardwell Supplemental at 12; Hearing Day 6 Transcript at 487:1-19 (Bardwell).

[176] Freye Supplemental at 5, 7-8.

[177] Freye Rebuttal at 7-8; Freye Supplemental at 5; Hearing Day 6 Transcript at 342:5-343:3 (Bardwell); Hearing Day 6 Transcript at 464:3-23 (Dickinson).

[178] Hearing Day 6 Transcript at 337:25-338:4 (Freye).

[179] The evidence shows that, "particularly in this part of the world where we're looking here where you have a lot of terrain changes, your roads are not straight particularly on private roads, which the owners tend to move frequently or with some regularity and a good example is the Capital Road. You saw the imagery of that where the owner decided to rebuild a bridge and they moved it over by several hundred feet. We know of other forest management owners that have acquired land and completely rebuilt the road system. So putting a piece of infrastructure particularly next to a logging road has a certain amount of risk associated with it." Hearing Day 6 Transcript at 409:10-23 (Freye). Furthermore, "putting any transmission line either overhead or underground along a road is not necessarily a good idea unless you're in some place where the roads are very straight and the land is very flat on either side. The roads tend to be a series of curves and transmission lines -- overhead lines tend to be -- they are a series of straight tangents and when you try to match the two together you end up with angle points that are in wetlands, your pole locations end up in low spots instead of high spots, so it's one of these ideas that people think, oh, this is great, we've got a road, we'll run the overhead transmission line next to it and it's really not good idea from a siting standpoint." Hearing Day 6 Transcript at 407:18-408:8 (Freye).

[180] Freye Supplemental at 2-4.

and does not connect to Québec.[181] The JTL instead terminates in Jackman about 16 miles from the Canadian border and would require new corridor through the towns of Jackman and Moose River as well as additional corridor along Route 201 for the entire distance from Jackman to West Forks Plantation.[182] In addition, the JTL corridor between Harris Dam and Route 201 would need to be expanded through two conservation easements and across the State-owned Cold Stream Forest.[183] Co-location along Route 201 is thus unfeasible and results in new corridor in any event.

Nor is undergrounding available and feasible here simply because other projects have undergrounded portions of transmission line elsewhere, contrary to the assertions of NextEra and NRCM. NextEra Appeal at 4, n.5; NRCM Appeal at 30-31.[184] In the underlying proceeding as well as here, NextEra claimed that undergrounding is technically and logistically feasible based on proposed, but neither developed nor in-state, examples of other projects that would bury a portion of a transmission line.[185] However, the testimony of NextEra's own witness belies these simplistic conclusions,[186] acknowledging that the feasibility of burial depends on "the unique circumstances in geography. Many of them are under water connecting different islands or bodies of water. The design of transmission lines that interconnect systems is very, very site dependent."[187] Furthermore, on questioning at the hearing, NextEra's witness could provide no details on the feasibility of undergrounding as it relates to existing technology and logistics that

[181] Freye Rebuttal at 6; Hearing Day 6 Transcript at 364:23-367:8 (Freye).

[182] Freye Rebuttal at 7; Bardwell Supplemental at 12; Hearing Day 6 Transcript at 364:23-367:8 (Freye).

[183] Freye Rebuttal at 7.

[184] *See also* Group 8 Post-Hearing Brief at 8-12.

[185] Group 8 Post-Hearing Brief at 2-4, 8-9.

[186] *See* Group 3 Post-Hearing Brief at 14-19.

[187] Hearing Day 4 Transcript at 179:24-180:4 (Russo).

are specific to this Project.[188] Indeed, the evidence shows that projects that have undergrounded large portions of transmission line, and which NRCM cites in its appeal, are factually *dissimilar* from the NECEC.[189] NRCM Appeal at 30-31.

The evidence clearly shows that undergrounding is neither available nor feasible considering location, existing technology, and logistics,[190] and is instead a "fruitless option."[191] Furthermore, as described below, undergrounding will not lessen environmental impacts, but instead would cause a continuous surface disruption (rather than intermittent and widely spaced at each overhead structure installation location) that would have a greater fragmenting effect, would require additional control measures for soil erosion, sedimentation, and dust generation during construction, would require permanent access roads to every jointing location along the route, and could only avoid wetlands and waterways by using higher cost and higher risk trenchless methods.[192] The record demonstrates that the extremely high cost, technical feasibility, logistical difficulties, and adverse impacts render any undergrounding beyond the HDD installation at the Kennebec River not practicable.[193] The DEP therefore correctly found that "[r]ecord evidence supports the conclusion that undergrounding in Segment 1 may be so

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[188] *See* Group 3 Post-Hearing Brief at 15-17.

[189] Hearing Day 6 Transcript at 462:2-13 (Bergeron), 473:11-16 (Bensinger) and 463:9-464:2, 473:17-25 (Bardwell) (in response to the questions of Mr. Bergeron and Ms. Bensinger, explaining the differences between the NECEC and other transmission line projects – Northern Pass, Connect New York, TDI Vermont – and why given those differences undergrounding is unfeasible for the NECEC Project).

[190] Bardwell Rebuttal at 9-16; Hearing Day 6 Transcript 341:22-342:1; 355:2-5 (Paquette); 356:11-14; 418:7-15, 431:20-432:4; 443:16-444:20.

[191] Paquette Surrebuttal at 3-4, 7, 16-17.

[192] Bardwell Rebuttal at 12-13; Paquette Surrebuttal at 7-17.

[193] Bardwell Rebuttal at 3-16, 23-27; Tribbet Rebuttal at 5; Freye Rebuttal at 5-6; Bardwell Supplemental at 2-8; Hearing Day 1 Transcript at 265:16-266:12, 266:13-23, 289:20-290:9 (Mirabile); Hearing Day 3 Transcript at 192: 12-14 (Warren); Hearing Day 6 Transcript at 341:5-344:22, 431:7-432:4 (Bardwell); Hearing Day 6 Transcript at 346:23-347:1 (Tribbet); Hearing Day 6 Transcript at 432:5-12 (Achorn); Hearing Day 6 Transcript at 445:7-447:12 (Paquette); Exhibits CMP-11-A through CMP-11.1-G.

technically challenging as to be impracticable. Even if technically practicable, the trenching that undergrounding entails would result in greater impacts to natural resources such as wetlands. Undergrounding also would require a permanent clearing in Segment 1 that is 75 feet in width, almost 50% wider than the corridor clearing approved in this Order."[194]

B. CMP's alternatives analysis considered impacts to natural resources, including as part of its undergrounding analysis.

NextEra claims, and West Forks echoes NextEra's claim, that while the Order describes impacts to natural resources along the Project corridor "the Order and record are silent regarding any CMP analysis of NRPA practicable alternatives (such as undergrounding) to the Preferred Route NRPA Impact." NextEra Appeal at 5-6; West Forks Appeal at 8; *see also* NRCM Appeal at 28-29, 32. West Forks further claims that the DEP ignored evidence on the impact of underground transmission lines on forest fragmentation. West Forks Appeal at 10. These claims are patently false. So too is NextEra's claim that the record is devoid of Section 487-A(4) evidence regarding alternatives to the proposed location and character of the Project that may lessen its impact on the environment or the risks it would engender to the public health or safety, a standard which the Permit Order explicitly references when describing the applicable standards under which it conducted its natural resource impacts review and alternatives analysis. NextEra Appeal at 6-7; Permit Order at 58, 75, and 108. To the contrary, that is precisely what CMP's alternatives analysis, set forth in its 2017 permit applications and further developed throughout the iterative permitting process, accomplishes. CMP's alternatives analysis, and the Permit Order, exhaustively describe the lack of any practicable alternative that would meet the project

[194] Permit Order at 2.

purpose and have less environmental impact, pursuant to the Site Law,[195] NRPA standards,[196] Section 404(b)(1) Guidelines,[197] and LUPC criteria,[198] and also describe the process by which alternatives were developed and evaluated to identify a technically and economically sound solution that avoids and minimizes environmental impacts to achieve the least environmentally damaging practicable alternative, including undergrounding the Project at its upper Kennebec River crossing.[199]

While the three routes that CMP analyzed would meet the Project's purpose, the routes that CMP did not select would result in more environmental impact than the selected corridor route (the Preferred Alternative), [200] as summarized in the following tables.[201]

[195] 38 MRS § 487-A(4).

[196] DEP Regs. Ch. 310 § 5; DEP Regs. Ch. 315 § 9; DEP Regs. Ch. 335 § 3.

[197] 40 CFR § 230.10(a)(2).

[198] LUPC Regs. Ch. 10.23(I)(3)(d)(8).

[199] NRPA Application § 2.0; NRPA Application Amendment for the Kennebec River Horizontal Directional Drill § 2.0; Site Law Application § 25.3.1; Site Law Application Amendment for the Kennebec River Horizontal Directional Drill § 25.3.1.1.

[200] NRPA Application §§ 2.3.2.2 and 2.3.2.3; Mirabile Direct at 18-21; Berube Direct at 6-9. CMP also considered the no-action alternative (i.e., not constructing the NECEC Project), but that alternative would not meet the Project's purpose and need of allowing CMP to deliver 1,200 MW of clean energy generation from Quebec to New England at the lowest cost to ratepayers. NRPA Application § 2.3.1; Berube Direct at 4.

[201] NRPA Application § 2.3.2.2.2 HVDC Alternative 1 Comparison; NRPA Application 2.3.2.3.2 Alternative 2 Comparison.

2.3.2.2.2 HVDC Alternative 1 Comparison

Table 2-1, below, compares the NECEC Preferred Alternative to Alternative 1.

Table 2-1: Comparison of NECEC Preferred Alternative to Alternative 1

Point of Comparison	Unit	Preferred Alternative	Alternative 1
Conserved lands	no./acres	6 parcels/42 acres	8 parcels/275.3 acres
Undeveloped ROW	miles	53.5	93.1
Clearing	acres	1,823	1,934
Parcel count total	no.	7	120
Stream crossings	no.	115	88
Transmission line length	miles	146.5	119.3
NWI mapped wetlands	no./acres	263 wetlands/76.3 acres	238 wetlands/118.3 acres
Deer wintering areas	no./acres	8 DWAs/44.3 acres	8 DWAs/71.3 acres
Inland waterfowl and wading bird habitat	no./acres	12 IWWH/22.7 acres	9 IWWH/23.1 acres
Public water supplies within 500 feet	no.	1	1
Significant sand and gravel aquifers	no.	12	7

2.3.2.3.2 Alternative 2 Comparison

Table 2-2, below, compares the NECEC Preferred Alternative to Alternative 2.

Table 2-2: Comparison of NECEC Preferred Alternative to Alternative 2

Point of Comparison	Unit	Preferred Alternative	Alternative 2
Conserved lands	no./acres	6 parcels/42 acres	9 parcels/53.2 acres
Undeveloped ROW	miles	53.5	17.3
Clearing	acres	1,823	1,670
Parcel count total	no.	7	34
Stream crossings	no.	115	123
Transmission line length	miles	146.5	138.5
NWI mapped wetlands	no./acres	263 wetlands/ 76.3 acres	283 wetlands/ 113.3 acres
Deer wintering areas	no./acres	8 DWAs/44.3 acres	8 DWAs/44 acres
Inland waterfowl and wading bird habitat	no./acres	12 IWWH/22.7 acres	12 IWWH/16.5 acres
Public water supplies within 500 feet	no.	1	1
Significant sand and gravel aquifers	no.	12	10

So too did CMP analyze the environmental and natural resources impact of undergrounding the Project, contrary to NextEra's and West Forks' allegations. NextEra Appeal at 5-6; West Forks Appeal at 10. The evidence shows that underground transmission installations cause a continuous surface disruption (rather than intermittent and widely spaced at each overhead structure installation location), require additional control measures for soil erosion, sedimentation, and dust generation during construction, require permanent access roads to every jointing location along the route, and can only avoid wetlands and waterways by using

higher cost and higher risk trenchless methods.[202] Undergrounding the Project would result in a continuous clearing of an average width of 75 feet, a far greater fragmenting source than the 54-foot scrub shrub Project centerline permitted here.[203] So too does undergrounding require termination stations, access roads for the termination stations, permanent access roads for every jointing location along the route, and vaults that create impervious surface – all environmental impacts that do not arise with overhead transmission lines.[204] Overhead transmission, on the other hand, has minimal impact between structures.[205] Undergrounding therefore does not lessen the Project's impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost.[206]

CMP also considered alternatives to crossing the five outstanding river segments that the Project will cross, and the record shows that no reasonable alternative exists which would have less adverse effect on the natural and recreational features of the river segment for each outstanding river segment the transmission line will cross.[207] This is because there are no reasonable alternatives to undergrounding the upper Kennebec River crossing that would have less adverse effect on that river segment, and because all other outstanding river segment

[202] Bardwell Rebuttal at 12-13; Paquette Surrebuttal at 7-17; Hearing Day 6 Transcript 341:5-7 (Bardwell). CMP also analyzed undergrounding in combination with other mitigation methods, and "has made significant efforts to evaluate and incorporate alternatives into its project design. The most significant example of this is the Upper Kennebec where the project electively decided to implement approximately one mile of underground estimated at approximate incremental cost to the project of $31 million. In addition to this major commitment, the project has also agreed to significant and costly overhead line design alternatives totaling nearly $11 million for a total incremental commitment of $42 million." Hearing Day 6 Transcript 347:20-348:5 (Tribbet).

[203] Bardwell Rebuttal at 12; Bardwell Supplemental at 5; Exhibit CMP-11.1-C; Hearing Day 6 Transcript at 419:24-420:23 (Bardwell) (noting that the clearing area for an underground transmission cable can be as wide as 100 feet).

[204] Bardwell Rebuttal at 12-13; Bardwell Supplemental at 6.

[205] Bardwell Rebuttal at 13.

[206] 38 MRS § 487-A(4).

[207] Site Law Application Amendment for the Kennebec River Horizontal Directional Drill § 25.3.1.1; Segal Direct at 35; Berube Direct at 11-12.

crossings are within existing transmission line corridors, so any alternatives would be in new corridors and would significantly and unreasonably increase clearing and visual impact for those crossings.[208] Crossing at a new location (i.e., a crossing that is not co-located within an existing transmission line corridor) would have a greater adverse impact on the river, and is therefore not reasonable, because such crossing would be a new crossing location. By using the existing ROW, additional clearing in the four outstanding river segments crossed aerially by the Project will be limited to a typical width of 75 feet and impacts will be concentrated in locations where transmission lines already cross the rivers.[209] Nor is undergrounding at the four outstanding river segments crossed aerially by the Project a reasonable alternative, given the prohibitive cost and existing overhead transmission lines at those locations.[210]

Cumulatively, these analyses demonstrate that there are no alternatives to the Project that would lessen its impact on the environment or risks to public health or safety without unreasonably increasing its costs. This evidence is not "conclusory" nor is it deficient, as NextEra claims, and fully satisfies DEP's 38 M.R.S. § 487-A(4) duty to receive and consider evidence regarding the location, character, and impact of the Project. Indeed, this evidence demonstrates that that there is no "practicable alternative to the activity" that "would be less damaging to the environment" or "will have less visual impact."[211] The Project does necessarily result in some impact, as all projects that trigger DEP permitting do, but the record clearly shows that this impact is less than that of the reasonable and practicable alternatives. Appellants'

[208] Segal Direct at 35; Berube Direct at 11-12.

[209] Segal Direct at 35.

[210] Mirabile Direct at 26; Goodwin Direct at 24-25; Segal Direct at 3, 34-36; Berube Direct at 11-12; Bardwell Rebuttal at 23-24.

[211] DEP Reg. Ch. 310 §§ 5(A), 5(D), 9; DEP Reg. Ch. 315 § 9; DEP Reg. Ch. 335 §§ 3(A), 5(A).

preferred alternative would be no project at all – their parochial position is that any impact is unreasonable impact. This simply is untenable, given the growing and existential climate change threat to Maine's natural environment.

V. A hearing before the Board is unwarranted.

A hearing on the Permit Order is unwarranted and would result in the waste of the Board's and public's resources. Over the course of the DEP's years-long regulatory review, which extended from September 2017 to May 2020 and included six days of evidentiary hearings and two nights of public testimony by hundreds of Maine citizens, hundreds of written comments, sworn testimony from and cross-examination of dozens of witnesses, and extensive briefing on the interpretation and application of relevant permitting criteria, the DEP developed an administrative record stretching tens of thousands of pages. The breadth of this record is matched only in its depth, particularly on the issues that are the subject of these appeals.[212]

[212] *See, e.g.,* Mirabile Direct at 9, Goodwin Direct at 11-13, Johnston Rebuttal at 7-9, Exhibit CMP-2-G, Exhibit CMP-3-F, Exhibit CMP-4.1-A, Hearing transcript Day 1 at 291:16-292:25 (Goodwin/Johnston), Hearing Day 6 Transcript at 308:18-310:3, 324:19-325:14 (Goodwin), CMP Response to DEP May 9, 2019 Additional Information Request Attachment B, Group 4 Initial Brief at 35-37, and CMP Reply Brief at 16-17 and 19 **regarding brook trout habitat**; Mirabile Direct at 9-12, Goodwin Direct at 11, 19, Goodwin Rebuttal at 14-18, Emond Rebuttal at 8-9, Giumarro Supplemental at 2-13, Publicover Supplemental at 4, Exhibit CMP-3-G, Exhibit CMP-3-H, Hearing Day 4 Transcript at 66:14-67:5, 79:10-16 (Publicover), Hearing Day 6 Transcript at 62:12-22, 78:20, 102:12-103:8 (Publicover), 128:17-129:17, 133:22-134:6 (Simons-Legaard), 146:2-25 (Wood), 237:21-240:11 (Giumarro), and 241:17-242:1, 295:6-25, 325:15-326:15 (Mirabile), CMP Response to MDEP May 9, 2019 Additional Information Request Attachment B (Cross Section Typical Wildlife Travel Corridor), Group 4 Initial Brief at 39-41, CMP Initial Brief at 16-18, and CMP Reply Brief at 17-19 **regarding habitat fragmentation**; CMP January 29, 2019 letter to DEP, CMP March 25, 2019 Comments Regarding GHG Emission Reductions, CMP April 24, 2019 Supplemental Comments Regarding GHG Emissions Reductions, CMP May 24, 2019 Response to the Group 4 May 9, 2019 Comments Regarding GHG Emissions, Group 4 Initial Brief at 49-53, and CMP Reply Brief at 30-33 **regarding greenhouse gas benefits;** Dickinson Rebuttal at 2-3, 9-10, and 13, Bardwell Rebuttal, Tribbet Rebuttal, Freye Rebuttal at 5-8, Paquette Surrebuttal at 3-17, Bardwell Supplemental, Freye Supplemental at 4-8, Hearing Day 1 Transcript at 248:12-15, 285:13-287:3 (Dickinson) and 265:16-266:12, 266:13-23, 289:20-290:9 (Mirabile), Hearing Day 2 Transcript 146:8-150:7 (Dickinson), Hearing Day 3 Transcript at 192: 12-14 (Warren), Hearing Day 4 Transcript at 179:24-180:4 (Russo), Hearing Day 6 Transcript at 337:22-338:10-15 (Freye), 341:5-344:22, 431:7-432:4, 487:1-19 (Bardwell), 346:23-348:23 (Tribbet), 355:2-5, 445:7-447:12 (Paquette), 432:5-12 (Achorn), and 441:15-442:5, 464:3-23 (Dickinson), Exhibits CMP-11-A through CMP-11.1-G, Group 3 Initial Brief at 14-19, Group 4 Initial Brief at 8-9 and 56-58, and CMP Reply Brief at 19-24 **regarding alternatives analysis**.

Appellants have made no showing that a second bite at the apple is warranted here. It is in fact not warranted, as explained below, and would be a waste of the Board's time and resources.

If a hearing is requested, the DEP's rules require that an appellant "provide an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any expert or technical witnesses would testify." DEP Regs. Ch. 2 § 24(B)(4). A hearing, discretionary under the DEP's rules, is appropriate only in those instances where there is (1) credible conflicting technical information, (2) regarding a licensing criterion, and (3) it is likely that a hearing will assist the Board in understanding the evidence. DEP Regs. Ch. 2 § 7(B). Appellants fail to make these required showings, and thus their hearing requests should be denied.

A. West Forks' and NextEra's hearing requests do not meet the DEP's requirements.

West Forks and NextEra both request a hearing on their appeals of the Permit Order, but both fail to make any of the required proffers. Instead, West Forks and NextEra invert the DEP's rules, calling on the Board to require testimony and evidence by the Licensees, rather than providing the required offer of proof regarding specific testimony and other evidence that they would present at the hearing. West Forks Appeal at 17; NextEra Appeal at 9-10. Proffering supplemental evidence on behalf of the Licensees, who stand firmly behind the existing administrative record, is both illogical and contrary to the DEP's rules. These appellants' failure to follow the DEP's straightforward rules of procedure is fatal to their hearing requests.

West Forks requests that the Board require CMP to submit certain evidence, as well as that the Board "take" certain evidence that West Forks alleges "is required to counter the Department's findings," but makes no offer of proof regarding any testimony and other evidence

that they would present at the hearing. West Forks Appeal at 17. Instead, West Forks merely requests that it be permitted to submit "any rebuttal testimony and evidence Petitioners may decide to submit on [decommissioning]." *Id.* But nowhere does West Forks describe the substance of this rebuttal evidence, its relevance to the issues on appeal, and whether any expert or technical witnesses would testify on this rebuttal evidence, as required under section 24(B)(4). Failure to do so makes it impossible to determine if West Forks' hearing testimony would meet the requirements of section 7(B), i.e., whether there would be (1) credible conflicting technical information, (2) regarding a licensing criterion, and (3) that it is likely that a hearing will assist the Board in understanding the evidence. West Forks' hearing request should be denied.

NextEra similarly requests that the Board direct CMP to submit hearing evidence that will consist of "credible conflicting technical information regarding a licensing criterion that will assist the Board in understanding the evidence," but makes no statement as to what evidence it would present at the hearing, let alone of the substance and relevance of its evidence or whether it would call any expert or technical witnesses to testify. NextEra Appeal at 10. NextEra's failure to do so makes it impossible to determine whether NextEra's hearing testimony would meet the requirements of section 7(B), and thus is fatal to its hearing request, which should be denied.

B. NRCM's hearing request does not meet the DEP's requirements and does not offer credible conflicting technical information regarding a licensing criterion that will assist the Board in understanding the evidence.

NRCM purports to follow the DEP's offer of proof requirements, submitting that it will offer testimony on the following categories of evidence: (1) TRI, (2) the 2014 BPL lease, (3) Permit Order conditions regarding brook trout habitat and habitat fragmentation, (4) mitigation and compensation, (5) greenhouse gas benefits, and (6) Permit Order conditions generally.

NRCM Appeal at 35-39. However, NRCM's offer of proof is deficient. Nowhere does NRCM explain the relevance of its general categories of proffered evidence to the issues on appeal, nor whether any expert or technical witnesses would testify, as required under section 24(B)(4).

Even if the Board were to infer a connection between NRCM's proffered categories of evidence and its issues on appeal, and even if the Board were to assume that NRCM will offer expert or technical witnesses, a hearing still would be unwarranted because not one of NRCM's proffered categories would provide information that would "assist the Department in understanding the evidence" given that the Commissioner issued the Permit Order after six days of hearings at which the parties had ample opportunity to submit evidence and cross-examine testimony, as discussed below. Another hearing would not assist the BEP in understanding the evidence, but rather would be a needless and wasteful repetition of the hearings already held. DEP Regs. Ch. 2 § 7(B).

The purpose of a hearing is to develop the record with additional technical evidence, here on the Site Law and NRPA licensing criteria, without which the Board cannot render a decision on the appeal. Where the Board requires no assistance considering any credible conflicting technical evidence regarding a licensing criterion, it simply reviews the existing record or, if appropriate under the criteria for admitting supplemental evidence, admits into the record supplemental evidence and renders a decision after due consideration of such evidence without the assistance of a hearing.

In its offer of proof regarding its first two categories of evidence, TRI and the 2014 BPL lease, NRCM makes no offer of any technical evidence that it would provide at a hearing. Nor can it, as leaseholds and other evidence of TRI are not section 7(B) "technical information." Furthermore, TRI is not a licensing criterion but rather a Chapter 2, section 11(D) application

submission and processing requirement, and the DEP is not an adjudicatory body that determines ownership rights. *See Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345 (Me. 1995); *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983). Where the evidence offered does not concern any technical evidence or licensing criterion, no hearing is warranted. In any event, NRCM has failed to demonstrate how a hearing on TRI and the 2014 BPL lease will assist the Board in understanding the evidence, and thus a hearing on such evidence is inappropriate. DEP Regs. Ch. 2 § 7(B). NRCM's remaining categories of evidence – Permit Order conditions regarding brook trout habitat and habitat fragmentation, mitigation and compensation, greenhouse gas benefits, and Permit Order conditions generally – purportedly relate to licensing criteria but would not assist the Board in "understanding the evidence." To the contrary, the record is replete with evidence in each of these categories.[213]

In short, the conflicting technical evidence already is in the record – NRCM simply disagrees with the Commissioner's findings after consideration of that evidence and wants yet another bite at the apple to try to confuse the well-considered, substantial, and clear-cut evidence that undercuts NRCM's arguments. Additional testimony and evidence on these issues would be duplicative and unnecessary, a waste of the Board's and the parties' resources, and certainly would not assist the Board in understanding the evidence before it.

Because there is an adequate, and indeed abundant, record on which the Board can render its decision on the appeals of the Permit Order, and because neither NRCM nor any of the Appellants can demonstrate that there is sufficient conflicting technical evidence on a licensing criterion to warrant a public hearing to assist the Board in understanding the evidence before it,

[213] *Id.*

another hearing before the Board is unwarranted. *Concerned Citizens to Save Roxbury v. BEP*, 2011 ME 39, 15 A.3d 1263; *Martha A. Powers Trust v. BEP*, 2011 ME 40, 15 A.3d 1273.

CONCLUSION

In short, the Permit Order is a thorough document that analyzes and makes reasoned findings and conclusions, based on a robust record, on the issues the Appellants assert in these consolidated appeals. Applying the relevant Site Law and NRPA standards, and DEP rules implementing those standards, DEP staff exhaustively evaluated the Project, soliciting thousands of pages of record evidence, requesting design changes in consultation with its sister agency MDIFW, and crafting conditions based on the record suggestions of parties to the permitting proceeding. The record that the DEP developed over the course of this nearly three years of expert and professional analysis demonstrates that the Project will have no unreasonable adverse impact on the environment. The Board should not indulge Appellants' meritless claims to the contrary. Yes, the Project (like all projects) results in some impact that the Permit Order more than amply mitigates, but the DEP – the agency responsible for protecting Maine's natural resources – sees a far greater threat:

> *Climate change, however, is the single greatest threat to Maine's natural environment.* It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. *Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts.*[214]

It is imperative that the Project move forward without further delay. For the foregoing reasons, the Board should decline to hold a hearing on the consolidated Permit Order appeal and deny that appeal.

[214] DEP Order at 105 (emphasis added).

Dated this 12th day of March, 2021.

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