

STATE OF MAINE
BOARD 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
SITE LAW CERTIFICATION SLC-9

FRIENDS OF THE BOUNDARY
MOUNTAINS

SUBMISSION
IN SUPPORT OF THE CONSOLIDATED
APPEAL OF DEPARTMENT OF
ENVIRONMENTAL PROTECTION's
MAY 11, 2020 ORDER

MARCH 12, 2021

Friends of the Boundary Mountains (FBM) strongly supports the Appeals of the Department of Environmental Protection (DEP) Commissioner's May 11, 2020 NECEC Order, as well as the requests for a new hearing, filed by the Natural Resources Council of Maine (NRCM), the West Forks Intervenor Group, and NextEra Energy Resources, LLC.

In addition, FBM supports NRCM's appeal of and a request for a hearing on the December 4, 2020, Order of the Commissioner (L-27625-26-K-T) conditionally approving the application of CMP and NECEC Transmission LLC to partially transfer to NECEC Transmission LLC the May 11, 2020, NECEC Order (Transfer Order). It is our understanding that all the above appeals are being processed as a Consolidated Appeal by the Board of Environmental Protection (BEP).

Friends of the Boundary Mountains has standing as an aggrieved party and as a party to the DEP proceedings on the Order as an Intervenor. Friends of the Boundary Mountains (FBM) is a 501(c)(3) non-profit grassroots organization formed in 1995. The mission of FBM is to safeguard the Boundary Mountains from development and to conserve the area for traditional uses of recreation, wildlife and forestry.

DEP's May 11 ORDER is Unreasonable, Unjust, And Unlawful

As documented in the submission of the West Forks Group to the Somerset District Court (and subsequently remanded to the Board of Environmental Protection) the DEP's decision to grant permits to NECEC is unreasonable, unjust, and unlawful on the evidence in the record. DEP has made numerous errors in the Order and its Findings and Conclusions are unsupported by substantial evidence.

Throughout the NECEC proceedings there are egregious examples of DEP's abuse of its discretionary authority in order to favor the applicant, CMP. DEP has shirked its responsibility by accepting the conclusions of other agencies without examining the actual evidence in the record or by denying the admission of relevant evidence.

Despite the fact that the stated purpose for a DEP hearing is to bring forth technical information to the attention of decision-makers, the DEP Order again and again ignores the testimonies of Maine natural scientists, ecologists, and land conservation experts regarding the extreme adverse impacts of NECEC on Maine's natural resources and environment. Moreover, Friends of the Boundary Mountains was witness to the stifling of the opposition through an anti-democratic pre-determined bias in favor of the applicant, which appeared in every Procedural Order that DEP issued and in the rulings on motions put forth by the opposition.

Essentially the DEP proceedings were an environmental travesty. The Board of Environmental Protection should conduct a *de novo* review and reverse the DEP May 11 Order. As pointed out by NRCM in its Appeal: "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."

INEFFECTIVE MITIGATION and DEP's ERRORS

The Order imposes conditions that purport to mitigate NECEC's impacts to protected resources and the environment but which fail to meet the standards set for the in NRPA and the Site Law. (NRCM Appeal, p.7).

DEP's May 11 Order acknowledges that CMP's NECEC proposal as submitted and modified violates NRPA and the Site law in many substantial ways. The introduction to the Order itself states, "the project as originally proposed would have had substantial impacts" and continues to state that it is "feasible to avoid or minimize those impacts through a variety of mitigation measures." Order, May 11, 2020, at 1.

So the question becomes— does DEP's mitigation measures overcome NECEC's violations of NRPA and the Site law? The answer is a resounding NO!

Landscape-Scale Ecological Values Of The Region

The Order fails to address the landscape-scale ecological values of the region that will be severely and unreasonably impacted as the CMP corridor crosses Segment 1. DEP in the Order claims that by reducing the width of the corridor to 54' from CMP's proposed 150'. However DEP ignores the overall impacts of fragmentation of the forest landscape that still remains with a 54' wide corridor.

The big picture issue of the cumulative landscape-scale regional impacts of the NECEC project due to landscape fragmentation and the permanent interruption of regional wildlife migratory patterns was thoroughly addressed by Janet McMahon in her sworn testimony at the DEP Hearing. Ms. McMahon is an ecologist who has extensively studied the effects of fragmentation on the Western Maine forest landscape

and has published two papers on this subject, both of which were submitted as exhibits with Ms. McMahon's testimony. Yet the substance of her testimony was ignored by DEP in issuing this Order.

Dr. David Publicover, scientist with the Appalachian Mountain Club, gave extensive expert testimony at the DEP Hearing on the critical adverse impacts of fragmentation that would be generated by the NECEC project. The importance of his testimony on fragmentation has also been largely ignored by DEP, as has other expert testimonies.

The Maine Site Law requires no net loss of function and values. DEP presents no scientific evidence that CMP's proposed NECEC project as modified by the DEP Order meets this requirement. DEP's focus in the Order is on discrete habitat scale impacts and mitigation, rather than landscape-scale impacts and mitigation, which is far more critical to the overall enduring habitat values of the Maine forest. It must be concluded that NECEC habitat fragmentation impacts are unreasonable even considering the Order conditions intended to mitigate impacts: a 54' high energy transmission corridor is nevertheless a permanent fragmentation of the 53 miles of Segment I with lasting impacts (unlike temporary impacts from responsible logging operations).

The Order describes the significant impacts to fisheries and wildlife from the NECEC. This part of Maine's North Woods supports exceptional biodiversity and maintains that biodiversity even as the climate changes. These qualities make the area unique and important wildlife habitat.

The DEP Order acknowledges that the NECEC "could contribute to habitat fragmentation and have unreasonable adverse impacts on wildlife as a result of the effects on wildlife as a result of the effects on wildlife travel lanes and lifecycles and accessibility to suitable and sufficient habitat. Fragmentation occurs when contiguous habitat is broken into smaller, more isolated patches." Order at 75-76.

As pointed out by NRCM (p. 24) stands that provide the greatest connectivity benefit (mature closed canopy stands) would undoubtedly see the greatest level of overstory removal. As a result, achieving the required basal area threshold for interior forest wildlife, such as the pine marten, would largely depend on restoration through future growth. As such, this criterion for avoiding adverse fragmentation effects is likewise unlikely to be met. In short, the Wildlife Areas established in the Order are highly unlikely to provide the characteristics necessary to avoid habitat fragmentation. Further, there is no clarity regarding maximization of the benefits of the Wildlife Areas for mature forest connectivity or if there are alternative which would better mitigate the admittedly unreasonable habitat fragmentation impacts of the NECEC.

Tapering

Because DEP cannot ignore the impacts to this unique region, it sets out a few conditions in an effort to make reasonable the NECEC adverse impacts. However, these measures are inadequate. The NECEC adverse impacts remain unreasonable. The NRCM Appeal, pages 13 – 20, details all the specific reasons why these measures are totally inadequate

in addressing the unreasonable impacts to significant wildlife habitat, freshwater and wetland plant habitat, or threatened or endangered plant habitat.

Tapering is being offered by DEP as a mitigation measure. As pointed out by NRCM there is no evidence that tapering mitigates impacts to wildlife habitat or addresses forest fragmentation. 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). Tapering is insufficient to provide adequate connecting habitat for pine marten (a keystone species) or other mature forest species.

Tapering is walking into the unknown and not a viable mitigation measure. How will this tapered condition be established? Does the DEP have sufficient capacity to monitor and enforce this condition for the life of the NECEC? The Order holds that NECEC impacts are unreasonable without tapering. Yet tapering will not present any benefit whatsoever in terms of an offset to habitat fragmentation.

Conservation of Wildlife

The DEP May 11 Order states “Because of the impacts to wildlife, even with on-site mitigation, the Department finds additional, off-site, mitigation in the form of land conservation is required to ensure the applicant has made adequate provision for the protection of wildlife in the region affected by the project.” (p.80).

To claim that off-site mitigation in the form of land conservation can somehow make up for the damage to the Maine forest environment perpetuated by 53 miles of a transmission corridor is ludicrous on its face. This is because the most severe damage that will be done by the corridor is *landscape-scale fragmentation*, as testified to by several experts at the DEP Hearing.

No amount of “conservation” land elsewhere can possibly restore fragmentation, and therefore wildlife habitat and wildlife migratory pathways and connectivity will be lost *forever*. DEP’s misplaced focus is on discrete habitat scale impacts, rather than true landscape-scale impacts, which are far more critical to the overall enduring habitat values of the Maine forest. As stated in the NRCM Appeal “The Order-mandated land conservation does not adequately compensate for the NECEC abnegation of functions and values of significant wildlife habitat.” Off-site land conservation is insufficient and unacceptable as a replacement for the lost functions and values associated with the NECEC impacts.

The Site Law requirement that the project fit harmoniously into the environment cannot be mitigated by offsite measures, easements, or financial contributions to compensation funds. However, DEP is desperately using the false mitigation measure of offsite land conservation, which would be a trivial financial burden to CMP’s foreign corporate masters, as a smokescreen to cover up the obvious fact that CMP’s corridor cannot

possibly fit harmoniously into the environment!

The NRPA and Site Law become twisted and distorted when used to favor a corporate scheme that otherwise should be rejected outright. If a project has unreasonable adverse impacts it should be rejected outright. The developer should not be given the opportunity to avoid responsibility for the impacts with some extraneous financial deal.

Alternatives Analysis

NRCM's Appeal examines the Alternatives Analysis that CMP submitted and finds that CMP failed to perform an adequate alternatives analysis, ignored practicable alternatives, and the NECEC results in unreasonable adverse impacts in contravention of NRPA and the Site Law. The West Forks Appeal points out "The DEP Commissioner's Order discusses the current version of the NECEC project and route in relation to what CMP originally proposed, instead of what could have and should have been required of NECEC to protect the land, resources and people of the State of Maine."

NRCM's Appeal cites the many alternatives that would mitigate the adverse impacts of the project, which CMP totally neglected to include in its proposal or dismissed out-of-hand without doing any analysis. CMP's Alternatives Analysis ignored practicable alternatives that would minimize scenic, wildlife habitat and wetland impacts by following existing roads and leaving full-height vegetation via taller poles. CMP never looked at alternate routes for NECEC along existing disturbed corridors, such as the Spencer Road or Route 201. CMP's alternatives analysis contains no discussion of undergrounding all or any portion of the NECEC, except the after-the-fact addition of burial of the Kennebec Gorge crossing when the immediate threat of permit denial looked probable to CMP (likewise the alteration around Beattie Pond).

CMP also failed to consider any alternative that utilized a combination of mitigation strategies. As the West Forks Appeal states "The Applicant chose not to spend its money on more expensive but far less damaging routes." The DEP Commissioner's decision did not fully discuss these alternatives and instead stated that the currently proposed NECEC route was less damaging than the original route. This is not the standard for considering alternatives. Failing to address alternatives was unreasonable.

Chapters 310 (Wetlands), 315 (Scenic and Aesthetic), and 335 (Wildlife) of the DEP Rules all contain explicit requirements that an applicant conduct an alternatives analysis to determine whether a less harmful alternative exists. Under no circumstances can an application be approved where this analysis is not done or where the project would cause unreasonable harm to a protected resource, even where no practicable alternative exists.

DEP rules require applicants to examine the no build alternative in its alternative analysis. 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.

CMP's application dismisses the entire concept of a no-build alternative or a non-CMP option as not meeting "**CMP's needs**", (i.e., to make an enormous profit for its foreign corporate masters). Of course it would not meet CMP's needs! Why does it have to meet CMP "needs"? However, the no-build alternative could very well satisfy the ultimate purpose of generating clean energy to the N.E. grid.

DEP buys into the notion that it must dismiss the no-build (no action) alternative "**because it does not meet this applicant's project needs.**" The Order states, "The Department did not evaluate that approved project as an alternative because it does not meet this applicant's project needs. The Department declines to interpret an alternatives analysis as requiring an assessment of whether third party commercial competitors in other states may be able to fulfill the stated project purpose by some other means. The Department requires applicants to examine the no build alternative, alternative sites, alternative designs, and reductions in the scope of the project in an alternatives analysis and the applicant has done so in this case."

So is the Maine Department of Environmental Protection funded by Maine taxpayers to meet CMP's "needs" or to protect Maine's environment? It obviously cannot do both.

DEP's Abuse of Discretionary Authority

Throughout the NECEC proceedings the DEP used its discretionary powers to deny the consideration of extremely relevant evidence because it would go against the applicant.

(1) Greenhouse Gas Emissions:

On January 24, 2019, Intervenor Group 4 filed a written request to include greenhouse gas emissions as a hearing topic and Intervenor Groups 2 and 10 filed a letter in support of that request. In the February 5, 2019 Third Procedural Order, the (DEP) Presiding Officer determined that greenhouse gas emissions would not be included as a hearing topic.

In its comments to the Department, NRCM noted that the PUC and the Department failed to examine whether the NECEC would simply divert electricity from other markets to supply this contract or whether those other markets would ramp up fossil-fuel-generated electricity to make up for lost supply going through NECEC. ***This is the most important issue in determining whether NECEC would reduce carbon emissions.*** NRCM provided extensive evidence that NECEC would result in this sort of energy "shell game." However, the Department never mentioned NRCM's comments or discussed this issue in any of its decision documents (emphasis added).

This exclusion decision was an egregious abuse of DEP's discretionary authority and enormously prejudiced the NECEC hearing. Purporting to limit greenhouse gas emissions

was the central justification that CMP put forth for NECEC incurring severe adverse impacts to the environment of our Western Maine Mountains and landscape.

Counsel for the Department claimed that this exclusion was the result of a lack of jurisdiction for review of greenhouse gas emissions under NRPA or the Site Law. DEP claimed that they could only consider greenhouse gas emissions in the immediate vicinity of the project. Greenhouse gas emissions are a worldwide atmospheric issue and DEP needs to take off its narrow-minded blinders. Greenhouse gas emissions generated by Hydro-Quebec in building and operating mega dams is extremely relevant to whether NECEC should receive approval.

Even more egregious, as pointed out in NRCM's Appeal, the Order then relied on CMP's assertions of greenhouse gas emissions benefits from NECEC in offsetting NECEC adverse impacts under NRPA. Notwithstanding the Department's obligation to assess greenhouse gas emissions generally, see 38 MRSA §577, the Department **erroneously** excluded evidence on and analysis of the greenhouse gas impacts, and then concluded that the permits could not be granted without counting the unsupported assertions of such benefits by CMP, which the parties were never allowed to address with evidence. Such double talk is impermissible.

(2) Impact of NECEC on Indigenous Populations

The Innu Nation, located in Labrador, has submitted comments to DEP to dispel the multiple and continuing assertions of CMP, and by implication, Hydro-Québec, that the proposed New England Clean Energy Connect is “clean energy generation” or “environmentally friendly.” The Innu—the aboriginal inhabitants of lands and waters indiscriminately destroyed by Hydro-Québec to generate the power that CMP wants to transmit through Maine via NECEC—have shown that nothing could be further from the truth.

The Innu Nation's comments state, “The Project unquestionably proposes, “use” of the Innu's territory, and will exacerbate unreasonable adverse impacts thereon. Neither CMP, nor Hydro-Québec, have sought, nor obtained, the necessary permissions from the Innu Nation for this “use.” Unless or until they do so, under the plain language of Department's own rules, the Department must either deny CMP's application or condition any permit approval on CMP and Hydro-Québec obtaining the necessary permissions from the Innu Nation. In addition to the Department's rules, this result would be required by faithful adherence to the United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by the State of Maine, the United States, and the Canadian Government. If CMP and Hydro-Québec fail to satisfy this condition, the stated project purpose of delivering clean energy generation from Québec to the New England Control Area is, by definition, impossible to accomplish.”

Five Indigenous First Nations [Pessamit (Innu), Wemotaci (Atikamekw), Pikogan, Lac Simon and Kitcisakik (Anishnabeg)], have joined together to oppose NECEC. They have pointed out that 36% of the total hydroelectric power installed by Hydro-Quebec has been stolen from them, without prior consultation, without their consent and without compensation. The plights of the indigenous communities have been devastating

due to Hydro-Quebec's damming of rivers, diverting rivers, generating methyl mercury poisoning of the population, erecting power lines, operating reservoirs and hydroelectric plants, all within their ancestral territories.

In their own words:

"Our community is located at the foot of a dam which inundated a large area of our ancestral territory equal in size to the island of Manhattan (59.1 mi). Although surrounded by Hydro-Québec installations, our homes have no electricity or running water and have no wastewater management infrastructure. Our First Nations have enabled Quebec to industrialize and the majority of its citizens to access a better quality of life, but the health and well-being indicators for our communities continue to be comparable to those in third-world countries."

"Hydro-Québec's long-standing contempt toward us forces us to henceforth air its dirty laundry in the United States, where it is counting on selling billions of dollars of electricity," they wrote. "Our ultimate recourse consists of revealing to American society the immoral character of the electricity being offered."

Despite these concerning issues, DEP is silent on the plight of indigenous communities. It is alarming, and disgraceful, that Maine would give a green light to CMP to construct NECEC when so much is at stake for the First Nations. We, as citizens of Maine, cannot let this pass and pretend not to understand the implications for the indigenous communities.

(3) Insufficient right, title or interest

DEP has abused its discretion by ignoring the evidence that CMP **DOES NOT** have proper right, title or interest in that portion of the proposed transmission corridor that would pass through two parcels of Public Reserved Land– the Johnson Mountain and West Forks Plantation Northeast parcels.

Article IX, Section 23 of the Maine Constitution requires that any reduction or substantial alteration of public reserved lands require approval by a 2/3rd vote of the Legislature. These Public Reserved Lands have been set aside for Wildlife, Recreation, and Forestry – not to be fragmented by high voltage infrastructure.

As documented in NRCM's Appeal, the Bureau of Parks and Lands lease of State Public Reserved Land in Johnson Mountain and West Forks Plantation Northeast parcels ("Illegal BPL Lease") was not authorized by a 2/3 vote of the Maine Legislature as prescribed by the Constitution of Maine. Also, The Illegal BPL Lease was issued to a utility (CMP), which had not yet obtained the required CPCN. As a result, the Illegal BPL Lease is void on its face and does not meet the submission requirements for documentation of TRI set forth in Chapter 2 Section 11(D) of the Department's Rules.

(4) Devastating Impacts of Mega-Dams

In deciding whether to grant CMP the permits to build NECEC DEP has completely

failed to consider the adverse environmental impacts of mega-dams, the claimed source of the electricity, which CMP's application proposes to import through Maine.

Stephen M. Kasprzak has submitted well-researched data and analysis to DEP, dated 2/14/2019, documenting and demonstrating the negative environmental impacts caused by Hydro-Quebec's reservoir hydroelectric facilities to the Gulf of Maine's ecosystem, which includes Gulf of St. Lawrence and its Estuary, James Bay and Hudson Bay and Labrador Sea. DEP is mandated by state statute to protect the land, air, and water of the Gulf of Maine's ecosystem even if it lies in Canada.

Mr. Kasprzak's information and conclusions are supported by other scientific studies:

10 Reasons Why Climate Initiatives Should Not Include Large Hydropower Projects

<https://www.internationalrivers.org/news/civil-society-manifesto-10-reasons-why-climate-initiatives-should-not-include-large-hydropower-projects/>

Five ways mega-dams harm the environment

<https://www.dw.com/en/five-ways-mega-dams-harm-the-environment/a-53916579>

Dams Cause Climate Change, They Are Not Clean Energy

<https://www.ecowatch.com/dams-cause-climate-change-they-are-not-clean-energy-1881943019.html>

Conclusion

The evidence in the existing record and DEP's denial of additional relevant evidence for the public hearing overwhelmingly demonstrates that CMP should never have been granted permits for NECEC. DEP's erroneous judgments and abuse of its discretionary authority support the requests in the Consolidated Appeal to overturn these mistakenly granted permits. 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.



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