

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Central Maine Power Company Application for a Site
Location of Development Act Permit and Natural
Resources Protection Act Permit for the Construction
of 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

**COMMENTS OF THE NATURE CONSERVANCY AND CONSERVATION LAW
FOUNDATION (GROUP 6) ON DEPARTMENT'S DRAFT ORDER**

April 13, 2020

Table of Contents

I. Introduction.....1

II. Certain Permit Conditions Require Additional Detail and Measures if They are to Meet the Legal Requirement that the Project Avoid, Minimize and Compensate for its Habitat Fragmentation Impacts2

 A. Conservation2

 B. Tapering; Taller Poles and Taller Vegetation.....7

 C. Brook Trout and Coldwater Fisheries.....9

 D. Significant Vernal Pools10

 E. Decommissioning11

III. Conclusion11

Appendix A. Proposed eligible towns and townships for compensatory conservation project(s)13

Appendix B. Proposed eligible watersheds for compensatory culvert replacements.....15

I. Introduction

Thank you for this opportunity to comment on the Department's Draft Order on the Applicant's Site Location of Development Act and Natural Resources Protection Act permit applications (Draft Order). The Nature Conservancy and Conservation Law Foundation (Group 6) argued in our post-hearing brief that the New England Clean Energy Connect project, (project) as currently proposed, would have unreasonable impacts and adverse effects on Maine's natural resources by fragmentation of wildlife habitat. Post-Hearing Brief and Proposed Findings of Fact of Group 6 at 1. We also argued that evidence and testimony presented and elicited during the Department's hearings by Group 6, the Applicant and other parties established that the project, with appropriate and reasonable additional conditions, could be modified to avoid, minimize and/or compensate for these impacts, in particular in Segment 1 of the proposed corridor. *Id.* We recognize and appreciate that Department staff clearly considered that record in preparing the Draft Order and identifying additional conditions necessary for the Department to approve the permit applications. However, as currently drafted, these conditions require additional specificity to ensure they will achieve their intended purpose.

In particular, and consistent with the testimony and evidence presented by Group 6, the conditions concerning land conservation in western Maine, the creation of Wildlife Areas in Segment 1, the use of tapered vegetation to maximize forest canopy in the portions of Segment 1 where there are not Wildlife Areas, and the installation of Stream Smart culvert replacements to compensate for coldwater fisheries impacts require additional detail and measures if they are to truly serve to meet the legal requirement that the project avoid, minimize and compensate for its habitat fragmentation impacts.

II. Certain Permit Conditions Require Additional Detail and Measures if They are to Meet the Legal Requirement that the Project Avoid, Minimize and Compensate for its Habitat Fragmentation Impacts.

Group 6 agrees with the Department's conclusion in the Draft Order that "as Segment 1 initially was proposed, the Applicant had not made adequate provision for the protection of wildlife; the proposal's contribution to habitat fragmentation and impact on habitat and habitat connectivity was an unreasonable impact on wildlife habitat." Draft Order at 75. This conclusion is well supported by the evidence presented throughout the hearings, as cited in the Draft Order. *Id.* We also appreciate that the Department is conditioning permit approval on modifications to the project to ensure that "adequate provision for the protection of wildlife will be achieved." *Id.*

With respect to those conditions, as noted above, the manner in which they are executed is critical to ensuring habitat fragmentation is avoided, minimized and compensated for adequately.¹ Accordingly, the Draft Order should be modified to include the following additional details in any Final Order.

A. Conservation

The Draft Order requires that:

Within two years of the date of this Order, CMP must develop and submit to the Department for review and approval a plan to permanently conserve 40,000 acres in the vicinity of Segment 1. Allowable conservation may include preservation or working forest conservation easements, requiring sustainable harvesting practices, focused on large habitat blocks. Any plan including the proposed use of a conservation easement must include a proposed holder. Within five years of the date of the Order, the approved conservation plan must be fully implemented.

¹ While many aspects of the Draft Order's conditions are consistent with the testimony, proposed findings of fact and post-hearing brief provided by Group 6, we continue to believe that the Applicant did not fully examine the feasibility of co-locating the project above-ground with nearby roads such as the Spencer Road, as the Applicant admittedly failed to contact one of the major relevant landowners to explore this option. Hearing Transcript for May 9, 2019 at 406:12-17. We continue to recommend that the Department consider the above-ground co-location option, as co-location with the Spencer Road, either below-ground (preferred) or above-ground, would significantly reduce the project's habitat fragmentation impacts. Post-Hearing Brief and Proposed Findings of Fact of Group 6 at 20-21.

Draft Order at 80, 110. The parameters governing the planning and execution of the 40,000 acres of conservation are essential to ensuring this condition achieves the Department's intended goal of compensating for the project's habitat fragmentation impacts.

As an initial matter and in keeping with standard mitigation practices that recommend compensation be implemented prior to the permitted alteration, the Department should require that the initial conservation plan be completed within one year of the date of the Order, rather than within two years. This will ensure that the compensation minimizes temporal losses to habitat connectivity and reduces any time lag between when project impacts occur and when the compensation benefits are realized.

Furthermore, the following additional measures are necessary to ensure the conservation condition required by the Department meaningfully enhances habitat connectivity in the affected region, thereby compensating for the reduction in habitat connectivity caused by the project in Segment 1.

First, all—or at a minimum the majority of—the 40,000 acres should be held in fee, rather than placed under conservation easement. These fee lands should be held by the state (e.g., the Department of Agriculture, Conservation and Forestry (DACF) or the Department of Inland Fisheries and Wildlife (DIFW)); a Wabanaki Tribe; or a nonprofit conservation organization whose mission includes land conservation and with demonstrated professional capacity for stewardship of comparable properties. As we urged in our post-hearing brief, compensation should come in the form of “land preservation” in the affected region. Post-Hearing Brief and Proposed Findings of Fact of Group 6 at 21-22. Land held in fee for conservation purposes will ensure that the acreage is improving habitat connectivity in the region, thereby compensating for the lost habitat connectivity associated with the project. While we acknowledge the potential

merit of conservation easements, easements should not be used simply to reduce cost and thereby achieve a lower level of conservation outcomes. Easements would be more appropriate as a strategy to increase the total acreage conserved to 100,000 acres, the high end of the range proposed by Group 6.

The Department should require that any conservation easement(s) purchased to satisfy the conservation condition, if allowed, must include provisions to enhance habitat connectivity above business-as-usual working forest. At a minimum, any working forest easement(s) should require enhanced riparian buffers and a management plan designed to increase timber stocking and create and maintain connected areas of mature forest throughout the easement (suitable for pine marten as a proxy for mature forest species, as established during the hearing by the testimony of Dr. Simons-Legaard). Pre-Filed Supplemental Testimony of Dr. Simons-Legaard at 1-2; Hearing Transcript for May 9, 2019 at 120:16-2. Any working forest easement should also prohibit all future development, including transmission lines, and as with the fee lands, should be held and monitored by the state (e.g., DACF or DIFW) or a nonprofit conservation organization with demonstrated professional capacity for holding, monitoring and enforcing comparable easements. The Department could consider ordering that any easements meet an existing set of standards, such as those required by the Land for Maine's Future program.

The Department should also clarify that the Applicant must fully fund the conservation acquisition(s). If any project receives only partial funding from the Applicant and the balance from another party or other parties, only the Applicant's funded portion of the project should count toward the minimum requirement of 40,000 acres.

Relatedly, the Department should require that the conservation project(s) include financial resources provided by the Applicant for long-term stewardship and management of the

parcel(s), such as a stewardship endowment. This is a standard best management practice, is key to meaningful conservation outcomes and should not be a cost borne by taxpayers.

Further, the Department should establish a minimum parcel size for conservation projects. We appreciate that the Draft Order emphasizes “large habitat blocks,” and we believe this should be codified with a minimum contiguous acquisition and/or conservation easement size of 5,000 acres. Smaller parcels should be acquired only if contiguous to existing conserved lands, creating or adding to contiguous conserved areas of at least 5,000 acres. If isolated parcels smaller than this are utilized, the result may be a patchwork of scattered and unconnected parcels that do not achieve the goal of enhancing regional habitat connectivity. Acquisition of larger parcels is also likely to reduce the per-acre cost.

Similarly, the Department should further specify geographic constraints for the conservation acreage in its Final Order. We appreciate that the Draft Order requires conservation to take place “in the vicinity of Segment 1.” Draft Order at 110. This approach is consistent with sound mitigation principles. However, “in the vicinity” could be interpreted in a number of ways. For the purpose of clarity, we urge the Department to specify a list of townships and towns that are eligible for conservation projects. We recommend that limiting projects to within approximately three towns/townships directly north and south of Segment 1 would be consistent with the intent of “in the vicinity of Section 1”. We have attached a proposed list of towns and townships and accompanying map in Appendix A below.

The Department should additionally require that any approved conservation project include basic performance standards. These standards should include a land survey conducted by a licensed surveyor; an appraisal determining the fair market value of the property conducted within two years of closing and using approved appraisal standards; a purchase and sale

agreement or similar agreement; an environmental assessment prior to closing; a project agreement signed by the Department and the fee owner or easement holder; a notice of project agreement recorded with the deed; and a long-term management plan.

Finally, the Department should develop a formal process to review and approve conservation projects proposed by the Applicant (consistent with the other parameters outlined above). The Final Order should specify that the Department will appoint a panel of advisors to assist in reviewing proposed projects, including representatives of relevant state agencies, the University of Maine and nonprofit conservation organizations with expertise in the western Maine region, as well as, if applicable, relevant federal agencies. This panel should also review and recommend for approval or disapproval the initial conservation plan discussed above. If necessary to ease the administrative burden on the Department, the Department could contract with a third-party administrator to assist in facilitating the review process and require the Applicant to fund this administrative function. This structure would share characteristics with Maine's existing compensatory mitigation program, the Maine Natural Resource Conservation Program (MNRCP). This process will ensure that the Department retains control over the conservation outcomes, and also ensures that projects selected to compensate for the habitat fragmentation caused by NECEC are informed by a comprehensive view of the habitat values of the affected region and are selected with the central and overriding goal of enhancing habitat connectivity.

Conditioning approval of this project on a significant conservation component is firmly rooted in the evidence presented during the public hearing process. Specifying the additional parameters outlined above in its Final Order will ensure that the intent of the Department's

action—compensating for the project’s habitat fragmentation impacts—is properly executed and will have meaningful and lasting benefits for Maine.

B. Tapering; Taller Poles and Taller Vegetation

Group 6 appreciates that, consistent with the testimony it presented during the hearing, the Draft Order requires tapering for the entirety of Segment 1 and establishment of 14 miles of Wildlife Areas that largely align with the priority habitat connectivity areas we identified. Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 6, 16. That said, as with the conservation condition, the Department must include additional specificity in the Final Order to ensure these conditions are as strong as possible and result in their desired effect.

Specifically, the Department should require the Applicant to develop separate management plans—or modify the Vegetation Clearing and Vegetation Management Plans included in the application—for the Wildlife Areas and for the tapered right-of-way. These plans should be reviewed and approved by the Department, in consultation with relevant agencies such as DIFW. For the nine Wildlife Areas that are required to maintain 35-foot minimum vegetation height and for the 35-foot portions of the tapered right-of-way, the management plans should be designed to achieve adequate habitat conditions for pine marten (serving as a proxy for interior forest species). Pine marten require trees at least 30 feet tall, but they also require a minimum basal area of 80 ft²/acre and at least 30 percent canopy closure in all seasons. Pre-Filed Supplemental Testimony of Simons-Legaard at 1. The Applicant should be required to actively manage the Wildlife Areas and tapered portion of the right-of-way with the goal of achieving these basal area and canopy closure requirements. This may entail, for example, selective cutting to ensure that trees in even-aged stands do not all reach the maximum height simultaneously

(which would result in clear-cutting that section of the right-of-way) and topping some hardwoods as they approach maximum heights.

Just as important, the Department should clarify in its Final Order that, except in access ways required for construction, vegetation must be left in place in the Wildlife Areas and the tapered portion of the right-of-way during construction. The Applicant should be explicitly prohibited from clearing the entire right-of-way during construction, except for removing individual capable specimens in the Wildlife Areas and tapered portions of ROW that will exceed the maximum vegetation height prior to the next maintenance cycle (and removing all capable species in the 54-foot wire zone).

Relatedly, the Department should specify in its Final Order a maximum width for access ways used for corridor construction and maintenance (for example, 16-foot width, which is the standard width of timber mats used during construction). Similarly, the Final Order should specify a maximum surface area that may be used for structure preparation and installation, especially in Wildlife Areas. These suggestions are intended to ensure the integrity of the connectivity-enhancing measures required in the Draft Order.

Finally, it is essential that quality control measures are in place to ensure these conditions are executed as intended. The Department should require independent quality assurance monitoring during and immediately following construction. This could be accomplished by adding review of these conditions to the existing Third-Party Inspection Program already included in the Draft Order, or by requiring the Applicant to hire a separate third-party inspector—with funding set aside in escrow for this purpose—to monitor for compliance with the Department's tapering and Wildlife Area conditions during construction. The Department

could also conduct monitoring directly. Post-construction monitoring of these conditions should be conducted by an independent party periodically after construction (e.g., every 2-3 years).

C. Brook Trout and Coldwater Fisheries

We appreciate the Department's responsiveness to testimony from intervenors noting that the Applicant's originally proposed \$200,000 would not be enough to fund 25 culvert replacements as compensation for impacts to coldwater fisheries. Increasing this amount to \$1,875,000 in the Draft Order is an important step and we acknowledge that this figure is based on average construction costs provided by Group 6 (and Group 4) at the time of the public hearings. Since that time, construction costs increased sharply statewide, however, such that \$1,875,000 may fall substantially short of achieving the 25-culvert threshold.

To address this concern, we recommend that the Department require the Applicant to replace a minimum of 25 culverts, in addition to requiring the \$1,875,000 set aside in escrow. If \$1,875,000 ultimately proves adequate to fund more than 25 culvert replacements, this will provide additional aquatic connectivity benefits, but there should be a minimum benefit of 25 Stream Smart culvert replacements that is not contingent on fluctuating construction costs.

The Department should also specify that these culvert replacements are incremental to any culvert installations or replacements required to construct the right-of-way and related access ways. The culvert replacements required for mitigation of Brook Trout and coldwater fisheries impacts should be truly additional in the region.

Further, the Department should require that any installation or replacement of culverts on Brook Trout or other coldwater fisheries streams necessary to construct the corridor must meet Stream Smart specifications. The Applicant should not create any additional barriers to fish passage during the course of construction by using undersized or otherwise inadequate culverts.

Finally, Group 6 strongly supports the Department’s requirements in the Draft Order that, “Prior to commercial operation of the project, the Applicant must submit a plan to the Department for review and approval that establishes the locations of the culvert replacements and how the funds will be disbursed. The culverts to be replaced must be in the vicinity of Segments 1 or 2, must completely or partially block fish passage, must be replaced with crossings consistent with Stream Smart principles, and must be selected to provide the greatest possible habitat benefit.” Draft Order at 84. We recommend that, for clarity, the Department should further define the phrase, “in the vicinity of Segments 1 or 2.” We have attached a proposed list of watersheds and an accompanying map in Appendix B below for this purpose. These watersheds contain stream networks identified as high-value brook trout habitat based on data compiled by The Nature Conservancy (including information previously provided by DIFW staff), and as such they offer significant habitat restoration opportunities. We also encourage the Department to require the Applicant, in selecting specific culverts for replacement, to consult with state agencies and nonprofit organizations that possess expertise in prioritizing culvert replacements to maximize habitat benefit.

D. Significant Vernal Pools

Although Group 6 did not comment on significant vernal pools (SVPs) in our testimony during the public hearings, we note that the Draft Order does not include any provisions to protect SVPs located in the right-of-way during construction. Typically, transmission projects are required to maintain maximum noncapable vegetation in and around SVPs during, rather than only after, construction. To minimize impacts to SVPs, we encourage the Department to include such a requirement in its Final Order.

E. Decommissioning

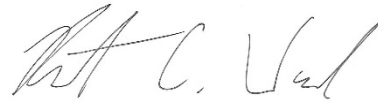
The Draft Order does not require a decommissioning plan for the project. While it is understood that the project is intended to operate after the terms of the underlying contract for the energy it is designed to deliver, we encourage the Department to require the Applicant to develop a plan and a satisfactory funding mechanism to decommission the project when it is no longer commercially viable as an additional condition of permit approval.

III. Conclusion

As noted at the outset of these comments, the Draft Order reflects the evidence provided by the parties to this proceeding, takes into account all of the testimony presented and elicited during the permit application hearings and the public hearings conducted by the Commissioner and the Presiding Officer, and provides a thoughtful analysis of the project's impact on Maine's environment. The project is unprecedented in size and scope for the western Maine region and would result in significant fragmentation of highly connected and resilient wildlife habitat. The conditions set forth in the Draft Order recognize the importance of the wildlife habitat in the project area, particularly in Segment 1, and the need for further measures to be imposed in order to avoid, minimize and compensate for the project's habitat fragmentation impacts. We appreciate that the Department has included a number of the conditions and project modifications as recommended by Group 6 and its experts. To ensure these conditions are executed in a manner that results in meaningful minimization of and compensation for the project's habitat fragmentation impacts, we believe the additional details described above are critical to include in any Final Order.

We thank the Department for its consideration, and we offer our sincere appreciation to Department staff for all of their work throughout this process.

Respectfully submitted,



Rob Wood
The Nature Conservancy
14 Maine Street, Suite 401
Brunswick, ME 04011
(207) 729-5181
robert.wood@tnc.org

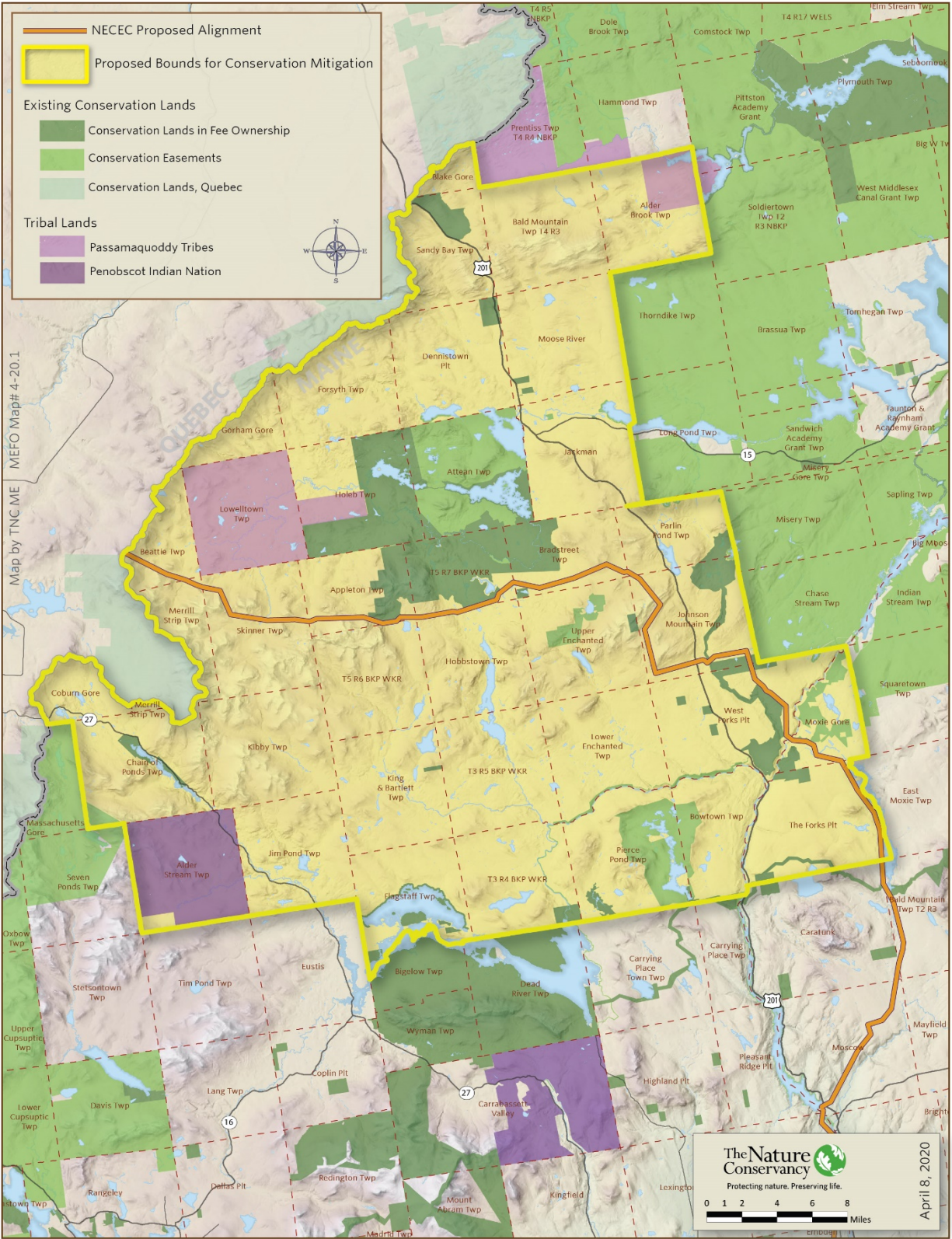


Sean Mahoney
Phelps Turner
Conservation Law Foundation
53 Exchange Street, Suite 200
Portland, ME 04101
(207) 210-6439
smahoney@clf.org
pturner@clf.org

Dated: April 13, 2020

Appendix A. *Proposed eligible towns and townships for compensatory conservation project(s)*

Alder Brook Twp
Alder Stream Twp
Appleton Twp
Attean Twp
Bald Mountain Twp T4 R3
Beattie Twp
Blake Gore
Bowtown Twp
Bradstreet Twp
Chain of Ponds Twp
Coburn Gore
Dennistown Plt
Flagstaff Twp
Forsyth Twp
Gorham Gore
Hobbstown Twp
Holeb Twp
Jackman
Jim Pond Twp
Johnson Mountain Twp
Kibby Twp
King & Bartlett Twp
Lowelltown Twp
Lower Enchanted Twp
Merrill Strip Twp
Moose River
Moxie Gore
Parlin Pond Twp
Pierce Pond Twp
Sandy Bay Twp
Skinner Twp
T3 R4 BKP WKR
T3 R5 BKP WKR
T5 R6 BKP WKR
T5R7 BKP WKR
The Forks Plt
Upper Enchanted Twp
West Forks Plt



Appendix B. Proposed eligible watersheds for compensatory culvert replacements

Hydrologic Unit Name	Hydrologic Unit Code (HUC 12)
Austin Stream	10300030203
Baker Stream	10300010605
Baker Stream	10300020401
Barret Brook	10300010205
Big Sandy Stream	10300010606
Bog Brook	10300010201
Cold Stream	10300010609
Dead Stream-Kennebec River	10300010610
Embden Pond	10300030802
Enchanted Stream	10300020504
Fall Brook	10300030302
Fish Pond	10300020404
Gulf Stream-Lower Dead River	10300020506
Jackson Brook-Kennebec River	10300030301
Lower Sandy River	10300031206
Moxie Stream	10300010607
Number Five Bog-Moose River	10300010206
Number One Brook	10300010101
Parlin Stream	10300010308
Pelton Brook	10300031205
Salmon Stream	10300020505
South Branch Moose River	10300010102
West Branch Spencer Stream	10300020402
Wyman Lake	10300030106

