

September 25, 2020

SENT VIA EMAIL AND FEDEX
TRK NO. 7716 2790 4726

Mark C. Draper, Chair
c/o Cynthia Bertocci, Executive Analyst
Board of Environmental Protection
17 State House Station
28 Tyson Drive
Augusta, ME 04333-0017

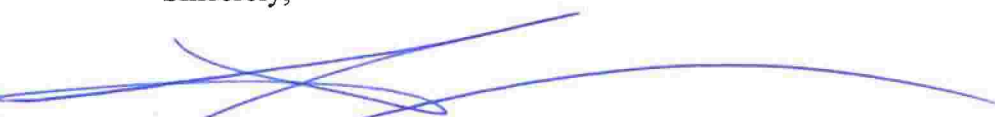
**RE: Central Maine Power Company Application for Site Location of
Development Act permit and Natural Resources Protection Act
permit for the New England Clean Energy Connect**

Dear Chair Draper and Members of the Board of Environmental Protection:

Pursuant to your letter dated August 26, 2020, and in accordance with the Superior Court's ruling, please find NextEra Energy Resources, LLC's Notice of Appeal of the Department's Order from May 11, 2020 which conditionally approved Central Maine Power Company's New England Clean Energy Connect project.

Thank you for your review.

Sincerely,



Joanna B. Tourangeau
Attorney for NextEra Energy Resources, LLC

JBT/mnw
Enclosures
DWM No. 24274-2

ecc: NECEC Service List dated September 22, 2020

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

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

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

Hearing Requested

**NEXTERA ENERGY RESOURCES,
LLC’S APPEAL OF THE
DEPARTMENT’S ORDER
CONDITIONALLY APPROVING
NECEC**

NextEra Energy Resources, LLC (“NextEra”) hereby appeals to the Board of Environmental Protection (“Board”) the May 11, 2020 Order (“Order”) of the Maine Department of Environmental Protection (“Department”) which conditionally approved Central Maine Power Company’s (“CMP”) application for the New England Clean Energy Connect (“NECEC” or “Corridor”). Specifically, the Department’s Order should be reversed and remanded for failing to comply with Maine’s environmental statutes, specifically the Natural Resource Protection Act (“NRPA”) at 38 M.R.S. §§ 480-A – 480-JJ; the Site Location of Development Act (“Site Law”) at 38 M.R.S. §§ 481 – 490, Section 401 of the Federal Water Pollution Control Act (33 U.S.C. § 1341) (“WQC”); and Chapter 310 of the Department Rules.

As detailed below, CMP’s evidence and the Department’s Order fail to meet Maine’s environmental requirements thereby requiring *de novo* Board review. NextEra, therefore,

respectfully requests that the Board direct CMP to submit supplemental evidence and conduct a public hearing on the evidence as part of this review of NECEC and the Order.¹

BACKGROUND

On September 27, 2017, CMP applied to the Department pursuant to the Site Law, NRPA, and WQC for approvals necessary to construct and operate a 145-mile, 1,200 MW high-voltage direct current (“HVDC”) transmission line, from the Quebec-Maine border to a new converter station in Lewiston and related upgrades. Approximately 54 miles of the proposed transmission line route consists of an entirely new cleared transmission corridor through Maine’s North Woods. CMP also filed an application with the Land Use Planning Commission (“LUPC” or “Commission”) seeking qualification of portions of the NECEC as a special exception within the P-RR subdistrict as required by the Site Law. 38 M.R.S. § 489-A-1; 01-672 CMR Chp. 10 Sub-chapter II §10.23(I)(3).

In the May 11, 2020 Order, the Department erred in approving NECEC, because it does not comply with NRPA, the Site Law, and WQC. More specifically, the Department failed to require CMP to file, as part of its Application or through an amendment to its Application, alternate construction methodologies and routes to avoid NRPA impacts or to reduce Site Law environmental impacts or risks to public health or safety. In addition, the Department’s *sua sponte* imposition of a new corridor width and vegetation management conditions (which the Department finds necessary for SLODA and NRPA compliance), without any findings on whether the conditions are consistent with the federally mandated clearance requirements for such corridors was also in error.

¹ NextEra incorporates by reference all of the prefiled direct, rebuttal, surrebuttal, and hearing testimony of and comments on the Draft Department Order—and any attachments or exhibits thereto—by Groups 1, 2, 4, 6, 8, and 10, for review by the Board as part of its appellate review of the Order.

For these reasons, the Board must provide *de novo* review and hold a hearing on the NECEC. 06-096 CMR, Ch. 2 (hereinafter “Ch. 2”) § 24 (G).

DISCUSSION

I. **NextEra has Standing as an Aggrieved Party and as a Party to the Department Proceedings on the Order.**

NextEra petitioned to intervene as a party to the Department and LUPC proceedings resulting in the Order.² NextEra sought and obtained intervenor status as being directly and adversely impacted because the NECEC route would run directly through the proposed development area of the Moose Wind, LLC project, which is owned by a subsidiary of NextEra. NECEC would directly and adversely impact the ability of the Moose Wind project to access and interconnect to the transmission grid and the ISO-New England market, because NECEC is proposing to use HVDC technology which is not conducive to interconnecting Maine-based renewable generating projects.³ NextEra established in the Department proceedings that it would be substantially and directly affected by the proceeding as required for party status under 06-096 CMR Ch. 3 § 11(A).

NextEra participated in all proceedings, including submitting prefiled testimony, presenting an expert witness, cross-examining CMP’s expert witnesses and other intervenors’ witnesses, filing a post-hearing brief, and submitting comments on the March 13, 2020 Department Draft Order (“Draft Order”).⁴

² NextEra incorporates by reference its petition to intervene and the First Procedural Order granting NextEra intervenor status.

³ On appeal of the Maine Public Utilities Commission’s approval of NECEC, the Maine Supreme Judicial Court, over the objections Industrial Energy Consumer Group, concluded that NextEra had standing as a party who was adversely effected by the Commission’s decision. *NextEra Energy Resources, LLC v. Public Utilities Commission*, 2020 ME 34, ¶ 15.

⁴ NextEra incorporates by reference its submissions and the Department’s findings on the Draft Order.

On June 8, 2020, NextEra timely appealed the Order to the Maine Superior Court in Kennebec County, Docket No. KEN-AP-20-27, pursuant to Maine Rule of Civil Procedure 80C. By the Court's August 11, 2020 Order, Justice Murphy remanded NextEra's 80C appeal for further consideration by the Board.

NextEra is substantially and directly affected by the NECEC and the Order and is an aggrieved party with standing to pursue this appeal in compliance with Justice Murphy's order. *See* Ch. 2 § 24(B)(1); August 11, 2020 Order issued by Justice Murphy.

II. The Order Does Not Comply with Maine's Environmental Statutes and Regulations and is Not Supported by the Department Record.

The Order is unsupported by the NRPA required alternatives analysis, Site Law required alternatives analysis, nor any evidence regarding CMP's ability to comply with Order conditions and applicable federal law.

A. CMP's Alternatives Analysis Does Not Comply with NRPA because CMP Failed to Identify or Implement Practicable Alternatives that Would Not Defeat the Project Purpose and that Would Avoid or Minimize Impacts to Protected Natural Resources.

Pursuant to NRPA, CMP must establish that there is no "practicable alternative to the activity that would be less damaging to the environment." 06-096 CMR Ch. 310 (hereinafter "Ch. 310") § 5(A); 38 M.R.S. §§ 480-A *et seq.* To make this showing, "[t]he applicant shall provide an analysis of alternatives . . . to demonstrate that a practicable alternative does not exist." Ch. 310 § 5(A). NRPA defines "practicable" as "[a]vailable and feasible considering cost, existing technology and logistics⁵ based on the overall purpose of the project." Ch. 310 § 3(R).

⁵ Undergrounding is technically and logistically feasible. HVDC transmission lines similar to NECEC are routed underground or underwater. Prefiled testimony of Chris Russo Exhibit (hereinafter "Exhibit CR") 3 and CR-4. In fact, HVDC transmission lines of the same length or shorter than NECEC are routed underground or underwater, with only one exception in the world, Exhibit CR-3, which uses the HVDC line commutate converter technology, Exhibit CR-4, rather than the HVDC voltage-sourced conversion technology selected by CMP. In addition, CMP's HVDC vendor, Siemens, indicated that, between those

Therefore, the Department cannot allow impacts to protected natural resources if there are practicable alternatives that meet the project purpose. The NECEC's Project Purpose "is to deliver up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Areal via a High Voltage Direct Current (HVDC) transmission line, at the lowest cost to ratepayers." CMP Application at 2-1.

CMP's NRPA application failed to comply with NRPA because it did not include an alternative analysis that included consideration of undergrounding the 54 miles of the greenfield, new transmission corridor from the Forks to the Canadian border. Order at 60. In fact, the application was devoid of any competent evidence regarding undergrounding this section of the NECEC or any other section. *Id.* In response to NextEra's identification of this deficiency, CMP submitted testimony attempting to rebut the use of undergrounding for the 54 miles of greenfield corridor. *Id.* at 66. CMP's rebuttal testimony, however, does not meet NRPA requirements for an alternatives analysis. An alternatives analysis, including consideration at the application stage of whether alternative routes and undergrounding would be less damaging to the environment as required by NRPA, was not conducted by CMP. Order at 72-74.

Further, the Order describes the significant impacts to natural resources (110 acres of impacted wetlands, 674 river/stream crossings including 471 with coldwater fisheries and 5 outstanding river segments, 15 acres of IWWH, 31.5 acres of SVP, 83.5 acres of DWA, 13 protected species, 15 rare plant species) (together, herein, these impacts are referred to as the "Preferred Route NRPA Impacts"). Order at 61-62. The Order also details careful review by the Maine Department of Inland Fisheries and Wildlife, Order at 62-64, and the Maine Natural Areas

projects that are already in-service or planned, only one out of 14 HVDC VSC transmission lines of any length are aboveground in the world, *id.*, and that one project involves DC and alternating current lines sharing overhead transmission towers. Exhibit CR-5 at 25.

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

B. The Order Does Not Comply with the Site Law because It Does Not Establish That There are No Alternatives that would Lessen its Impact on the Environment or Risks to Public Health or Safety without Unreasonably Increasing Costs.

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

The DEP’s Order does not properly address this Site Law standard. CMP made conclusory assertions in its post hearing brief that the NECEC complied with Section 487-A(4), claiming that “no proposed alternatives to the proposed location and character of the transmission line would lessen its impact on the environment or the risks it would engender to

the public health or safety, without unreasonably increasing its cost” and that it “did not conduct an alternative route analysis for....Segment 4...and ...Segment 5...because those components are proposed in existing CMP corridors and thus any route alternatives would occur in new corridors and would not lessen project impact on the environment.” CMP Post Hearing Brief at 20-21. The Order similarly summarily concluded that “[n]o further project modification or conditions regarding the transmission line’s location, character, width, or appearance, beyond what is required by this Order, are warranted, under 38 M.R.S. § 487-A(4) or otherwise, to lessen the transmission line’s impact on the environment or risk to public health or safety.” Order at 108.

This is the entirety of the record and the Department’s rationale supporting NECEC compliance with this section of the Site Law. Such conclusory allegations are insufficient to comply with the legal requirement that the Order’s findings and conclusions be based on substantial evidence. *See* 5 M.R.S. § 11007(4)(C)(5) (providing that a court may reverse an administrative decision if it is “[u]nsupported by substantial evidence on the whole record”); *Lewiston Daily Sun v. Unemployment Ins. Comm’n*, 1999 ME 90, ¶ 7, 733 A.2d 344, 346 (defining substantial evidence as “such relevant evidence as a reasonable mind might accept as adequate to support the resultant conclusion.”) (internal quotes omitted); *Griswold v. Town of Denmark*, 2007 ME 93, ¶ 9, 927 A.2d 410, 414 (noting “[s]ubstantial evidence exists when a reasonable mind would rely on that evidence as sufficient support for a conclusion.”) (internal quotes omitted).

C. The Department erred Ordering of a Narrower Transmission Corridor than that proposed by CMP without any consideration whether such a can be constructed and operated consistent with federal mandates on transmission clearance.

The Department Order acknowledges that NECEC will have substantial impacts, including specific and substantial impacts on the new 53.5 mile corridor that runs from the

Maine-Québec border to The Forks. To address the impacts, the Department, conditioned approval on the following:

1. The width of the cleared corridor in Segment 1 must be reduced from 150 feet to 54 feet at its widest point. (Order at 1, 4, 42-43, Appendix C)
2. The establishment of vegetation within the cleared area that can grow 10 feet.⁶ (Order at 4, 42-43, Appendix C)
3. The establishment of taller vegetation with a 35-foot height outside of the 54-foot cleared area. (Order at 4, 42-43, Appendix C)
4. Full canopies in specified areas. (Appendix C)

The Department's imposition of narrower corridors and more vegetation under the conductors as well as alongside the conductors was ordered without any record evidence showing whether these conditions are consistent with federal law, specifically North American Electric Reliability Corporation Reliability Standard FAC-003-4. It is axiomatic that the Department cannot impose a condition that is inconsistent with a federally approved and mandated NERC Reliability Standard. *See, cf, Hughes v. Talen Energy*, 136 S. Ct. 1288 (2016) (struck down Maryland law because it disregarded FERC's regulation of wholesale rates); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U. S. 354, 365, 370-373, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988) (holding that an order regulating wholesale purchases fell within FERC's jurisdiction, and preempted contrary state action, even though it clearly affected retail prices); *Algonquin Gas Transmission, LLC v. Weymouth*, 365 F. Supp. 147 (D. Mass. 2019) (local environmental ordinance that conflicted with FERC's delegated authority was preempted). The Department, therefore, erred in not seeking evidence to support whether its conditions are enforceable or conflict with federal law.

⁶ Footnote 4 to the Order states that that 10 feet should not reach the conductor safety zone; however, the Order cites no evidence supporting this conclusion.

Even if, *arguendo*, NECEC can be constructed and not be in conflict with federal law, the Order effectively amends the NECEC project by narrowing the transmission corridor which directly impacts the pole height and configurations to ensure compliance with federal law. However, there is no evidence in the record establishing the new pole heights, and, thus, no consideration of new pole heights in light of the Department's criteria. Put simply, the Order is legally defective as it orders the narrowing of corridors with no understanding of the consequences to CMP's ability to comply with federal law or impact on NECEC's poles.

D. NextEra Respectfully Requests that the Board Hold a Public Hearing and Accept Supplemental Evidence.

On appeal, the Board is required to conduct a *de novo* review of the record in this matter. 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."). As part of its *de novo* review, the Board is authorized to conduct public hearings and NextEra specifically requests that it do so pursuant to Chapter 2, Section 24 of the Department's Rules.

As discussed above, the Department record and the Order contain no:

- NRPA compliant alternatives analysis;
- Evidence regarding compliance with the Site Law's special restrictions for hazardous activities; and
- Evidence regarding the narrowed corridor, altered pole heights, and vegetation management practices required in the Order including:
 - Whether the new pole and conductor designs required to comply with the Order will also comply with NERC FAC-003-4 under all proposed conditions, including (a) the narrowing of the corridor in certain areas to 54 feet and (b) the minimum conductor height (with max sag and blowout) of 60 feet needed for the deer travel corridor management requirements?

- What are the current and proposed tree species present in the areas where the proposed conditions in the Order proposed narrowed corridors, and are their growth rates consistent with the ability to comply with NERC FAC-003-4?
- Will LIDAR be employed at any location with a fully maintained canopy to ensure compliance with NERC FAC-003-4? and
- What will be used to accurately measure clearance distance between a conductor and vegetation in order to ensure compliance with NERC FAC-003-4, given the undergrowth conditions, and narrowing of the corridor?

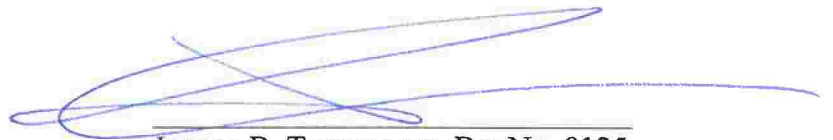
A hearing on evidence regarding these topics is warranted under Ch. 2 Section 7(B) of the Department's Rules because there will be "credible conflicting technical information regarding a licensing criterion" that will assist the Board in understanding the evidence.

Consistent with NextEra's comments on the March 13, 2020 draft order and comments herein, NextEra requests that the Board direct CMP submit the above evidence and that the evidence be subject to a public hearing.

CONCLUSION AND REMEDY

For the foregoing reasons, NextEra respectfully requests *de novo* Board review through which the Board will take, review, and consider all the evidence necessary to address the above discussed issues to ensure NECEC compliance with NRPA the Site Law, WQC, and Department Rules. NextEra respectfully requests that this Board review include a public hearing pursuant to Ch. 2 § 24 (G).

Dated: September 25, 2020



Joanna B. Tourangeau, Bar No. 9125

Emily T. Howe. Bar No. 5777

Drummond Woodsum

84 Marginal Way, Suite 600

Portland, Maine 04101

(207) 772-1941

jtourangeau@dwmlaw.com

ehowe@dwmlaw.com

Counsel to NextEra Energy Resources, LLC