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April 29, 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 Second Objection to Supplemental Evidence.

Please let me know if you have any questions.

Sincerely,

Matthew D. Manahan

Enclosure
cc (via email only): Service List (rev. April 5, 2021)

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 SECOND OBJECTION TO SUPPLEMENTAL EVIDENCE

Central Maine Power Company (CMP) and NECEC Transmission LLC (NECEC LLC) (collectively, Licensees) object to the untimely and improper March 12, 2021 submission of supplemental evidence by the Natural Resources Council of Maine (NRCM), the West Forks Petitioners (West Forks), and the Friends of the Boundary Mountains (FBM), which were masked as responses to the appeals of the Commissioner's May 11, 2020 Permit Order (the Permit Order)[1] that granted the New England Clean Energy Connect (NECEC or the Project)

[1] Because those submissions contained supplemental evidence that is inadmissible, Licensees anticipated that the Chair would unilaterally reject such supplemental evidence. Given that the Executive Analyst is now moving forward to set the schedule for oral arguments on these appeals, and no action has yet been taken on the proposed supplemental evidence, Licensees hereby submit this objection.

In addition to the supplemental evidence described herein, Licensees object to (1) FBM's March 12 filing to the extent that it "supports NRCM's appeal of and a request for hearing on" the Commissioner's December 4, 2020 Transfer Order (FBM Submission at 1) because such a response to the merits of the Transfer Order is untimely (*see* Chair Draper's January 19, 2021 letter ruling at p. 2, setting a 5:00 p.m. February 18, 2021 deadline for Licensees' and any Respondent's responses to the merits of NRCM's appeal of the Transfer Order), and (2) NRCM's March 12, 2021 submission to the extent that it repeats arguments it made in its June 10, 2020 appeal of the Permit Order. While the Chairman accepted NRCM's submission to the extent that it is a response to the appeals of West Forks and NextEra Energy Resources, LLC, so too did the Chairman determine that NRCM's repetitive argument is improper, stating that in their March 12 filings "NRCM and West Forks Group may not rehash or further support their own appeals." *See* Chair Draper's March 19, 2021 letter ruling at 2. To the extent that they do, they should be disregarded. For example, NRCM makes much ado about its discredited original jurisdiction argument, which no other party has raised other than West Forks' stated support for NRCM's request for Board jurisdiction, and which has already been presented to and decided by the Board. NRCM March 12 Memorandum at 2-3. In fact, the vast majority of NRCM's March 12 filing fails to cite to those portions of the other Appellants' filings it purportedly is supporting, and in the mere two instances in which NRCM does cite to the other Appellants' appeals, it nevertheless rehashes *its own* appeal arguments. *Compare* NRCM Appeal at 27-32 (June 10, 2020) *with* NRCM March 12 Memorandum at 3-6, arguing in both instances that the Permit Order is silent regarding CMP's analysis of

approvals under the Site Location of Development Act (Site Law) and Natural Resources Protection Act (NRPA).[2]

The DEP's rules make clear that an appellant seeking to supplement the record must make that request at the time the appeal is filed, and in the appeal "must address the criteria for inclusion of the supplemental evidence." DEP Regs. Ch. 2 § 24(B)(3). Contrary to this direction, NRCM, West Forks, and FBM (which is not an Appellant, but rather a Respondent that was subject to a January 25, 2021 deadline for offering supplemental evidence) offer an assortment of supplemental evidence and citations to non-record evidence under the guise of responses to the merits of the Permit Order appeals. All such evidence, discussion, and citations, set forth below, should be excluded from the record, and references to them should be redacted from the responses to the appeals.

I. The Department's Rules

"The record for appeals decided by the Board is the administrative record prepared by Department staff in its review of the application, unless the Board admits supplemental evidence or decides to hold a hearing on the appeal." DEP Regs. Ch. 2 § 24(D). Chapter 2 of the DEP's rules establishes the limited instances in which the Board may allow a party to supplement the record in support of an administrative appeal of a permitting decision. First, "[i]f the appellant

practicable alternatives; *compare* NRCM Appeal at 8-11 (June 10, 2020) *with* NRCM March 12 Memorandum at 9-12, arguing in both instances that CMP lacked title, right, or interest in the parcels subject to the 2014 and 2020 BPL Leases. Because NRCM's March 12 filing both rehashes and further supports its own appeal, in contravention of the Chairman's March 19 ruling, it should be disallowed in its entirety.

[2] In their March 12, 2021 Response, Licensees objected to any responses to the merits of these consolidated appeals by persons who did not comment on the underlying September 2017 Site Law and NRPA applications, pursuant to Chapter 2, section 24(C) of the Department's rules. Licensees' Response at n.1 (Mar. 12, 2021). Because, upon information and belief, the Chairman and members of the Board have received and continue to receive numerous comments regarding these consolidated appeals by persons who did not comment on the underlying September 2017 Site Law and NRPA applications or the September 2020 permit transfer application, Licensees renew this objection. Such comments must be disregarded. DEP Regs. Ch. 2 § 24(C).

requests that supplemental evidence be included in the record and considered by the Board, such a request, with the proposed supplemental evidence, *must* be submitted with the appeal." *Id.* § 24(B)(3) (emphasis added). The inquiry should and must stop there. All of the below-listed supplemental evidence was not submitted with the appeal and should be disregarded.

Even if NRCM, West Forks, and FBM had made such a request, the Board *may* allow the record to be supplemented on appeal only when it finds that the evidence offered is relevant and material and that:

> (a) the person seeking to supplement the record has shown due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or
>
> (b) the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process. [Id. § 24(D)(2).]

The burden rests with the party seeking to supplement the record both to request addition of the supplemental evidence and to demonstrate why, under the standards in Chapter 2, the supplemental evidence should be admitted into the record. An appellant who does not propose supplemental evidence in the written appeal is considered to have waived any opportunity for inclusion of such evidence in the record. *Id.* § 24(A). No party has made a section 24(D)(2) showing and all have waived the opportunity to include the below-listed evidence in the record.

II. NRCM's Proposed Supplemental Evidence

Rather than follow the DEP's required Chapter 2, section 24 procedure, NRCM simply worked non-record material into its filing without acknowledging that such material was not part of the record or asking for its admission. The inquiry into whether to admit this additional material should begin and end here, and the following material should not be admitted into the record:

- Factual Allegations of Statewide Significance. Evidence as to whether the Project is of statewide significance is not in the administrative record, notably because NRCM failed to timely raise the issue, in violation of DEP Regs. Ch. 2 § 17(A). As it did in its appeal of the Permit Order, NRCM again attempts to slip in the following extra-record material in support of its original jurisdiction argument:
    - "The sheer number of parties to, and the length of, the underlying Department proceeding evidence the hotly contested nature of the project, *as do the number of parties who have submitted comments supporting the appeals over the past several weeks*[.]" NRCM March 12 Memorandum at 2, n.5.

  The italicized factual statement is not in the record or based on any evidence in the record. As the Chair determined in his February 12, 2021 ruling on similar statements NRCM made in its appeal of the Permit Order, such extra-record statements "are assertions of a factual nature and are not in the administrative record. NRCM has not demonstrated that this non-record material is relevant and material nor demonstrated that it was brought to the attention of the Department at the earliest time possible." Chair Draper Letter Ruling on Proposed Supplemental Evidence at 8 (Feb. 12, 2021). A consistent ruling striking the above statements is warranted here.
- Reference to Licensees' December 30, 2020 Minor Revision Application. Licensees' minor revision application proceeding was not consolidated with this proceeding nor did the Board assume jurisdiction over that proceeding. *See* BEP March 18, 2021 Meeting Minutes at 3 (noting that the Board unanimously upheld a motion to decline to independently consider NRCM's and Sierra Club's request that it assume jurisdiction over the minor revision application and declined to advance its discussion to an

evaluation of the statewide significance criteria). Evidence in that proceeding plainly is not before the Board here, nor relevant to this proceeding, and the following factual statements should be disregarded:

- "Remarkably, as part of its so-called 'minor revision' application, CMP and NECEC LLC submitted a 'full set of revised natural resource maps,' which is 'intended to replace the full set of maps [previously filed with the Department] in its entirety.' See CMP Minor Revision Application at 3. . . . This type of wholesale replacement of NRPA impact maps demonstrates that the record on the original Permit Appeal is insufficient. This would be an independent basis for the Board to reverse the Permit Order, but it also serves as a reason why, procedurally, the Board should assume jurisdiction and hold a hearing on the entire project, including all pending changes thereto." NRCM March 12 Memorandum at 6, n.9.

- Electronic Links and Late-Filed Transcripts. The Chair noted in his January 8, 2021 letter that the Department's rules unambiguously state that "[e]lectronic links to documents will not be accepted,"[3] and struck footnotes citing to electronic links in NRCM's Permit Appeal. In an attempt to cure its provision of links to legislative audio files,[4] which is impermissible under the DEP's rules, NRCM on January 21, 2021 purported to supplement its appeal of the Permit Order with transcripts of those audio files. Because NRCM's "supplement" is no cure, but rather also is impermissible under the DEP's rules, which in no uncertain terms require that all proposed supplemental

[3] DEP Regs. Ch. 2 § 24(B)(2).

[4] NRCM Permit Appeal at 36, n.60 and Appendix B, n.1.

evidence must be submitted with the appeal,[5] the Chairman in his February 12, 2021 ruling on supplemental evidence again rejected NRCM's attempt to impermissibly supplement the record. Chair Draper Letter Ruling on Proposed Supplemental Evidence at 2 (Feb. 12, 2021). Obstinately, NRCM tries now for a *third* bite at the apple, again providing the inadmissible audio links. NRCM's March 12 Memorandum footnote 10 at page 10 should, again, be redacted.

- Factual Statements Regarding TRI. NRCM references a purported "termination" of the Bureau of Parks and Lands' (BPL's) 2014 lease to CMP of certain public lots, apparently and incorrectly construing the June 2020 restatement of that 2014 lease as a "termination." Regardless, the June 2020 restatement of the 2014 lease occurred after the DEP issued the May 2020 Permit Order that is now on appeal, and the following statements thus should not be admitted into the record:
    - "BPL has since acknowledged that it entered the 2014 Lease prior to the issuance of a CPCN and without a 2/3 vote of the Legislature, and terminated the 2014 Lease." NRCM March 12 Memorandum at 10.

NRCM's deadline to appeal the Permit Order was June 10, 2020 – NRCM cannot on March 12, 2021, nine months after that deadline, file new supplemental evidence. Nor does NRCM present any argument as to whether its supplemental evidence is relevant and material and that it has shown due diligence in bringing the evidence to the Board's attention at the earliest possible time, or that any of the above-stated evidence is newly discovered. NRCM's proffered supplemental evidence does not meet the requirements for admissibility.

[5] DEP Regs. Ch. 2 § 24(B)(3).

III. West Forks' Proposed Supplemental Evidence

West Forks, like NRCM, worked non-record material into its March 12 filing without acknowledging that such material was not part of the record or asking for its admission, ignoring DEP's clear Chapter 2 rules. The following additional material should not be admitted into the record:

- Reference to Licensees' December 30, 2020 Minor Revision Application. As described above, Licensees' minor revision application proceeding was not consolidated with this proceeding and the Board did not assume jurisdiction over that proceeding. Thus, evidence in that proceeding is not before the Board here nor is it relevant to this proceeding. *See* BEP March 18, 2021 Meeting Minutes at 3. The following factual statements should be disregarded:
    - "Additionally, the Board must address the question of whether the Acting Commissioner correctly assessed the original jurisdiction criteria under the same statutory standard with respect to the 'Minor Revision Application.'" West Forks March 12 Response at 2.
    - "The same AAG also advised the then Acting Commissioner during her recent review of whether the 'Minor Revision Application' was subject to original Board jurisdiction. In fact, it is also very likely that the same AAG drafted, or at least certainly gave legal guidance to inform Commissioner Loyzim's February 10, 2021 decision that the 'Minor Revision Application' was not one of state-wide significance, despite overwhelming evidence to the contrary." West Forks March 12 Response at 2.

- "For this reason alone, the Board should undertake an independent and fresh look at the question of its original jurisdiction as applied to both the underlying application and the 'Minor Revision Application,' and if possible, obtain different legal counsel." West Forks March 12 Response at 3.
- "Finally, because the 'Minor Revision Application' is inextricably tied to the Conditional Permit which will be reviewed and potentially significantly altered in substance after the Board's review, the Board should assert its original jurisdiction and take up the 'Minor Revision Application' along with the underlying application for the NECEC." West Forks March 12 Response at 3.

- Reference to Extra-Record Materials. The following italicized language concerns materials that are outside of the record and inadmissible in this proceeding. West Forks did not submit this evidence with its appeal, make any request that the Board supplement the record with this evidence, nor make the required showing as to its relevance or materiality, or that it brought this evidence to the attention of the Board at the earliest possible time or that this evidence is newly discovered. DEP Regs. Ch. 2 §§ 24(A), (B), (D).
  - "Not only did they fail to conduct that review but they failed to hold CMP accountable for delivery of evidence on its unsubstantiated claims – *claims it continues to make in all of its public relations materials*." West Forks March 12 Response at 4.

West Forks cannot now, six months after it filed its September 25, 2020 appeal of the Permit Order, file the above new evidence, and its improperly proffered supplemental evidence does not meet the requirements for admissibility.

IV. FBM's Proposed Supplemental Evidence

FBM is a Respondent in this proceeding, because it filed comments on the Permit Order that underlies this appeal but did not appeal the Order. DEP Regs. Ch. 2 § 24(C). As a Respondent, any supplemental evidence that FBM wanted to propose was due on January 25, 2021, not at the time of the filing of a response to the merits of the appeal. Chair Draper letter ruling at 3 (Jan. 8, 2021) (setting a deadline of 5:00 p.m. on January 25, 2021 for Respondents' filing of supplemental evidence); DEP Regs. Ch. 2 §§ 24(C)(2)(a), (4). Because the following supplemental evidence is untimely, it should not be admitted into the record.

- Irrelevant and immaterial extra-record factual statements. FBM makes numerous belated extra-record statements that are inadmissible not only because of their untimeliness, but also because FBM has made no showing as to their relevance or materiality, or that it brought this information to the Board at the earliest possible time, or that it is newly discovered. The following statements should be disregarded and redacted.
    - "This part of Maine's North Woods supports exceptional biodiversity *and maintains that biodiversity even as the climate changes*." FBM Submission at 3. Even if the italicized language were timely, it has no basis in the record and FBM has made no showing as to its relevance or materiality to this proceeding.
    - "Tapering provides almost no connectivity benefit for mature forest species to offset fragmentation. *Even along the edges, where tapering would result in trees that are a maximum of 35-feet high, these trees will be mere saplings in the 3-inch to 5-inch diameter range (excluding damaged or broken trees with larger diameters).*" FBM Submission at 4. Even if the italicized language were timely,

it has no basis in the record and FBM has made no showing as to its relevance or materiality to this proceeding.

- "The developer should not be given the opportunity to avoid responsibility for the impacts with some extraneous financial deal." FBM Submission at 5. Even if this statement were timely, there is no record evidence of any "extraneous financial deal" in the context of the conservation of 40,000 acres of land ordered by the DEP and FBM has made no showing as to its relevance or materiality to this proceeding.
- "There are several no-build alternatives that could be utilized to provide MA the clean energy it claims it needs (which is the ultimate purpose of the entire endeavor), without fragmenting and destroying one of the most important and outstanding natural environments and wildlife habitats in Maine. There is Vermont's already permitted transmission project that would be underground its entire length. There is the offshore (of MA) Vineyard Wind project, which just received a favorable review from federal Bureau of Ocean Energy Management and will generate 800 megawatts of electricity." FBM Submission at 5-6. There is no record evidence of "Vermont's already permitted transmission project" as a no-build alternative, nor that such transmission project "would be underground its entire length." Nor is there any record evidence whatsoever of the Vineyard Wind Project. Even if these factual statements were timely submitted, FBM has made no showing as to its relevance or materiality to this proceeding.
- "However, the no-build alternative could very well satisfy the ultimate purpose of generating clean energy to the N.E. grid." FBM Submission at 6. Even if this

statement were timely, it has no basis in the record and FBM has made no showing as to its relevance or materiality to this proceeding.

- "Greenhouse gas emissions generated by Hydro-Quebec in building and operating mega dams is extremely relevant to whether NECEC should receive approval." FBM Submission at 6. Even if this statement were timely, it has no basis in the record and FBM has made no showing as to its relevance or materiality to this proceeding.
- "There will be severe adverse impacts and fragmentation to the environment and habitat of the woods of Western Maine if this project is allowed to move ahead, *as well as inflicting terrible harm to the indigenous peoples in the north,* while showing no proof of reduction in greenhouse gas emissions." FBM Submission at 9. Even if the italicized language were timely, it has no basis in the record and FBM has made no showing as to its relevance or materiality to this proceeding.

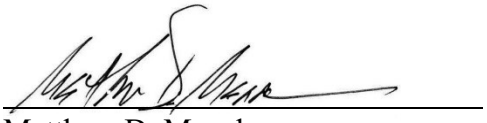
- Section (2) Impact of NECEC on Indigenous Populations. The Innu Nation did not file any comments in the DEP by proceeding. No member of the public spoke on behalf of the Innu Nation at the DEP's April 2, 2019 and April 4, 2019 public hearing, and Licensees are unaware of any written comments submitted by the Innu Nation. Thus, the entirety of FBM's Section 2, which refers to evidence outside the record, should be disregarded as extra-record material not properly proffered here.
- Electronic Links. As noted above, the Chair ruled in his January 8, 2021 letter that the Department's rules unambiguously state that "[e]lectronic links to documents will not be accepted." DEP Regs. Ch. 2 § 24(B)(2). For that reason alone, the links FBM provides at page 9 of its Submission should be disregarded. Furthermore, FBM has not provided

copies of this supplemental evidence with its written response, nor made any showing as to its relevance or materiality, or that it brought this evidence to the attention of the Board at the earliest possible time or that this evidence is newly discovered. DEP Regs. Ch. 2 § 24(D).

Again, even if the above evidence were timely, FBM has made no showing as to its relevance or materiality to this proceeding. It plainly is not relevant or material. Nor has FBM made a showing of due diligence in bringing the evidence to the attention of the Department at the earliest possible time; or that the evidence is newly discovered and could not, by the exercise of reasonable diligence, have been discovered in time to be presented earlier in the licensing process.

For the foregoing reasons, the proposed supplemental evidence in the March 12 filings of NRCM, West Forks, and FBM is inadmissible and should be redacted from those filings prior to distribution to the Board.

Dated this 29th day of April, 2021.



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