

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

and
STATE OF MAINE
LAND USE PLANNING COMMISSION

IN THE MATTER OF

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

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

SITE LAW CERTIFICATION SLC-9

GROUP 4 (AMC, NRCM, TU) REPLY
BRIEF

Group 4, consisting of Appalachian Mountain Club (AMC), Natural Resources Council of Maine (NRCM), and the Maine Council of Trout Unlimited (TU), collectively referred to as Group 4, respectfully submits this reply brief in response to briefs filed by Central Maine Power Company (CMP or Applicant), Group 3, and Group 7.

I. CMP’s conclusion regarding the potential adverse impacts of the project on scenic resources, scenic uses and scenic character is completely unreliable and should be rejected.

In its brief, CMP notes that its consultants, Terrence J. Dewan and Associates, concluded that the proposed project would “not unreasonably interfere with existing scenic and aesthetic uses of a scenic resource and will not have an unreasonable adverse effect on the scenic character of the surrounding area.”¹ These conclusions are entirely unreliable and should be ignored.

¹ CMP Brief, p. 8.

During his testimony, Mr. Dewan acknowledged that his firm has worked for CMP on at least 15 projects over the past 25-30 years.² Under cross examination, Mr. DeWan admitted that not once in reviewing those at least 15 projects has he ever concluded that a proposed project would have an unreasonable adverse impact on scenic resources or scenic character.³ Given a track record of never finding an unreasonable adverse impact, his conclusions in this case are entirely predictable and completely unreliable.

By contrast, the multiple concerns raised by Dr. Palmer in his review of the DeWan Visual Impact Assessment⁴ provide clear support for the conclusion that CMP has failed its burden of showing that the proposed project will not have an unreasonable adverse impact on scenic uses, scenic resources, and scenic character.

II. CMP's proposed Findings of Fact regarding scenic character misrepresent Dr. Palmer's conclusions.

CMP asserts that it “worked with Dr. Palmer and the Department *to their satisfaction* with regard to the reasonableness of its visual impact.”⁵ In fact, there is no evidence in the record that Dr. Palmer was ever satisfied with regard to the reasonableness of the visual impact assessment. The record includes two reports from Dr. Palmer, one dated Aug. 20, 2018⁶ and one dated Nov. 23, 2018⁷. These reports raised multiple concerns about the Visual Impact Assessment. The concerns in the later of the two reports include:

- The visual impact of the proposed transmission line on locations other than the Kennebec Gorge;
- The very limited relevance of the Baskahegan survey;

² CMP witness DeWan cross-examination, Tr. 4/2/19, p. 16 lines 8-10.

³ *Id.* p. 18 lines 8-14.

⁴ James Palmer, Review of the New England Clean Energy Connect October 2018 Supplemental Application Materials (hereinafter Palmer Nov. 23 Supplemental VIA Review), Nov. 23, 2018.

⁵ CMP Post-hearing Brief, Attachment A, Proposed Findings of Fact, p. 65 (Emphasis added).

⁶ James Palmer, Review of the New England Clean Energy Connect Visual Quality and Scenic Character (hereinafter Palmer Aug. 20 VIA Review), Aug. 20, 2018.

⁷ Palmer Nov. 23 Supplemental VIA Review.

- The failure of CMP to use the most accurate available land cover height information for conducting the visibility assessment;
- The inaccuracy of the land cover viewshed map which “did not correctly identify visibility of NECEC structures at many viewpoints;”⁸
- Inconsistencies up to 50% between the viewshed map and the photo simulations;
- The failure to provide “a full accounting of potential scenic resources and a documented evaluation of all those with potential visibility;”⁹
- The questionable accuracy of the photo simulations;
- The use of only two raters to evaluate visual impacts when the research suggests more than five should be used;
- The failure to evaluate all of the more than 50 scenic resources with potential visibility of the project; and
- The failure to even discuss compensatory mitigation for these visual impacts of the project.

The record does not include any further conclusions from Dr. Palmer addressing these many concerns. Given the many problems with the Visual Impact Assessment identified by Dr. Palmer, it is impossible to conclude that the Assessment satisfies CMP’s burden of showing that the project would have no unreasonable adverse impact on the scenic resources, scenic uses or scenic character of the region. Because of CMP’s failure to show that the project would have no unreasonable adverse impact of the scenic resources, scenic uses or scenic character of the region, the permits should be denied.

III. DEP’s Site Law Chapter 375.14 is not unconstitutionally vague.

In its brief, CMP seems to threaten to challenge an adverse decision related to unreasonable effects on scenic character under the Site Law by “reserve[ing] the right to argue that the DEP’s Site Law Chapter 375.14 provision requiring that DEP must consider the ‘scenic character of the surrounding area’ is unconstitutionally vague and that the review of impacts to scenic and aesthetic uses must be limited to scenic resources as that term is defined in the NRPA

⁸ *Id.* at sec. 3.4.

⁹ *Id.* at sec. 4.

rules.”¹⁰ This threat lacks teeth. The Supreme Judicial Court of Maine has already addressed a challenge to the protections for existing scenic and aesthetic uses under NRPA in *Uliano v. Board of Environmental Protection*, 977 A.2d 400 (2009). In that case the Law Court upheld Section 480-D(1)’s scenic and aesthetic uses standard, finding that

the concept of scenic and aesthetic uses within a particular natural resource is, when viewed through the lens of modern sensibilities, sufficiently definite so that such uses can, in any given case, be reliably identified based on competent proof. The same is true as to the determination of whether, under all relevant circumstances, a proposed activity will unreasonably interfere with the uses.¹¹

The NRPA standard in question required an applicant to demonstrate that “[t]he activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.”¹² The Site Law standard that CMP questions requires the Department to find that “the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.”¹³ The two standards are very similar, identifying “existing scenic, aesthetic . . . uses” (NRPA) and “existing uses, scenic character” (Site Law) as deserving special consideration.

Of the NRPA standard, the Law Court wrote that

Section 480–D(1)’s scenic and aesthetic uses standard is distinguishable from the municipal ordinances whose terms we have found unconstitutionally vague due to their failure to provide cognizable, quantitative standards. First and foremost, unlike the terms in section 480–D(1), which are susceptible to a logical construction as discussed above, the standards at issue in the *Kosalka* line of cases were wholly subjective and permitted municipal employees or board members to make “legislative-type decisions based on any factor they independently deem[ed] appropriate.” Identifying an existing scenic or aesthetic use for purposes of section 480–D(1) and determining whether a proposed activity will unreasonably interfere with those uses is a far more concrete exercise than the amorphous

¹⁰ CMP Brief, p. 3 fn. 9.

¹¹ *Uliano v. Brd of Envntl. Protection*, 977 A.2d 400, 412 (2009).

¹² 38 M.R.S. § 480-D(1).

¹³ 38 M.R.S. § 484(3).

command we considered in *Kosalka* requiring an applicant to prove that a project will “conserve natural beauty.”¹⁴

The analysis would not vary for the Site Law. Just as with the scenic and aesthetic uses standard in the NRPA, the existing uses and scenic character standard in the Site Law is susceptible to a logical construction.

Furthermore, as was the case with the NRPA scenic and aesthetic uses standard, the Department’s implementation of this provision of the Site Law is subject to the Maine Administrative Procedure Act, and the rules implementing 38 M.R.S. § 484 (1) “are subject to public notice, modification, and judicial review.”¹⁵ CMP’s concern over the Site Law provision requiring the Department to consider the “scenic character of the surrounding area” is unfounded.

IV. CMP failed to demonstrate that there is no reasonable alternative to an aboveground crossing of the Appalachian Trail (AT) or that the transmission line can be buffered from AT users.

In its initial brief, CMP attempts to paint its proposed overhead transmission line crossing at the AT as a foregone conclusion, claiming that “[t]he visual impact statements made by the intervenors that oppose the Project . . . are entirely subjective.”¹⁶ It is curious that CMP would feel emboldened to characterize certain opponents’ testimony as “entirely subjective” when its own visual witness admitted that he had not ever, in the course of at least 15 projects for CMP, concluded that a proposed project would have an unreasonable adverse impact on scenic resources or scenic character.¹⁷ This same witness concluded that the impact of an overhead

¹⁴ *Uliano v. Brd of Env'tl. Protection*, 977 A.2d 400, 411 (2009) (citations omitted).

¹⁵ *Id.*

¹⁶ CMP Post-hearing Brief, p. 42.

¹⁷ CMP witness DeWan cross-examination, Tr. 4/2/19, p. 16 lines 8-10.

crossing of the Kennebec River on recreational users would be “minimal to moderate.”¹⁸ Before criticizing oppositional witnesses, CMP would be wise to consider the age old advice that people in glass houses should not throw stones. CMP cites only a single statement made by a single opposition witness to support its claim that testimony indicating unreasonable visual impacts is “entirely subjective.” Extending this statement to all opposition witnesses is inappropriate and ignores testimony from Group 4 witness Dr. Publicover that the proposed changes would increase the exposure of hikers to the open corridor and intensify the experience of being in a developed rather than backcountry environment.¹⁹ Regardless of whether they’re characterized as subjective or objective, given CMP’s flippant disregard for local opposition to this project from users of this resources, it seems likely that the applicant’s characterization of the impact to the AT will once again be proven to be spectacularly wrong, and that the supposedly subjective conclusions of project opponents (who have much greater knowledge of the region) will prevail.

CMP also argues that certain factors either require an overhead crossing of the AT or entitle CMP to cross the AT overhead, regardless of the size or configuration of its proposed transmission line. Several of these points are refuted below.

- CMP’s easement with the National Park Service does not entitle CMP to an overhead crossing. CMP references its easement with the National Park Service as evidence that the proposed project is not incompatible with the Appalachian Trail.²⁰ While the easement may be sufficient to demonstrate title, right or interest, it does not conclusively establish that the proposed use meets LUPC standards for a special exception. All transmission or distribution

¹⁸ Application Chapter 6, Section 6.2.1.5, p. 34. In their 7/10/18 response to questions from DEP, CMP indicated that the project would have a “Moderate” level of visual impact on the river, and that the project “will not adversely affect scenic character in the surrounding area.” This conclusion has since been shown to be in error as the applicant now proposes to spend tens of millions of dollars to bury the line under this scenic river due to intense public opposition.

¹⁹ Publicover Direct Testimony, p.27.

²⁰ CMP Post-hearing Brief, p. 43-45;

lines are not equal. Certainly an existing crossing does not mean that any future crossing, regardless of how large the clearing or how tall the poles, must be allowed. Furthermore, CMP's utilization of visual buffer techniques (in the form of vegetative planting) is an admission by the applicant that it believes that the use is incompatible as buffering is only necessary for incompatible uses.

- Existence of a transmission line crossing, and notation of those crossings in guide books does not indicate that a new and bigger transmission line crossing would be a compatible use.

CMP states that “[t]he Appalachian Trail has crossed the existing transmission line since its construction in the 1950s, and the transmission line is a landmark noted in Trail Guides.”²¹

The use of the word “landmark” in this context is disingenuous. AT trail guides note many “landmarks” that are incompatible with the trail experience, most notably highways. These merely serve to help orient users as to their location on the trail. The fact that these features are noted in trail guides says nothing about their compatibility with or impact on the trail experience. Similarly, CMP states that “...co-location of new transmission line within a CMP-owned corridor crossed by the AT is consistent with the existing use and with hikers’ expectations of crossing a transmission line corridor in the associated P-RR subdistrict.”²²

Hikers expect to see a single transmission line with 45 foot tall wooden towers. Hikers’ reaction to seeing a second line with 100 foot tall metal towers are unknown, since no crossings of the AT by a transmission line of this size currently exist in Maine²³ and no user surveys were undertaken.²⁴ In fact, Ms. Segal admitted that the trail guides (which CMP

²¹ CMP Post-hearing Brief, p. 44.

²² *Id.* at 52.

²³ Tr. 4/2/19, p. 159:8-18.

²⁴ *Id.* at p. 163:9-14.

uses as the basis for judging user expectations) do not describe the proposed condition²⁵, thus any claims about user expectations are without any basis in the record. By CMP's logic, if users expect to encounter a country road, their reaction would be unchanged if they encountered a highway.

Finally, CMP's proposed Findings of Fact related to the AT crossing²⁶ should be rejected. First, the proposed Finding is self-contradictory in that it claims that the project is "not incompatible" with use of the AT but recognizes that additional buffering is needed because it is incompatible. Second, CMP claims that there would be a "negligible change" in visual impact to the AT. This is contradicted by CMP's own admission that the Troutdale Road crossing has a "moderate to strong" visual impact²⁷ – a more severe rating than they gave to the overhead crossing of the Kennebec River Gorge. There is simply no basis for claiming that the addition of a second much larger transmission line would have negligible visual impact. Third, by the testimony of CMP's own witnesses, the proposed vegetative planting would only partially screen the project from users of the trail²⁸ and hikers will still see the proposed structures.²⁹ In addition, buffer plantings are proposed for only one of the three crossings in this area. Therefore, the project has not been adequately buffered.

V. CMP's discussion of alternatives misrepresents and distorts the testimony of intervenor witnesses to justify erroneous conclusions.

Throughout its alternatives discussion CMP misrepresents, oversimplifies, or takes out of context Group 4 witness testimony to create an impression of concurrence with CMP's erroneous

²⁵ Tr. 4/2/19, p. 163:15-164:15.

²⁶ CMP Post-hearing Brief, p. 85.

²⁷ Application Chapter 6, Appendix F (revised 1/30/19).

²⁸ CMP witness Segal Direct, p. 29.

²⁹ Tr. 4/2/19, p. 166:17-167:1.

conclusions where none exists. Group 4 has identified the following instances where Group 4's testimony does not support CMP's assertions.

A. Misrepresentations in CMP's underground analysis Section (C)(3)(b).

In its discussion of undergrounding alternatives in Section (C)(3)(b), CMP cites Dr. Publicover's supplemental testimony and Dr. Publicover and Mr. Reardon's Day 6 testimony in support of the statement that "numerous intervenor witnesses testified that undergrounding is not a preferred alternative due to their concerns with the environmental and visual impacts of undergrounding."³⁰ CMP's brief leaves the impression that Dr. Publicover and Mr. Reardon object to undergrounding generally, which is not the case. In all cases cited by CMP Group 4 testimony is clear that the concern was with undergrounding *within the proposed* [Segment 1] *corridor* and not with undergrounding along a more appropriate route, such as a disturbed corridor.

For instance, in page 3 of Mr. Publicover's Supplemental Testimony (cited in CMP's Brief to support the statement that "undergrounding is not a preferred alternative"), Mr. Publicover was again very clear that his opposition to undergrounding was limited to CMP's failure to consider a route well-suited to an undergrounding approach such as a route along a disturbed corridor. Dr. Publicover's words cited by CMP speak for themselves and are reproduced below:

A direct burial trenching within the proposed corridor either in short sections or for long distances is an inadequate solution of the issue of fragmentation as it would still require the clearing of a new, albeit, narrower corridor through this undeveloped forest region. It is not the above-ground line that is of concern but rather the permanent deforested corridor. Horizontal direct drilling may allow short portions of the line to remain forested but would still result in significant disturbance in the areas near the injection points and there would still be extensive sections of above-ground line with its associated corridor.

³⁰ CMP Brief, p. 24.

In addition, the new impacts created by the use of either of these burial techniques would have to be thoroughly described and analyzed in an amended application. It is highly unlikely that a properly designed underground route would be proposed in a remote undeveloped location due to the numerous environmental and logistical challenges identified by both CMP witnesses and Group 3 witness Gil Paquette.

Finally, Mr. Reardon also did not testify that he was opposed to undergrounding in general. Instead, Mr. Reardon specifically raised concerns about the potential impacts of undergrounding along Section 1 of CMP's proposed route and suggested that undergrounding should have been considered along disturbed corridors such as the Spencer Road.

Regarding undergrounding I would have substantial concerns about the impacts of trenching on stream habitat on the proposed route. Directionally drilled stream crossings might have little or no impact on streams, but, as Dr. Publicover said, we don't have that proposal in front of us to evaluate in a site specific way. Undergrounding along the existing corridor, for example, the Spencer Road or as I discussed earlier, Route 201 could substantially reduce the impacts in Segment 1. I do not believe undergrounding on the existing Segment 1 would be a desirable alternative.

CMP's after-the-fact "analysis" of burial along Segment 1 of its proposed route is legally inadequate and inappropriate from an environmental and engineering perspective. CMP did not conduct a good faith analysis of burial along an existing disturbed corridor, which would have relieved a significant number of environmental and scenic concerns raised by the public and intervening parties throughout this proceeding. CMP's attempt to mischaracterize Group 4's testimony on this topic adds insult to the environmental and scenic injury that this project is guaranteed to cause.

B. Misrepresentations in CMP's taller structures and tapering analysis in Section (C)(3)(c).

In Section (C)(3)(c), "Taller Structures and Tapering Analysis", CMP again misrepresents Group 4 testimony by conflating testimony specifically addressing tapering as addressing both tapering and taller structures; stringing together snippets of testimony from

different days and differing lines of questions in a manner that leads to a conclusion that is not supported in the cited testimony; and simply distorting the cited testimony.

Most troubling is CMP's failure to accurately characterize testimony regarding tapering and taller structures. On pages 29-30 of CMP's brief, CMP writes that "the tapering methods proposed in CMP's Compensation Plan, combined with the tapering proposed at select perennial stream and riparian areas, could appropriately and adequately [sic] the address habitat fragmentation concerns the intervenors have raised." In support of this specious statement, CMP cites, in part, Dr. Publicover's April 4th testimony at page 117, line 16, through page 118, line 7.³¹ The cited testimony states:

MR. BEYER: If the 53 miles of new line, if that was tapered such as what they're doing along the stretch near Coburn Mountain, would that lessen the impact of habitat fragmentation in your opinion?

DAVID PUBLICOVER: It would lessen it to some degree. *It would certainly be an improvement, you know, it would take a bad situation and make it somewhat less bad.* It would reduce the edge effects because you would have less penetration of light and wind and things into the adjacent forest. It might increase -- it would probably increase the ability of some species to get across the corridor. I would say I'm not sure it would have that much benefit for pine marten if vegetation was only 35 feet at the edges and they generally require forest 30 feet or above. So would it be an improvement? Yes. *Would it solve all of the issues?* *No.* (Emphasis added)

The cited testimony from Dr. Publicover in no way indicates that tapering "could appropriately and adequately" address habitat fragmentation concerns. In fact, in addition to this testimony clearly stating that tapering would not solve habitat fragmentation concerns, Dr. Publicover repeatedly, in both pre-filed testimony and under cross-examination, testified that tapering would not adequately address his concerns regarding habitat fragmentation.³² If CMP

³¹ CMP Brief at 29-30, fn. 146.

³² Publicover Supplemental Testimony at p. 3 ("As for tapering or taller vegetation, they are merely band aids on a very serious wound, and would have limited value for reasons described below. The value of tapered vegetation. Tapering was proposed as a way to mitigate the scenic impact of the corridor in certain locations, not as mitigation for fragmentation impacts, and it would have limited benefit for the latter purpose."); Tr. 5/9/19 at 62:12-18 ("Tapering was proposed as a way to mitigate the scenic impacts of the corridor in certain locations not as mitigation

believes this to be a ringing endorsement for its compensation plan we now have some frightening insight into the dramatic mismatch between the likely adverse impacts from this project and CMP's exuberant rhetoric surrounding this project.

Furthermore, CMP knows better than to insinuate that Dr. Publicover believes that CMP's Compensation Plan addressed habitat fragmentation. CMP's attorney, Mr. Manahan, specifically asked Dr. Publicover on cross-examination if tapering or taller structures addressed his fragmentation concerns and Dr. Publicover unequivocally said that they did not.³³ And yet CMP in its brief insinuates that Dr. Publicover concurred with CMP's contention that tapering at a limited number of locations would address his concerns.

Below we address some of the additional mistakes in this section of CMP's brief that require correction or clarification. One sentence in CMP's brief in particular requires significant correction:

Furthermore, taller poles and tapering would provide minimal, if any, habitat connectivity benefits in the shifting mosaic of forest surrounding Segment 1, [fn.139] which 'contains a fairly limited amount of mature forest'[fn. 140] and would have 'limited effectiveness' with regard to pine marten habitat[fn. 141] and brook trout habitat.[fn.142]³⁴

for fragmentation impacts and it would have limited benefits for the latter purpose. Tapered vegetation would have little benefit for maintaining connectivity across the corridor."); Tr. 4/4/19 at 118:6-7.

³³ Tr. 5/9/19 at 79:6 - 80:1.

MR. MANAHAN: On Page 2 of your supplemental testimony you stated, as a general opinion, I do not believe that any of the proposed techniques would adequately correct the fatal flaws in the application. Is that still your belief?

DAVID PUBLICOVER: I think they all have concerns. I haven't seen anything -- any proposal that would indicate that use of those techniques would satisfy my concerns.

MR. MANAHAN: Okay. And on Page 6 you say -- I'll give you time to get there. To summarize, in my opinion none of the proposed techniques, and we're talking undergrounding, tapering and taller vegetation, would adequately address the fragmenting impacts of the project. They are inadequate fixes proposed to salvage a project that was improperly located in the first place and are a poor substitute for burying the project along existing and already disturbed corridors. Is that still your belief?

DAVID PUBLICOVER: Yes.

³⁴ CMP Brief, p. 29. Footnotes are noted in [brackets] within the quote for ease of discussion.

First, in footnote 139, CMP cites Dr. Publicover’s May 9 testimony in support of the statement that “taller poles and tapering would provide minimal, if any, habitat connectivity benefits in the shifting mosaic of forest surrounding Segment 1 . . .”³⁵ While Group 4 agrees that CMP’s proposed limited use of taller poles and tapering would provide minimal habitat connectivity benefits, the cited testimony from Dr. Publicover does not even address habitat impacts from taller poles or tapering. The cited testimony merely describes how marten will utilize all parts of the landscape at different times based on the shifting mosaic of timber harvesting.

Second, CMP cites a direct quote “contains a fairly limited amount of mature forest” from Dr. Publicover’s Day 4 testimony to imply that taller poles and tapering would provide minimal benefits to habitat connectivity in part because Segment 1 does not contain much mature forest.³⁶ CMP has taken this quote out of context, and taken testimony intended for one purpose and misleadingly applied it to a separate issue. Dr. Publicover’s discussion of mature forest in his rebuttal testimony,³⁷ which was the topic of the cross-examination cited in footnote 140, was focused on the balance between early-successional and mature forest habitat in the project region. It was intended to rebut CMP’s contention that the early-successional habitat created by the new corridor would provide habitat benefits. It was unrelated to the issue of marten and habitat connectivity. Marten habitat is not limited to mature forest as the term is used by Dr. Publicover, as is made clear later in the same cross-examination cited by CMP.³⁸

³⁵ CMP Brief at p. 29, fn. 139, citing in part Hearing Day 6 Transcript 102:12-103:8 (Publicover).

³⁶ *Id.* at p. 29, fn. 140, citing Hearing Day 4 Transcript at 79:10-16 (Publicover).

³⁷ Group 4 Publicover Rebuttal, p. 6-7.

³⁸ Tr. 4/4/19, p. 80: 3-14 (Publicover). CMP perpetuates this error in the next sentence as well. Citing Dr. Publicover’s cross-examination on May 9th, CMP writes that “As the evidence demonstrates, ‘intermediate-age’ and ‘mature’ forest habitat is, at best, marginally and intermittently present along the 150-footwide Segment 1 corridor, rendering travel corridors potential bridges to nowhere, as taller structure heights and travel corridors would not provide links between habitat patches that are not directly proximal to the corridor.” However, Dr. Publicover’s testimony does not support this statement and in fact contradicts it – marten use the entire landscape, with use of

Third, CMP cites Dr. Publicover's supplemental testimony and Days 4 and 6 cross-examination to support the phrase "...and would have 'limited effectiveness' with regard to pine marten habitat..."³⁹ Contrary to CMP's portrayal, Dr. Publicover's use of the phrase "limited effectiveness" occurred only on Day 4 and was made in response to a question specifically about tapering. In fact, all of CMP's citations in this section relate to Dr. Publicover's testimony on tapering, but CMP misrepresents this as applying to taller vegetation as well. Directly following the Day 6 material cited by CMP, Dr. Publicover gave a detailed and nuanced opinion on the utility of taller structures, stating that

Maintaining taller vegetation would have greater value than tapering, but [sic] would be difficult to assess its effectiveness in the absence of a specific proposal as to where and how extensively this technique would be applied. Creating travel corridors with taller vegetation in a few widely scattered locations would only be a marginal improvement. Maintaining full height mature forest vegetation would be the most effective as it would allow for the presence of larger trees and the retention and the recruitment of woody debris. Shorter vegetation in the range of 30 to 40 feet would meet the minimum height and density requirements for marten but would require the removal of larger trees and limit the recruitment of woody debris which would reduce its value of [sic] mature forest species."⁴⁰

CMP's citations to Dr. Publicover on this topic misrepresent his more nuanced testimony on the potential value of taller vegetation.

Finally, CMP cites Mr. Reardon's Supplemental Testimony and cross-examination on days 4 and 6 to support its contention that taller poles and tapering would have equally limited effectiveness in protecting brook trout habitat.⁴¹ This is simply not what Mr. Reardon's testimony states. In his Supplemental Testimony at page 7 Mr. Reardon does state that he "do[es]

specific areas depending on timber harvesting patterns and successional stages. Dr. Publicover did not testify that marten habitat is scarce or that travel corridors would be ineffective. CMP's use of Dr. Publicover's testimony to support this statement is at best careless or at worse purposefully misleading.

³⁹ CMP Post-hearing Brief, p. 28.

⁴⁰ Tr. 5/9/19, p. 62:23-63:14 (Publicover).

⁴¹ Group 4 believes that CMP's citation in footnote 142 to Hearing Day 4 Transcript at 72:24-73:1 (Reardon) was intended to refer to Hearing Day 6 as those pages in the Day 4 transcript contain testimony by Mr. Joseph on deer wintering areas.

not believe that tapering, as proposed in CMP's Exhibit 10-2, would have much benefit for streams.” However, on page 6 of that same Supplemental Testimony cited by CMP, Mr. Reardon testified that “[b]ased on the fact that they have been proposed for several sites to avoid impacts to Roaring Brook Mayfly and Northern Spotted Salamander, taller pole structures are clearly feasible and would reduce impacts on stream habitat by maintaining intact canopy cover. This would have substantial benefits for brook trout and other aquatic life in the affected streams.” CMP’s characterization of Mr. Reardon’s Supplemental Testimony is misleading and irresponsible. Similarly, Mr. Reardon’s Day 4 testimony cited by CMP dismissed tapering as not providing benefits to brook trout but encouraged Commissioner Reid “to consider taller poles to keep an intact canopy over the stream crosses.”⁴² Finally, again, Mr. Reardon’s cited testimony was limited to tapering, stating again that “I also do not believe that tapering as proposed in CMP's Exhibit 10-2 would have much benefit for streams.” But just a page earlier Mr. Reardon testified positively about the potential benefits of taller pole structures that could allow “intact canopy and reduce stream impacts on stream habitat.”⁴³

In summary, contrary to CMP’s misleading characterizations, Mr. Reardon’s and Dr. Publicover’s testimony, both in pre-filed testimony and on cross-examination, clearly states their conclusions that tapering would provide no significant habitat protection for streams and would not effectively avoid or minimize the adverse impacts of fragmentation on marten and other wildlife. In contrast, Mr. Reardon’s and Dr. Publicover’s testimony identified taller structures as a potentially beneficial mitigation technique if it allowed for the retention of intact canopy but that CMP had not utilized the technique enough and had not provided sufficient information about this option in its application to fully evaluate it as an option.

⁴² Tr. 4/4/19 at 131:8-20.

⁴³ Tr. 5/9/19 at 71:24-25.

VI. CMP's proposed Findings of Fact regarding right, title or interest fail to demonstrate a valid right, title or interest over the public reserved lands in Johnson Mountain Township and West Forks Plantation.

CMP's proposed findings of fact regarding right, title or interest⁴⁴ assert right, title or interest based on "deeds and easements." However, the proposed transmission line would cross two parcels of public reserved lands in Johnson Mountain Township and West Forks Plantation over which CMP has no deed or easement. The only purported right, title or interest CMP has over these two parcels of public reserved lands is a 2014 lease which is not valid because it has not been approved by 2/3rds of the elected members of both Houses of the Maine Legislature.

Unless and until CMP can provide a valid lease approved by 2/3rds of the elected members of both Houses of the Maine Legislature, CMP has failed to show that it has valid right, title or interest to the land needed for its proposed project, and all permits for the project should be denied.

VII. Brook Trout Habitat and Cold Water Fisheries Enjoy Protection in Maine

CMP argues that brook trout habitat is not "significant wildlife habitat" as defined at 38 M.R.S. § 480-B(10) and that "brook trout are pervasive in the project area."⁴⁵ CMP goes on to state that "[i]ndeed, brook trout have no special legal or regulatory protections in Maine."⁴⁶ In support of this statement CMP cites Group 4 witness Reardon. This is a gross misrepresentation of Mr. Reardon's response, below, to a question from Mr. Mark Bergeron about whether brook trout were, like Northern Spotted Salamander or Roaring Brook Mayfly, listed as threatened or endangered.

MR. BERGERON: Thank you. Also in your direct testimony you talked about Roaring Brook Mayflies and spotted salamanders and the protections -- the legal protections -- the regulatory protections they may have, are there any of those

⁴⁴ CMP Brief, Attachment A, Proposed Findings of Fact, p.60 -61 and p. 83.

⁴⁵ *Id.* at p. 15.

⁴⁶ *Id.*

same protections or similar protections for any other species of brook trout in this area?

JEFF REARDON: No. I think the question you're asking me is have we -- have we identified brook trout habitat as significant wildlife habitat under the Natural Resources Protection Act?

MR. BERGERON: No. Are there other protections for threaten/endangered or other classifications by the Department of Inland Fisheries and Wildlife for brook trout?

JEFF REARDON: No. Brook trout are not a threatened and endangered species. They are a species of greatest conservation need as identified in the most recent state wildlife action plan, which I think is dated 2015 and was finished in 2016.⁴⁷

As is obvious from the transcript of the exchange above, Mr. Reardon specifically asked if Mr. Bergeron was asking about brook trout as significant wildlife habitat under NRPA and Mr. Bergeron said “No”. Instead, Mr. Bergeron clarified that he was asking whether or not there are “other protections for threaten/endangered or other classifications by the Department of Inland Fisheries and Wildlife for brook trout.” To insinuate that Mr. Reardon testified that “brook trout have no special legal or regulatory protections in Maine” is a gross misrepresentation of Mr. Reardon’s testimony.

In fact, the permitting requirements outlined in statute and rule under the Natural Resources Protection Act (NRPA)⁴⁸ and Site Location of Development Law (Site Law)⁴⁹ go well beyond impacts to just those species listed as threatened or endangered or species for which significant wildlife habitat has been designated. NRPA prohibits any activity that will “unreasonably harm any . . . freshwater, estuarine or marine fisheries or other aquatic life.”⁵⁰ Similarly, Site Law prohibits projects that will adversely impact “other natural resources . . .”⁵¹ Adding further detail to this requirement, Chapter 375 of the Department’s rules require that an applicant demonstrate that the “[p]roposed alterations and activities will not adversely affect

⁴⁷ Tr. 4/4/18 at p. 144:7-145:1 (Reardon).

⁴⁸ 38 M.R.S. §§ 480-A – 480-JJ.

⁴⁹ 38 M.R.S. §§ 481 – 490.

⁵⁰ 38 M.R.S. § 480-D(3).

⁵¹ 38 M.R.S. § 484(3).

wildlife and fisheries lifecycles”⁵² and promote the use of buffer strips to protect water quality and wildlife habitat.⁵³ Furthermore, “Brook Trout Habitat” and “Buffer Strips Around Coldwater Fisheries” were identified by the Department as hearing topics in the Second Procedural Order, identifying 38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), and DEP Chapters 335 and 375 § 15 as provisions requiring the protection of these important resources. It is difficult to fathom how CMP reached the erroneous conclusion that brook trout “have no special legal or regulatory protections in Maine” but clearly this conclusion is wrong and casts doubt on CMP’s proposed mitigation of impacts on brook trout habitat. If CMP is under the mistaken impression that brook trout habitat does not require protection because “brook trout are pervasive in the Project area” and “have no special legal or regulatory protections in Maine” how can we trust that the company took adequate steps to protect this valuable and protected resource?

CMP also erred in claiming that the NECEC’s impacts on brook trout will be “de minimus.”⁵⁴ CMP ignores evidence in the record that: (1) the “pervasive” brook trout populations in the region which Segment 1 of the proposed corridor will pass are incredibly important as they are the “last true stronghold for brook trout in the United States”;⁵⁵ (2) this last remaining extensive and unique brook trout resource persists here and here alone as a result of the lack of impacts from human development on forested habitat in this region;⁵⁶ (3) the NECEC Corridor will be one of the largest fragmenting features in the Western Mountains region;⁵⁷ (4) CMP’s proposed “widened riparian buffers of 100 feet”⁵⁸ will prevent the growth of shade trees

⁵² 06-096, Ch. 375 §(15)(B)(2).

⁵³ 06-096, Ch. 375 §(9).

⁵⁴ CMP brief, page 15.

⁵⁵ Group 4 Witness Reardon Direct Testimony, p. 7-8; Group 4 Exhibit 2-JR.

⁵⁶ Group 4 Exhibit 1-JR.

⁵⁷ Group 4 Witness Publicover Direct Testimony, p. 9-10

⁵⁸ CMP brief, p. 16.

and recruitment of large woody debris into stream;⁵⁹ and that (5) closed canopy shade and large wood recruitment in buffers are important for brook trout habitat.⁶⁰ CMP's assurances that these buffers will be applied on "all cold water fishery streams (as determined by MDIFW)"⁶¹ cannot be relied upon due to CMP's failure to incorporate information on brook trout presence in streams into its application materials⁶² or use that information in its planning or even in its responses to written questions from DEP staff.⁶³

Finally, CMP's statement that seven stream crossings identified by Mr. Jim Beyer could accommodate 35-foot-tall trees with only limited changes to the heights of two poles⁶⁴ suggests that CMP did not adequately design its project to avoid or minimize impacts to brook trout habitat. That seven out of seven sites could be easily modified to dramatically reduce impacts to brook trout streams, but weren't until CMP was required to do that analysis by the Department, indicates that CMP has not adequately evaluated potential avoidance and mitigation measures throughout the project footprint. Interestingly, this failure by CMP to utilize readily available avoidance and mitigation measures is consistent with the applicant's assertions that they do not believe brook trout warrant special treatment under Maine law and calls into question the applicant's alternatives analysis, mitigation plan, and compensation plan.

VIII. The Department, not the Maine Department of Inland Fisheries and Wildlife (MDIFW), is responsible for determining whether CMP has adequately addressed harms to wildlife habitat and cold water fisheries.

In its brief the Western Mountains and Rivers Corporation (WMRC), whose legal representation is funded by money given to WMRC by CMP as a provision of an MOU between

⁵⁹ Group 4 Witness Reardon Rebuttal Testimony, pp 1-6;

⁶⁰ Group 4 Exhibit 6-JR; Group 4 Exhibit 7-JR.

⁶¹ CMP Brief, p. 15

⁶² Tr. 5/9/19, p. 276.

⁶³ CMP Goodwin Supp. Testimony, table on p. 5.

⁶⁴ CMP Brief, p. 16; CMP May 17, 2019 Response to MDEP May 9, 2019 Questions, pp. 30-35.

CMP and WMRC,⁶⁵ erroneously concludes that CMP's project "will fit harmoniously into the existing natural environment and will not have any unreasonable adverse effect upon existing scenic, aesthetic, recreational or other uses or other natural resources." To reach this sweeping conclusion, WMRC conflates the roles of the Department as decision maker with the role of MDIFW as a reviewer of the application and mischaracterizes an exchange of emails between CMP and MDIFW in March.

First, the Department is the agency tasked with determining whether or not CMP's proposed transmission line meets the NRPA and Site Law permitting requirements, not MDIFW. While MDIFW's expertise and input is incredibly valuable in evaluating CMP's applications, MDIFW does not have the statutory authority to approve or certify any components of CMP's application.

Second, WMRC alleges, based on emails between CMP and MDIFW and CMP witness Lauren Johnson's redirect testimony, that "it is clear that the MDIFW found that CMP's revisions to its compensation plan sufficiently addressed wildlife habitat and cold water fisheries issues."⁶⁶ But that conclusion is at odds with what DIFW's letter actually states. Gerry Mirabile's March 11, 2019 email to Robert Stratton requested that "MDIFW confirm that the attached clarification materials address all of MDIFW's remaining concerns" and that "MDIFW is satisfied that the latest (January 30, 2019) NECEC Project Compensation Plan, as supplemented by these attached clarifications, provides satisfactory mitigation of the NECEC Project's impacts."⁶⁷ In response to this email, Mr. James Conolly from MDIFW wrote on March 18 that MDIFW "accept[s] the explanations provided in the March 11 email as *sufficient to allow DEP to apply applicable*

⁶⁵ Tr. 4/3/19, p.198:10-199-18 (Christopher).

⁶⁶ WM&RC Brief, p. 18.

⁶⁷ Exhibit CMP-4.

natural resource law to the permitting process.”⁶⁸ Far from a ringing endorsement of CMP’s mitigation, MDIFW’s response merely indicates that MDIFW deemed the reviewed material ready for the Department’s evaluation.

IX. CMP’s failure to conduct a good faith alternatives analysis is a fatal flaw that cannot be remedied

Group 3, representing numerous parties with significant financial interest in this project, attempts to paint opposition to CMP’s proposed project as mere quibbling over minor impacts and disparages calls for a meaningful alternatives analysis as attempts to “defeat or delay by any means.” Group 3 misunderstands the evidence in the record and the intentions of intervenors gravely concerned about the significant impact this project will have on Maine.

CMP’s failure to evaluate a reasonable route for undergrounding, and instead looking only at above-ground routes which the applicant already owned, rendered CMP’s alternative analysis meaningless and unhelpful in determining whether a truly practicable alternative exists. Group 3’s attempt to justify CMP’s failure to evaluate an underground alternative by citing jurisprudence on unrelated statutes in other jurisdictions is unpersuasive. CMP’s after-the-fact cost estimate of how expensive it would be to bury the line along CMP’s pre-chosen route, based on aboveground siting considerations, cannot take the place of an alternative route specifically designed with the unique design parameters of undergrounding in mind. Because that analysis was not done, CMP cannot prove that no reasonable alternative exists that would avoid the impacts to scenic and aesthetic uses, significant wildlife habitat, and wetlands.

X. Group 3’s discussion of NECEC’s “Context” in Maine has no relevance to the Department’s or Commission’s permitting authority and should be disregarded

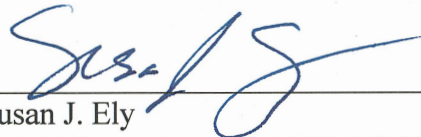
Group 3 dedicates significant space in its brief detailing what it calls the “significant, unique, and timely benefits of NECEC to Maine.” Tellingly, Group 3 does not cite to a single

⁶⁸ *Id.* (emphasis added).

Department or Commission statute or regulation in its discussion of these ‘benefits’. That is because this information, struck from the record by the Department and Commission during the hearing for being irrelevant, remains just so – irrelevant. The Department and Commission should disregard Section I.C. of Group 3’s brief as it has no relevancy to any statutory or regulatory criteria at issue in this matter.

Submitted on June 28, 2019

Respectfully,



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