

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:)	
)	
CENTRAL MAINE POWER COMPANY)	
25 Municipalities, 13 Townships/Plantations,)	
7 Counties)	
)	APPLICATION FOR SITE LOCATION OF
L-27625-26-A-N)	DEVELOPMENT ACT PERMIT AND
L-27625-TB-B-N)	NATURAL RESOURCES PROTECTION
L-27625-2C-C-N)	ACT PERMIT FOR THE NEW ENGLAND
L-27625-VP-D-N)	CLEAN ENERGY CONNECT
L-27625-IW-E-N)	
)	

Group 4 Comments on Draft Order

Group 4 (consisting of the Appalachian Mountain Club, Natural Resources Council of Maine, and the Maine Council of Trout Unlimited) hereby submits the following comments on the Department of Environmental Protection’s (DEP or Department) March 13, 2020, Draft Order (Draft Order) conditionally approving Central Maine Power Company’s (CMP or Applicant) application for State land use permits for the New England Clean Energy Connect (NECEC). Group 4 remains opposed to the granting of any State land use permit for this fundamentally flawed project. Nothing in the Draft Order changes Group 4’s conclusions in its initial or reply briefs in this matter, and Group 4 still finds that CMP has failed to demonstrate that this project will fit harmoniously into the existing natural environment and will not adversely affect existing uses, scenic character, and natural resources, including significant vernal pools, brook trout habitat, wildlife habitat and lifecycles, and deer wintering areas.

In submitting these comments, Group 4 reserves its right to appeal any and all Findings, Conclusions, and Conditions contained in this Draft Order, which may be included in a Final

Order, regardless of whether those elements are specifically identified and commented on in these comments.

I. Introduction

DEP has correctly recognized that the New England Clean Energy Connect (NECEC) project cannot be permitted as proposed by CMP. Unfortunately, instead of rejecting this flawed project, the Department has attempted to carry CMP's water by crafting and imposing conditions in an attempt to reduce and compensate for the project's serious impacts on brook trout and wildlife habitat. These proposed conditions are also a dramatic departure from the project as proposed by CMP that was debated during the hearings held last year by DEP and the Land Use Planning Commission. The correct course of action would have been for DEP to deny the permit for the project as proposed. Instead, DEP has inappropriately taken on the role of a surrogate for CMP and redesigned the project in a way that will justify granting a permit.

The proposed tapering and Wildlife Area conditions are unlikely to provide the wildlife and habitat benefits promised. It is also unclear how these conditions will be monitored and enforced or what the remedy will be if they do not provide the desired mitigating impacts. However, even with the best-case scenario for the proposed on-site mitigation, DEP correctly recognizes that the project still cannot be permitted due to its impacts on the environment and has required additional land conservation as compensation for the project's impacts. Unfortunately, the proposed conservation is also inadequate in both form and function. The proposed conservation is both too small in size to appropriately offset the harm caused by CMP's proposed project and also fails to provide the appropriate safeguards to ensure that the conserved land will be managed in a way that provides the required wildlife benefits. Stronger guidelines are necessary to identify the appropriate parcels and ensure adequate management to maximize

the habitat and connectivity benefits for the mature forest species most heavily impacted by the project.

II. Mitigation measures fail to ensure that the proposed project will not have unreasonable impacts on resources protected

Group 4 agrees with DEP’s assessment that the proposed project would have a substantial impact on brook trout habitat, particularly in Segment 1. However, we disagree with DEP’s assessment that the combination of minimization measures proposed by the Applicant and additional measures required as conditions of the draft permit have “minimized impacts to waterbodies that serve as fisheries habitat to the greatest extent practicable.”¹ We also maintain, as we did in our testimony, that the proposed mitigation measures intended to compensate for unavoidable impacts are insufficient and are primarily directed at resources very different from the high-quality, high-elevation, wild brook trout streams that are directly impacted by the NECEC.

Group 4 also fully agrees with DEP’s assessment that the project as proposed would have “substantial and harmful” fragmenting impacts on the western mountains region and could not be permitted as proposed by CMP. As a result of this finding, DEP has proposed three types of mitigation – tapering along the entire length of Segment 1, taller vegetation in selected areas, and compensatory land compensation. Unfortunately, these proposed mitigation measures are inadequate to ensure that the proposed project would not have unreasonable fragmenting impacts. The first two mitigation strategies, tapering and taller vegetation, would only provide limited benefit for mitigating fragmenting impacts (especially for mature forest species) and the land conservation is currently inadequate to provide significant compensatory benefits.

¹ Draft Permit, p. 84.

A. Proposed mitigation measures fail to ensure that the proposed project will not unreasonably harm brook trout habitat

The draft decision credits the following measures for minimizing impacts to brook trout and coldwater fisheries: (1) Increasing riparian filter areas (buffers) along streams from 25 feet to 100 feet around all perennial streams in Segment 1, all coldwater fisheries streams in other segments, and all Outstanding River Segments; (2) Protection of the Grand Falls, Basin, and Lower Enchanted Tracts, protecting 12.02 miles of streams combined; (3) Providing for full canopy vegetation at Gold Brook and Mountain Brook; (4) Maintaining 35-foot height vegetation in 12 “Wildlife Areas” that total 12.2 miles of Segment 1; (5) Tapered vegetation within the remaining length of Segment 1; and (6) \$1,875,000 in funding for culvert replacements.² Our concerns about the inadequacies of each of these measures are discussed below:

- **Riparian filter areas**

Within the wire zone of these areas, all vegetation taller than 10 feet would be cut to ground level during initial clearing. Outside the wire zone, in the remainder of the 150-foot-wide corridor, only non-capable vegetation would be allowed to exceed 10 feet in height. All vegetation capable of reaching into the wire zone would be removed on a two- to three-year cycle in Segment 1, and a four-year cycle in other segments. The result will be to convert the corridor from intact forest with strict limits on tree removal during timber harvest to a permanent 150-foot band of short scrub-shrub vegetation. Importantly, these “protections” would not apply within the wire zone except in areas where more protective prescriptions apply. This vegetative condition would be regularly maintained, preventing recovery of vegetation that could serve critical buffer functions such as providing shade and overhead cover to streams, woody debris

² Draft Permit, p. 82-84.

inputs that are essential for fish habitat, or a forest canopy that provides leaf fall and insect inputs to aquatic food chains. The increase in width of this zone from 25 feet to 100 feet does little to reduce the impacts of this project, with the exception that it may somewhat improve sediment removal.

- **Protection of the Grand Falls, Basin, and Lower Enchanted Tracts**

As discussed in detail in Jeff Reardon’s pre-filed direct and surrebuttal testimony, most of the river and stream habitat protected in the proposed compensation parcels is unlike the stream habitat impacted by the NECEC’s inadequate buffers. The impacted streams are mostly cold, high-elevation, headwater streams that are highly productive of wild brook trout. The streams “protected” in the compensation parcels are mostly large mainstem rivers that warm significantly in the summer, have a recreational fishery at least partially supported by stocking, and have limited or no potential to produce wild brook trout.^{3,4}

- **Full-height vegetation at Gold Brook and Mountain Brook**

The measure to require full canopy vegetation at Gold Brook and Mountain Brook was proposed to protect Roaring Brook Mayfly habitat in part of Wildlife Area 4 (Gold Brook) and Wildlife Area 6 (Mountain Brook) but are also cited for benefits to brook trout at these stream crossings.⁵ The full canopy vegetation at these two sites is provided by taller poles or pole locations that allow for mature tree canopy below the wire zone, and is required between four structures spanning 0.65 miles with two crossings of Gold Brook and between three structures spanning 0.38 miles with a single crossing of Mountain Brook. This condition is therefore applied to three of the 271 stream crossings in Segment 1 (only 1.1% of stream crossings in

³ Reardon Pre-filed Direct Testimony, p. 22-23.

⁴ Reardon Surrebuttal Testimony, p. 6-7.

⁵ Wildlife Area 11, which includes the Kennebec River crossing and no other streams, will also have full canopy vegetation, as the line will be underground. In CMP’s original overland crossing, full canopy vegetation would have been maintained due to pile heights and locations.

Segment 1). While full canopy closure reduces the impacts on these two streams, it is notable that tributaries to both streams are not included. At Gold Brook, five tributary streams adjacent to the Gold Brook crossings are not included in the “full canopy vegetation” zone, and therefore get only 35-foot tall vegetation. The effectiveness of these “full canopy” areas is further reduced by clearing within the “full canopy” areas for access roads and structures. Within the footprint of each structure and for the entire length of the access roads, all capable and non-capable species would be removed during initial clearing, and these areas would be maintained as scrub-shrub thereafter. Based on the Google Earth map layers provided,⁶ access roads coincide with approximately 0.4 miles of the 0.65 miles of full canopy in Wildlife Area 4, including one of the two Gold Brook crossings. The cleared road will cross Gold Brook, leaving a maintained scrub-shrub buffer rather than full canopy in perpetuity at the crossing. As a result, uninterrupted full canopy vegetation is applied to less than one mile of the 53-mile-long Segment 1, and only two of the 271 stream crossings would retain full canopy vegetation. At one of those streams, Gold Brook, one of the “full canopy” crossings of Gold Brook will be compromised by a cleared and maintained construction road.

This means that DEP’s mitigation measure is only fully applied to a single stream, Mountain Brook, and partially applied to Gold Brook. While both are important brook trout resources, the overall significance of these two improved crossings is very small in the context of the entirety of the NECEC’s impacts on brook trout and other aquatic habitat.

- **Thirty-five-foot tall vegetation in 12 Wildlife Areas**

Wildlife Areas 1-10 require 35-foot vegetation to protect fish and wildlife habitat. In these areas, rather than complete clearing, only trees that are taller than 35 feet, or may reach heights greater than 35 feet before the next scheduled maintenance (within two to three years),

⁶ https://www.maine.gov/dep/gis/datamaps/lawb_neccec_project/2019-10-10%20NECEC%20Project%20Data.kmz.

would be removed. Trees would be removed when they either reach 35 feet in height, or when they have the potential to reach 35 feet before the next scheduled maintenance. Note that the draft order labels these “35-Foot Minimum Vegetation Height” areas, but the prescription for vegetation maintenance would actually result in a 35-foot MAXIMUM vegetation height, as all vegetation taller than 35 feet would be removed. This prescription is applied to 12.23 miles of Segment 1. These areas include crossings of 21 streams or, according to DEP, 7.7% of the 271 intermittent and permanent stream crossings in Segment 1.⁷ Of the 12 miles that receive this treatment, more than seven miles include access roads that will still be cleared and maintained as scrub-shrub habitat, significantly reducing the area that will support 35-foot vegetation.

Importantly, vegetation maintenance within the 35-foot canopy areas would involve tree cutting at ground level, rather than topping, when trees reach 35 feet or have the potential to reach 35 feet within 2-3 years. As a result, this area, though it may support some vegetation taller than scrub-shrub, will never grow mature trees that support spreading canopies or larger trunks. A study of re-generating even-aged hardwood stands in upstate New York found that at age 19, sugar maple, beech, yellow birch, and white ash were all exceeding 30 feet in height; and all reached heights of 35 feet or taller by age 24.⁸ At age 24, trunk diameters (dbh) ranged from 3.08” to 4.29”.⁹ Even at age 29, when all species but beech were exceeding 45 feet, dbh never exceeded 6 inches for any species.¹⁰ Although trees with a maximum heights of 35 feet in the corridor may provide some shade, they will not grow to heights that support full crown

⁷ Draft order, Table C-1, page 132-133.

⁸ Nyland, Ralph D; Ray, David G; and Yanai, Ruth D, 2004. Height Development of Upper-Canopy Trees Within Even-Aged Adirondack Hardwood Stands. *Northern Journal of Applied Forestry*, September 2004. (See Table 1, p 119) https://www.researchgate.net/profile/Ruth_Yanai/publication/233671448_Height_Development_of_Upper-Canopy_Trees_Within_Even-Aged_Adirondack_Northern_Hardwood_Stands/links/5552a64f08ae980ca606c177/Height-Development-of-Upper-Canopy-Trees-Within-Even-Aged-Adirondack-Northern-Hardwood-Stands.pdf

⁹ *Id.*

¹⁰ *Id.*

development and provide substantial shading before their removal. They will also not attain trunk diameters large enough to count as large wood for instream habitat.

To summarize, this measure applies to only 12 of the 53 miles in Segment 1. The 35-foot canopy is interrupted by cleared and maintained access roads in more than half of that length. Even counting those areas that include access roads, it is applied to only 21 stream crossings, less than 8% of the stream crossings in Segment 1. On the streams to which it applies, it would result in vegetation taller than scrub-shrub but not in trees tall enough to provide full shading to streams or large enough to serve as large woody debris if recruited into the stream channel.

- **Tapered vegetation**

Tapered vegetation is required within the entire length of Segment 1. As prescribed in the draft permit, tapering will include (1) a 54-foot wide “wire zone” within which all woody vegetation would be cut to ground level and allowed to regenerate to no taller than 10 feet; (2) a 16-foot wide taper on each side of the wire zone that would be selectively cut to remove vegetation taller than 15 feet and maintained with vegetation of 15-foot maximum height; (3) a 16-foot wide taper within which vegetation up to 25 feet would be maintained; and (4) a final 16-foot wide taper within which vegetation up to 35 feet would be maintained. As with the “Full Canopy” and “35-Foot Canopy” zones discussed above, access roads would be cleared and maintained as scrub-shrub.

The effectiveness of this measure to protect brook trout habitat is limited by the same concerns that apply in the 35-foot canopy zones. Trees that are removed when they reach heights near 35 feet will be young, short, and attain small trunk diameters and limited canopy spread. This substantially limits their ability to provide shade or to serve as large woody debris. These limitations are of course even greater for woody vegetation that is removed when it nears 25 feet

or 15 feet in height. And the wire zone, which occupies more than 1/3 of the total width of the corridor, would still be maintained permanently as scrub-shrub, as will all access roads. Thus, tapering will provide neither sufficient shade nor input of large wood materials to protect the many high-quality brook trout streams NECEC would cross.

- **\$1,875,000 for culvert replacements**

While the NECEC project would have extensive impacts on brook trout habitat, and while improving fish passage at culverts can improve habitat access for brook trout, there is no nexus between the two. CMP's project would have many impacts on brook trout habitat through removal of forested buffers but it would not impede fish passage. Nor are the fish passage projects to be funded by the culvert replacement fund necessarily in the same streams or even watersheds that CMP will impact. The draft order allows the culvert fund to be spent "in the vicinity of Segments 1 and 2."¹¹ CMP's impacts and the existing quality of brook trout habitat are both highest in Segment 1, where there are few public roads and the land and the logging road network are owned and used primarily for timber harvest. Funds like the recently awarded municipal grants to install Stream Smart culverts¹² may not be used on private roads, and private forest landowners have generally been less interested than municipalities in using public funds to improve fish passage. Except for Route 201, there are no public roads adjacent to Segment 1. As envisioned, it is much more likely that the \$1,875,000 fund in the draft permit would be spent on public roads near Segment 2, where brook trout impacts are much lower due to co-location of the NECEC corridor with existing power lines.

In this region, where culvert replacements would likely be on public roads and need to meet state and federal DOT standards, culvert costs would almost certainly exceed the \$50,000-

¹¹ Draft Order, page 84.

¹² *Id.*

\$100,000 range cited, with the result that fewer than the envisioned 25 culverts would likely be replaced. The bigger problem is that the DEP has done no calculation of how the benefits of 25 culverts with improved passage compensates for the impacts of CMP's hundreds of stream crossings with inadequate buffers.

B. Proposed mitigation measures fail to ensure that the proposed project will not unreasonably harm wildlife habitat through increased fragmentation

- i. Tapering is a scenic impacts mitigation measure, was not designed to mitigate forest fragmentation impacts, and will be too difficult to implement as envisioned

Reliance on tapering to mitigate this project's environmental impact is unsupported in the record. The primary purpose of tapering as proposed by the Applicant was for reducing the scenic impact of the corridor in areas of high scenic sensitivity such as Coburn Mountain. The Applicant presented no evidence that tapering would have any mitigating impact on wildlife habitat or forest fragmentation. While tapering along the length of the corridor may have some benefit for reducing edge effects in forested areas adjacent to the corridor, this strategy has not been studied, and it would provide almost no connectivity benefit for mature forest species. Even along the edges, most 35-foot high trees would be saplings in the 3-inch to 5-inch diameter range (excluding damaged or broken trees with larger diameters). While there may some species that would avoid 10-foot high scrub-shrub but would utilize 15-foot to 35-foot-tall sapling vegetation, this would not provide adequate connecting habitat for marten or other mature forest species.

Group 4 also has serious concerns about how this tapered condition would be established, and whether DEP has sufficient capacity to monitor and enforce this condition for the life of the project. The tapering diagram provided by the Applicant shows nicely tapered vegetation.¹³

¹³ Prefiled testimony of Amy Bell Segal, Exhibit CMP 5-B, p. 60.

However, Section 1 of the proposed corridor would pass through a range of stand types and ages, and it is unrealistic to expect the uniform condition presented in Exhibit CMP 5-B to exist immediately following project construction. The initial clearing of the corridor would consist of a nearly complete overstory removal of all trees greater than 5-inch diameter, leaving seedlings and saplings of a range of heights and densities. Closed canopy stands may have little established regeneration and will require time for the regrowth to grow to the desired heights. This regeneration may itself be even-aged (as will regeneration where the corridor passes through recent clearcuts), and most trees may reach the target height at the same time, resulting in another heavy removal during the next corridor maintenance cycle. Rather than the nicely tapered vegetation pictured by the Applicant, the corridor is likely to consist of an on-going patchwork of seedlings and saplings that may only achieve the desired tapered condition after decades of careful tending, if ever.

There are many questions about how DEP will monitor and enforce the progress toward the desired condition. Will a monitor be onsite during clearing to ensure that clearing is being done appropriately to reach the desired condition in the shortest possible time? How will DEP determine if the Applicant is meeting this condition? What, if any, penalties will CMP have to pay for non-compliance, and will those penalties be sufficient to ensure compliance? Without monitoring and substantial penalties, the Applicant could decide that maintaining tapered vegetation is too expensive and simply choose to pay the penalties as a cost of business.

While tapered vegetation may provide limited benefits in theory, this outcome is not supported in the record and the practical difficulties of achieving and enforcing the maintenance of this condition raise serious questions about whether these benefits could ever be achieved.

- ii. Requirements for proposed Wildlife Areas are not sufficient to ensure that these areas provide significant connectivity benefit

In theory, the Wildlife Areas may provide some benefit to habitat connectivity, primarily for species that do not require mature forest. However, in practice there would be difficulties and delays in achieving the desired condition. Greater specificity is needed to ensure that these areas provide the desired benefits.

In her supplemental testimony, Group 6 witness Dr. Simons-Legaard set forth the minimum characteristics for marten habitat that should be maintained in the Wildlife Areas, which are not limited to canopy height.¹⁴ As she stressed in her testimony, it is critical that all of these requirements be incorporated into DEP's conditions. These include:

- **Trees be at least 30 feet tall (preferably greater than 40 feet tall).**

DEP's draft condition would require that "vegetation with a minimum height of 35 feet" be maintained.¹⁵ However, the draft order also states that "only trees taller than 35 feet, or trees that may grow taller than 35 feet prior to the next scheduled maintenance will be removed during construction," and that "[w]ith regard to ongoing vegetation management, trees that exceed 35 feet or are anticipated to exceed this height before the next scheduled maintenance cycle will be selected and cut at ground level."¹⁶ This effectively makes 35 feet not the *minimum* but the *maximum* height that will be maintained, with the likely outcome that most remaining vegetation will be significantly below the 35-foot threshold. In addition to barely meeting the height guideline for marten habitat, this creates problems for the other characteristics.

¹⁴ Supplemental testimony of Group 6 witness Erin Simons-Legaard, page 1.

¹⁵ Draft Order at 107.

¹⁶ Draft Order, Appendix C.

- **Minimum basal area of 80 ft²/acre**

This threshold is at least as important as the height requirement as a regenerating stand with a few scattered taller trees will not provide the intended mitigation. The removal of all trees greater than 35 feet tall from the Wildlife Areas during construction is likely to mean that large parts of these areas would not meet this threshold following construction. Those stands that provide the greatest connectivity benefit (mature closed canopy stands) would see the greatest level of overstory removal. This means that achieving this basal area threshold would largely depend on restoration through future growth.

The minimum size tree that can be counted toward this threshold is not specified in the testimony. However, the research on which this guideline is based specifies a minimum diameter at breast height of 7.6 cm (3 inches)¹⁷, meaning that this basal area must be maintained in trees at least 3 inches in diameter but no more than 35 feet tall – a very narrow window. Stands fitting this very narrow range of tree sizes would likely be dense, even-aged sapling stands and could require extensive removal once the canopy reaches 35 feet, reducing the stand below the basal area threshold. Thus, these stands could end up in a cycle of heavy clearing followed by regeneration.

Group 4 has serious concerns as to whether this threshold can realistically be achieved and maintained over the long term, as would be required to realize any environmental benefit from the proposed Wildlife Areas, as long as trees over 35 feet tall are regularly removed.

- **At least 30% canopy closure in all seasons**

This requirement can only be achieved in mixed wood or softwood stands. Absent planting of softwoods, hardwood stands can never meet this guideline. No information is provided as to how much of the area within the Wildlife Areas consists of mixed wood or

¹⁷ See for example Payer and Harrison (2003, 2004) cited in the prefiled testimony of David Publicover.

softwood stands capable of meeting this threshold. Based on examination of aerial photography and National Land Cover data, there are several extensive areas of hardwood forest within these wildlife areas.

- **Frequent snags (dead trees)**

While it may be possible to retain some snags less than 35 feet tall during construction, they would not last long, and the 35-foot height limit would prevent the recruitment of snags in the future. Dead 35-foot-tall saplings will not provide the necessary habitat benefits of larger snags. We do not believe that this characteristic can be maintained, further reducing the potential benefit provided by the Wildlife Areas.

Ensuring that the Wildlife Areas achieve and can be maintained in the desired condition over the long term requires much more information to support this strategy and stronger requirements to ensure that the necessary habitat conditions are maintained throughout the life of the project than are contained in the Draft Order.

DEP has failed to require, and the Applicant has failed to provide, sufficient information to ensure that the benefits of the Wildlife Areas for mature forest connectivity are maximized and that the desired conditions could be achieved and maintained:

- There is no evidence in the record of which stands within the Wildlife Areas currently meet the thresholds set forth above for canopy height, basal area, and softwood canopy cover, and which stands would meet these thresholds following construction.
- There is no evidence in the record of the tallest poles that can be utilized in different areas.
- There is no evidence in the record of the maximum tree height that can be maintained given poles of the maximum height. This will vary by location based on topography and

other factors. These heights, not a blanket 35 feet, should be set at the desired tree height in different areas.

- There has been no provision of any plan based on forest growth modeling (such as the Forest Vegetation Simulator) demonstrating how progress toward the desired conditions would be achieved, how long it would take to achieve these conditions, and that these conditions could be maintained given the need for on-going removal of trees above the maximum height.

DEP has also not developed any plan for long-term monitoring to ensure that progress toward these required conditions is achieved and maintained. It is not sufficient to examine aerial photography or simply measure canopy height – basal area must also be periodically monitored.

Finally, DEP has not specified any “triggers” that would require additional land conservation as compensation for portions of the Wildlife Areas that cannot meet the desired conditions (such as hardwood stands that will not meet the winter canopy closure threshold), which will not achieve them in a reasonable time, or which cannot be maintained in the desired condition over the long term.

The simplest and most effective way to achieve the desired benefits in the Wildlife Areas would be to require that full-height vegetation be maintained in the entirety of the Wildlife Areas (i.e., that the vegetation in these areas be allowed to naturally progress toward a mature condition). This strategy would also reduce monitoring and enforcement obligations for DEP. Given that CMP has demonstrated that it is feasible to do this in limited areas along Segment 1, it should be feasible to expand the practice to important Wildlife Areas. Based on available information, Group 4 does not believe any protective measure short of maintaining full-height

vegetation in all Wildlife Areas could provide the habitat functions DEP is attempting to protect by this condition.

III. The proposed compensatory land conservation is inadequate to offset significant habitat function losses

Group 4 strongly agrees with DEP's assessment that, even with the on-site mitigation of tapering and Wildlife Areas, the project is not permissible and that additional mitigation in the form of compensatory land conservation is required. However, the amount of conservation proposed by DEP is the absolute lowest level recommended by any non-Applicant expert witness during the hearing and is based on best-case assumptions about the environmental benefits of tapering and Wildlife Areas. Given that the environmental benefits of tapering and Wildlife Area mitigation strategies are unlikely to be fully realized for some time (perhaps several decades), if at all, the habitat protections provided by compensatory land conservation are especially critical. Unfortunately, the Draft Order does not contain assurance that the conserved land would be of sufficient quantity or quality to provide these necessary benefits. Conservation easements in an area with limited development threat, but which allow commercial forestry to continue as usual, would provide very limited additional benefits and are insufficient and unacceptable.

The conserved land must be held in fee by a state agency (MDIFW or MBPL) or a credible NGO and managed as a natural area. Without this ownership arrangement there is no guarantee that the protected land would provide the maximum possible benefit to mature forest species that would suffer the greatest impact from the project by allowing the natural development of unfragmented mature forest conditions and the abandonment of many roads. That the project would have a significant adverse fragmenting impact is well-established in the record and the Draft Order. The compensatory conservation land must have an offsetting and equally significant defragmenting benefit.

If the land is conserved by easement, it should be held by a state agency or NGO with an established history of holding and monitoring large easements. It should not be held by a newly created entity with no experience in this area.

The location and condition of the conserved land is also critical to ensure that it provides the necessary habitat benefits. Multiple scattered parcels of heavily harvested land would not provide the necessary benefits. Strong preference should be given to lands within the Moose River or Cold Stream watersheds, which would provide the greatest nexus to the project's impacts.

Group 4 recommends that proposed parcels be reviewed and approved by an advisory committee consisting of representatives of relevant state agencies (MDEP, MBPL, MDIFW, and MNAP) and Intervenor Groups 4 and 6. Lands proposed for mitigation should be evaluated according to a predetermined set of criteria, including but not limited to:

- Ideally the land mitigation land would consist of a single contiguous parcel. If this is not possible, the number of separate parcels should be minimized with one at least 25,000 acres and no parcel less than 5,000 acres.¹⁸
- Proximity to and connectivity benefits for existing conservation lands or other areas of high conservation value.
- Presence of large unfragmented blocks of mature forest.
- Presence of high-value brook trout streams and subwatersheds.
- Presence of other significant ecological values (such as habitat for Species of Greatest Conservation Need, rare or exemplary natural communities, and high-quality aquatic habitat).

¹⁸ These figures are based on guidelines for landscape-level ecological reserves developed by The Nature Conservancy and the Maine Ecological Reserves Scientific Advisory Committee.

- Areas of high climate change resilience as mapped by The Nature Conservancy's Resilient and Connected Lands analysis.

In addition, if lands are held with a conservation easement that allows timber harvesting, the following provisions should be included:

- Timber harvesting must not exceed growth over any 10-year period. One of the purported benefits of the project is a reduction in greenhouse gas emissions (a benefit that we believe has not been established), and over time the mitigation parcels must not become a source of greenhouse gases.
- The land should be managed according to the landscape-level marten habitat guidelines established by University of Maine researchers. The primary habitat impacted by the project is to marten and other mature forest species, and the conserved land must focus on enhancing this habitat. Over time the amount of suitable marten habitat on the conservation land must not be decreased and ideally should increase.
- A minimum 100-foot, no-cut riparian buffer should be maintained on all brook trout streams to protect intact riparian buffer functions.

IV. DEP erred in its Title, Right, and Interest (TRI) determination

When CMP presented its application to the Department, it included two leases that were void as a matter of law:

1. A lease over Passamaquoddy land that lacked the requisite signature from the Bureau of Indian Affairs (BIA), and

2. A lease of State Public Reserved Land in Johnson Mountain and West Forks Plantation Northeast¹⁹ parcels that lacked the requisite approval of the State Legislature (and was further unlawfully issued to a utility that lacked the requisite CPCN).²⁰

As a result, both leases were a legal nullity. This alone should have made clear at the outset that CMP lacked the requisite TRI necessary to proceed with its application. TRI cannot be cured after-the-fact; the law is clear that adequate TRI must exist continuously at all stages of the administrative process. On this ground, the Department should deny the permits.

More troubling is the Department's proposed disparate treatment of these two functionally identical dead-letter leases. With regard to the Passamaquoddy lease, the Department conditioned the permits on CMP obtaining the requisite BIA approval. Logically, this would require the same condition with regard to the lease over Public Reserved Lands: the permits must be conditioned on CMP obtaining the requisite legislative approval. There is no rational basis for the Department to propose to treat the Public Lands lease any differently than it proposes for the Passamaquoddy lease.²¹ Thus, the Department must condition the permit on CMP obtaining the requisite legislative approval.

¹⁹ 2014. Transmission Line Lease Between Department of Agriculture, Conservation, and Forestry, Bureau of Parks and Lands and Central Maine Power, p. 11. Attachment A.

²⁰ The Bureau of Parks and Lands (BPL) erred in granting CMP the lease prior to the company's obtaining a Certificate of Public Convenience and Need (CPCN), a clear violation of 35-A MRS § 3132(13).

Public lands. The State, any agency or authority of the State or any political subdivision of the State **may not sell, lease or otherwise convey any interest in public land**, other than a future interest or option to purchase an interest in land that is conditioned on satisfaction of the terms of this subsection, to any person for the purpose of constructing a transmission line subject to this section, **unless the person has received a certificate of public convenience and necessity from the commission pursuant to this section.**

(emphasis added). Despite not receiving a CPCN from the Maine Public Utilities Commission (PUC) until May 3, 2019, BPL issued this lease to CMP, for a transmission line subject to 35-A M.R.S. § 3132, across public lands, on December 8, 2014. When notified of CPCN requirement at a February 18, 2020, work session held by the Agriculture, Forestry, and Conservation (ACF) Committee of the Maine Legislature, BPL Director Andy Cutko stated that, "Now that I am aware of the utilities requirement I would certainly want to follow the law and get that secured prior." (Cutko statement available at: <https://www.mainepublic.org/post/maine-lawmakers-question-legality-2014-cmp-lease-state-lands-transmission-corridor>).

²¹ CMP may argue that the condition of BIA approval was unnecessary as a result of its proposed reroute around Passamaquoddy land. First, this changes nothing about the above analysis—the Department's proposed approach of

The Department's statement that it will simply defer to its sister agency is nonsensical. BPL's lease with CMP violates Maine's Constitution and DEP simply cannot defer to BPL's clear disregard for Constitutional requirements.

In November 1993, Maine voters amended the Constitution in order to protect public lands by passing Article IX, Section 23 of the Maine Constitution, which states that "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House."²²

In 1994, the Legislature classified Public Reserved Lands as "designated lands" and clarified that "designated lands...may not be reduced or substantially altered except by a 2/3 vote of the Legislature." 12 M.R.S § 598-A. The Legislature defined "substantially altered" as:

Changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State. The essential purposes of state parks, historic sites, public access sites, facilities for boats and the Allagash Wilderness Waterway are the protection, management and improvement of these properties for public recreation, conservation, scenic values, nature appreciation, historic preservation and interpretation, public access and related purposes. The essential purposes of public reserved and nonreserved lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847.

12 M.R.S § 598(5). In turn, 12 MRS § 1847 requires that Public Reserved Lands "be managed under the principles of multiple use to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the Public Reserved Lands be managed to demonstrate exemplary land management practices, including silvicultural, wildlife and recreation management practices, as a demonstration of state policies governing management of forested and related types of lands."

a permit condition is the only lawful option; second, this shows that the Department, in its proposed decision, made its findings and conclusions based on an incorrect understanding of what land the corridor would actually cross.

²² Accessed at: <http://legislature.maine.gov/ros/LawsOfMaine/#Const>.

In short, the Maine Constitution requires a 2/3 vote of the Legislature to approve any large-scale industrial, commercial, or utility lease of public lands. In spite of this, BPL entered into a lease in 2014 with CMP for a 300-foot wide, one-mile-long transmission line through the Johnson Mountain and West Forks Northeast public lands, both of which are “designated lands,” without obtaining a 2/3 vote of the Legislature. Despite requests for this issue to be considered during the hearing, DEP refused to allow this testimony.

This past legislative session, the ACF Committee sent a letter to BPL Director Cutko asking for documents related to BPL’s decision to grant a lease for a 300-foot-wide transmission corridor across the Johnson Mountain and West Fork Plantation Northeast parcels.²³ It is clear from the record that BPL never made such a finding. In response to ACF’s request, Director Cutko was only able to find three responsive documents, none of which contained any BPL analysis as to whether or not the 300-foot-wide corridor for NECEC across public lands would constitute a reduction or substantial alteration in those public lands.²⁴ One of the documents, an internal BPL memo, mistakenly stated that Maine law did not require such a finding; rather, approval of the governor and commissioner were all that was necessary for a lease across public lands.²⁵ With no analysis of likely impact of the lease on public lands, BPL also failed to send the issue to the Legislature for a vote. Thus, the only record evidence to which the Department can “defer” is that the leases were not issued in accordance with the law.²⁶

DEP’s statement that it will simply defer to its sister agency is also nonsensical because the State Legislature is not a “sister agency,” it is a separate branch of government. Just as CMP, in order to cross Passamaquoddy land, needs the approval of both the Passamaquoddy and the

²³ Letter from ACF Committee Chairs Senator Dill and Representative Hickman. Jan. 30, 2020, p.1. Attachment B.

²⁴ Attachment C 1-4: BPL Cover Letter and Three Responsive Documents.

²⁵ Attachment C – 3, p. 1.

²⁶ See Maine Legislature committee information webpage for LD 1893, accessed at: http://www.mainelegislature.org/legis/bills/display_ps.asp?id=1893&PID=1456&snum=129&sec3.

BIA, so too to cross Maine Public Reserved Land, CMP needs approval of both the BPL and the State Legislature. BPL has no authority to grant legislative approval and stating that the Department will “defer” to BPL’s signature on the lease as a substitute for legislative approval makes no more sense than deferring to the Passamaquoddy signature on the lease as a substitute for BIA approval.

Thus, the lease is void, and we ask that the Department deny the permits. In the alternative, we ask that the Department treat the Public Lands lease issue in the same manner that it proposed for the Passamaquoddy lease: condition the permits on CMP obtaining the requisite legislative approval.

V. DEP erred in its findings on greenhouse gas emission

Group 4 repeatedly requested that greenhouse gas emissions be included as a hearing topic.²⁷ DEP denied these requests, ruling instead that intervenors could submit written comments on the issue of greenhouse gas emissions until the close of the record.²⁸ Group 4 submitted extensive written comments on greenhouse gas emissions, which we incorporate here by reference in their entirety.²⁹ Despite our extensive submission, DEP failed to even address Group 4’s comments. Instead, DEP stated that

The Department defers to and accepts the PUC’s finding on this issue, and weighs the NECEC project’s reductions in GHG emissions against the project’s other impacts in its reasonableness determination. In doing so, the Department finds the adverse effects to be reasonable in light of the project purpose and its GHG benefits, provided the project is constructed in accordance with the terms and conditions of this Order.³⁰

²⁷ Group 4 oral request to include greenhouse gas emissions in hearing, Second Pre-Hearing Conference, Jan. 17, 2019; Group 4 request to include greenhouse gas emissions, Jan. 24, 2019 (supported by Intervenor Groups 2 and 10).

²⁸ Third Procedural Order, p 4. February 2019. “The Presiding Officer has determined that net greenhouse gas emissions will not be added as a topic to be addressed at the hearing, however the parties may submit written evidence on this issue into the record. The issue can be adequately addressed through written submissions.”

²⁹ Group 4 Greenhouse Gas Comments, May 2019.

³⁰ Draft Order at 103.

Despite denying parties an opportunity to vet CMP's greenhouse gas claims in an open hearing process and leading parties to believe that their comments would be reviewed, DEP merely accepted the conclusions of the Maine Public Utilities Commission (PUC) to find that the numerous and significant negative environmental impacts from this project are somehow justified by the findings of a different agency with no expertise in environmental issues. As the state agency tasked with protecting Maine from the impacts of climate change, DEP's failure to even acknowledge our extensive and well-documented evidence that NECEC would provide no climate benefits is shocking and an error of law. So, too, is the fact that DEP would consider greenhouse gas benefits a mitigating factor for the destruction that NECEC would cause without performing a thorough and independent evaluation of CMP's claims. The PUC, and now DEP, have not examined the issue of whether 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. Group 4 provided extensive evidence that NECEC would result in this sort of energy "shell game." However, no discussion of these considerations is presented in the Draft Order.

Moreover, DEP ignored compelling evidence in Group 4's comments that Hydro-Quebec's impoundments emit substantial amounts of carbon pollution, among the highest levels for impoundments in the world.³¹ Instead, in simply accepting the PUC's conclusions, DEP accepted the underlying assumption in the PUC's flawed finding that carbon emissions from Hydro-Quebec's reservoirs are zero. Massachusetts Institute of Technology Professor Bradford Hager submitted additional evidence on this topic during the Army Corps hearing process. His

³¹ Group 4 May 8, 2019 Comment on project's failure to reduce greenhouse gas emissions, p. 7-8 (citing Bradford M. Hager. 2019. Commentary: Hydro-Quebec offers misleading claims about power's climate impact. *Portland Press Herald*).

testimony and supplemental testimony on Hydro-Quebec's carbon emissions to the Army Corps of Engineers on this project are included as Attachment D.

DEP also erred in summarizing public comments related to greenhouse gas emissions by highlighting supportive comments about GHG emissions and failing to acknowledge overwhelming numbers of public comments in opposition to the project because it would not provide greenhouse gas reductions. DEP mentioned public comments in support of the project because of perceived greenhouse gas benefits two separate times, without citing which comments DEP was relying on or how many of these comments there were.³² However, nowhere in the Draft Order does DEP ever acknowledge the significant public comments expressing concern that the extensive environmental impacts of this project were not justified by the greenhouse gas emissions reductions claimed by CMP or asking DEP to do its own investigation of these claims to be sure that the sacrifice of Maine's environment was justified.³³

In closing, by neglecting to perform an independent analysis of purported NECEC carbon benefits, DEP's balancing of environmental impacts against potential greenhouse gas reductions is fatally flawed, endangering Maine's environment on a faulty and unsupported assumption. Based on the failure to appropriately investigate the purported objective of this project, we strongly urge DEP to deny this permit.

³² Draft Order at 35, 70.

³³ In the April 2, 2019, public hearing at least five individuals raised concerns about CMP's greenhouse gas claims (*see* April 2, 2019, public testimony of J. Mahon, Tr. p 62-63; J. Stewart, Tr. p. 78-79; M. McCarthy, Tr. p. 93-94; H. Trotsky, Tr. p. 103-05; S. Day, Tr p. 108-11) as compared with only one individual stating that environmental impacts were justified in light of perceived greenhouse gas benefits (*see* April 2, 2019, public testimony of A. Howlett, Tr. p 48-50).

VI. Conclusion

Based on the considerations raised in this comment letter and throughout this proceeding, the Department should deny CMP's permit application. CMP has not met its burden to show that this project complies with applicable laws. Despite DEP's efforts to "fix" CMP's application through numerous conditions in its Draft Order, the proposed minimization, mitigation, and compensation measures remain inadequate and this permit application must be denied.

Submitted on April 13, 2020

Respectfully,



Susan J. Ely
On Behalf of Group 4 (AMC, NRCM, TU)
3 Wade Street
Augusta, ME 04330
(207) 430-0175