

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

and

**STATE OF MAINE
LAND USE PLANNING COMMISSION**

IN THE MATTER OF:)	
)	
CENTRAL MAINE POWER COMPANY)	
25 Municipalities, 13 Townships/Plantations, 7)	APPLICATION FOR SITE
Counties)	LOCATION OF DEVELOPMENT
L-27625-26-A-N)	ACT PERMIT AND NATURAL
L-27625-TB-B-N)	RESOURCES PROTECTION ACT
L-27625-2C-C-N)	PERMIT FOR THE NEW
L-27625-VP-D-N)	ENGLAND CLEAN ENERGY
L-27625-IW-E-N)	CONNECT
)	
CENTRAL MAINE POWER COMPANY NEW)	
ENGLAND CLEAN ENERGY CONNECT SITE)	
LAW CERTIFICATION SLC-9)	

POST-HEARING REPLY BRIEF OF INTERVENOR GROUP 3

I. INTRODUCTION

The Department of Environmental Protection (“DEP”) and Land Use Planning Commission (“Commission”) (together, “Agencies”) should avoid the regulatory traps, rabbit-holes, and logical quagmires concealed in the arguments of those opposing the New England Clean Energy Connect (“NECEC” or “Project”). These rhetorical devices subvert the reasonableness standard, and thus the balancing of costs and benefits, that permeates the Natural Resources Protection Act (“NRPA”) and Site Location of Development Act (“Site Law”)¹ and replace them with an unattainable perfection standard. The Agencies must balance NECEC’s environmental

¹ While the NRPA explicitly contains reasonableness standards, the Site Law contains harmonious and no adverse effect standards. However, Chapter 375, implementing the Site Law, interprets the Site Law’s standards as reasonableness standards throughout. Moreover, 35-A M.R.S. § 3454, as explained in detail below, provides legislative confirmation that Site Law § 484 (3) is, at its core, a reasonableness standard requiring the balancing of costs and benefits in the same manner as under the NRPA.

impacts against its immense, and predominantly public, benefits. The Agencies should use the substantial information made available through the permitting processes to create sensible, effective, and flexible conditions to practicably mitigate Project impacts to the extent those impacts would not otherwise meet the applicable environmental standards.

II. ANALYSIS

A. There are No Less Environmentally Damaging Practicable Alternatives to NECEC (applicable to both Agencies).

Group 3 reiterates the arguments made in its initial brief concerning practicable alternatives and environmental impacts, having already addressed and refuted the arguments that NextEra Energy Resources and other opponents made in their initial briefs. Limited additional tapering and pole modifications may be warranted in discrete, environmentally sensitive areas, as explained in Group 3's initial brief. Additional undergrounding, however, is neither practicable nor environmentally beneficial in any locations. Group 3's conclusions about practicability are further supported by a proper balancing analysis, as described in detail below.

B. The Reasonableness of NECEC's Impacts Can Only Be Determined After Considering Costs and Benefits (applicable to both Agencies)

Opponents, including Groups 2 and 10, 4, and 6, erroneously characterize and criticize NECEC's alleged impacts without the requisite balancing of its benefits. Under *Uliano 1*, the Law Court made explicit that “[w]hether a proposed project's interference with existing uses is reasonable depends on a multiplicity of factors” and “[a] balancing analysis inheres in any reasonableness inquiry.”² In *Uliano 2*, the Law Court reinforced that the NRPA requires consideration of non-environmental benefits.³ The Law Court recounted, but did not disturb, the six factors cited by the Board of Environmental Protection, pursuant to Chapter 310, in

² *Uliano v. Bd. of Env'tl. Prot.*, 2005 ME 88, ¶ 13, 876 A.2d 16, 19.

³ *Uliano v. Bd. of Env'tl. Prot.*, 2009 ME 89, ¶¶ 21–23, 977 A.2d 400, 409–10.

determining that a proposed pier’s adverse impact on existing scenic and aesthetic uses would be unreasonable, including: “(3) the pier would provide no public benefit; (4) the Ulianos would only benefit from the pier for a few months each summer; and (5) the Ulianos could already use their property for boating and swimming at most tide levels.”⁴ These three factors relate to non-environmental benefits. The first two suggest that greater benefits (e.g., some public benefits of any kind and additional private use benefits) would make adverse impacts more reasonable or less unreasonable. The third factor suggests that the creation of a new or unique type of private use benefit would make adverse impacts even more reasonable or less unreasonable than creating more of an existing private use benefit.

Uliano 2 also provides additional guidance on the NRPA reasonableness standard, describing it as “a fact-specific inquiry”⁵ that “will necessarily depend on the specific circumstances of a given case.”⁶ Holding that the NRPA was not unconstitutionally vague, the Law Court concluded:

Unlike Shakespearean notions consigning beauty to the eye of the beholder, the concept of scenic and aesthetic uses within a particular natural resource is, when viewed through the lens of modern sensibilities, sufficiently definite so that such uses can, in any given case, be reliably identified based on competent proof. The same is true as to the determination of whether, under all relevant circumstances, a proposed activity will unreasonably interfere with the uses. The fact-finding required to give effect to NRPA’s protection of existing scenic and aesthetic uses is no more imprecise or speculative than the fact-finding required to determine the best interests of a child in a custody proceeding or the mental state of a criminal defendant in a criminal prosecution.⁷

Thus, for the DEP to determine the reasonableness of NECEC’s impacts, it must undertake a fact-specific inquiry, considering the specific circumstances of NECEC’s origins and purpose,⁸ viewed through “the lens of modern sensibilities.” The inquiry is a balancing test, weighing environmental

⁴ *Id.* ¶ 10.

⁵ *Id.* ¶ 22 (citation omitted).

⁶ *Id.* ¶ 23.

⁷ *Id.* ¶ 29 (emphasis added).

⁸ This is the “purpose” of CMP’s statement of the Project purpose.

impacts and other costs against all relevant benefits, including public and private non-environmental benefits, and more heavily weighing unique benefits.⁹

None of opponents' unreasonableness arguments comports with *Uliano 1* and *2* by accounting for any of the benefits provided by NECEC. Opponents argue that NECEC will cause unreasonable impacts by considering only alleged environmental costs in a vacuum, often relying on the Shakespearean notion of subjective beauty and ignoring modern sensibilities. These arguments are legally invalid because a fact-specific balancing that considers only half of the necessary facts is no balancing at all.

Some opponents even seem to argue that that the impacts of NECEC are per se unreasonable. For example, Groups 2 and 10 argue that “[t]he interference with the existing uses is incapable of mitigation. There is no buffering that would allow these uses to co-exist in the 53.5 miles of new territory.”¹⁰ This argument fails under *Uliano 1* and *2* because it eschews balancing of any kind. It also overlooks “relevant circumstances” in which the balancing must occur. For example, Western Maine is part of the modern electric grid, replete with large hydroelectric dams, wind farms, generator leads, transmission lines, and nearly ubiquitous distribution lines, each of which has a role in allowing out-of-staters to enjoy electric amenities at their vacation homes in Caratunk. These people neither ford rivers in wagon trains nor row north in bateaux; they drive cars with GPS systems to Western Maine, with knowledge of its abundant electric infrastructure and accepting its presence as a small price to pay for having (somewhat) affordable and (somewhat) clean electricity. Additionally, NECEC would provide timely economic stimulation throughout much of Maine, specifically in the Lewiston and Auburn areas. As described in Group

⁹ Similarly, there are higher standards for or more weight given to certain environmental costs, such as harm to endangered species or critical habitat.

¹⁰ Group 2/10's Br. 10.

3's public comments by Mr. Barrett, NECEC will provide a \$250 million injection into Lewiston, which will increase its tax revenues by about \$8.4 million¹¹ and help temper a low median household income, high poverty rate, and high tax rate.¹² A significant number of the projected 1,600 jobs created or induced annually during development and construction of NECEC will be in or near Lewiston.¹³ Mr. Connors explained that NECEC will alleviate the "problem" of high energy costs for Maine businesses, especially those competing with businesses in locations where energy costs are more affordable,¹⁴ and help Maine to develop and attract new businesses.¹⁵ These circumstances are certainly relevant to the requisite balancing of NECEC's costs and benefits.

Group 4 not only overlooks the benefits of NECEC, but even seems to imply that its benefits should be ignored because the Project is "simply a for-profit venture more akin to other traditional development projects such as subdivisions and shopping centers."¹⁶ The Maine Public Utilities Commission ("MPUC") has decided otherwise, granting a Certificate of Public Convenience and Necessity ("CPCN") to NECEC precisely because of its myriad public benefits, related to energy, emissions, and the economy.¹⁷ As Group 3 explained in its initial brief, NECEC's public benefits to Maine are significant, unique, and timely given the context in which NECEC is being proposed.¹⁸ Unlike the private pier rejected in *Uliano 1* and *2*, NECEC is a response to a defined Massachusetts need, that will transform New England's grid and provide unique public benefits to Maine as the state's first interconnection to North America's largest hydroelectric

¹¹ Group 3 Public Comments (Mar. 21, 2019), Appendix A, "Pre-filed Direct Testimony of Edward S. Barrett," at ¶ 3–4.

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ *Id.*, Appendix A, "Pre-filed Direct Testimony of Dana Connors," at ¶ 2.

¹⁵ *Id.*

¹⁶ Group 4's Br. 2.

¹⁷ See generally, *Central Maine Power Company*, Request for Approval of CPCN for the New England Clean Energy Connect Consisting of the Construction of a 1,200 MW HVDC Transmission Line from the Québec-Maine Border to Lewiston (NECEC) and Related Network Upgrades, No. 2017-00232, Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation (Me. P.U.C. May 3, 2019) ("CPCN Order").

¹⁸ Group 3's Br. 5–7.

system, especially under the Stipulation approved by the MPUC (e.g., broadband access, heat pumps, electric vehicles, renewable integration and decarbonization studies, etc.).¹⁹

A CPCN is not some irrelevant, private sector award. Rather, a CPCN is a pre-approval that a transmission line developer must obtain from Maine state government before it may construct and operate a transmission line of 69 kV or larger.²⁰ To receive MPUC authorization, a proposed line must be proven to be necessary and in the public interest.²¹ Critically, a line must provide substantial public benefits, primarily, but not exclusively, in the form of increased reliability and/or lower bills. Once approved, the owner of a line is, by definition, a transmission utility under federal law and a “Transmission and distribution utility” under state law,²² that is, an enterprise subject to rate and safety regulation in providing essential electric service to the public.²³ Approval by the MPUC demonstrates that the Project will provide extensive public benefits. As a matter of law for NECEC, therefore, the existence and magnitude of NECEC’s benefits have been determined, at least partially. The law requires the Agencies to consider the benefits found by the MPUC (along with additional benefits the Agencies find) and balance them against NECEC’s environmental impacts. NECEC opponents may not agree with the MPUC’s decision, but they cannot ignore a CPCN and comply with the requirements of *Uliano 1* and 2.

The Legislature has created a regulatory paradigm for the construction of transmission lines that is deliberately bifurcated and carefully designed to promote, and even require, the sharing of expertise between the Agencies and MPUC. The Agencies assess environmental impacts,

¹⁹ May 24, 2019 Group 3 Response to the Climate Change Comments Filed by Group 4 on May 9, 2019 at 11–12.

²⁰ See 35 M.R.S. § 3132.

²¹ See, e.g., CPCN Order, *supra* note 17, at 6. (“The Commission’s finding that the NECEC meets the public interest and public need standards is based on a careful weighing of the benefits and costs of the NECEC to the ratepayers and residents of the State of Maine. As required by Maine statute, these include the effects of the NECEC on economics, reliability, public health and safety, scenic, historic and recreational values, and state renewable energy goals. 35-A M.R.S. § 3132(6). Based on its consideration of these factors, the Commission finds that the NECEC is in the public interest.”).

²² 35 M.R.S. § 102 (20-B).

²³ See e.g., 35 M.R.S. §§ 101, 301, and 702.

alternative designs and locations, and means of practicable mitigation. The MPUC determines convenience and necessity of specific transmission infrastructure to serve the public within the energy regulatory system. This bifurcation intentionally harmonizes the respective expertise of the Agencies and MPUC and requires each to respect the expert findings of the others. For example, 35 M.R.S. § 3132 (6) states an MPUC approval of a transmission line:

is subject to all other provisions of law and the right of any other agency to approve the transmission line. The commission shall, as necessary and in accordance with subsections 7 and 8, consider the findings of the Department of Environmental Protection under Title 38, chapter 3, subchapter 1, article 6, with respect to the proposed transmission line and any modifications ordered by the Department of Environmental Protection to lessen the impact of the proposed transmission line on the environment.

If the MPUC issues a CPCN and the DEP issues a Site Law order that modifies “the location, size, character or design of the transmission line,” the applicant must present the Site Law order to the MPUC and explain the modifications and cost adjustments occasioned.²⁴ If the modifications increase cost by more than 20%, the MPUC must reopen its original decision and again make “specific findings with regard to the need.”²⁵ Recognizing the role and expertise of the Agencies in harmony with its own role, the MPUC stated, for example:

However, when these adverse impacts are balanced against the ratepayer, economic, and environmental benefits of the NECEC, the Commission finds that these adverse effects are outweighed by the benefits. Moreover, the Commission expects that the scenic and recreational impacts of the NECEC will be reviewed and, to the extent appropriate and feasible, mitigated, through the processes at the Maine Department of Environmental Protection (DEP) and Land Use Planning Commission (LUPC).²⁶

The MPUC’s expectation, of course, is tempered by its knowledge that should the Agencies make findings that substantially affect the MPUC’s CPCN determination, the MPUC must re-open its proceeding and do what it finds necessary and in the public interest.

²⁴ 39 M.R.S. §3132 (7).

²⁵ 39 M.R.S. §3132 (8).

²⁶ CPCN Order, *supra* note 17, at 6–7 (emphasis added).

Critically, the Legislature has also directed the Agencies to consider the role and expertise of the MPUC in harmony with their roles, specifically as it relates to balancing benefits determined to exist by the MPUC. Title 35-A M.R.S. § 3454 states:

In making findings pursuant to Title 38, section 484, subsection 3, **the primary siting authority shall presume** that an expedited wind energy development provides **energy and emissions-related benefits** described in section 3402 **and shall make additional findings regarding other tangible benefits provided by the development.** The Department of Labor, the Governor's Office of Policy and Management, the Governor's Energy Office and the Public Utilities Commission shall provide review comments if requested by the primary siting authority.²⁷

Thus, under the Site Law, the Agencies must presume the existence of energy and emissions benefits caused by wind projects and weigh them accordingly in determining the reasonableness of wind projects' impacts, based in part upon requested review comments of the MPUC. While a transmission line is not entitled to this presumption, the presumption's existence demonstrates that § 484 of the Site Law is essentially a reasonableness test that requires a balancing of project costs and benefits; if § 484 did not require a balancing of costs with the presumed benefits, the presumption would be meaningless and rendered mere surplusage. Moreover, energy and emissions benefits are examples of specific types of benefits that must be balanced by the Agencies and which the Agencies have substantial experience balancing. While the Agencies need not presume their existence in the case of NECEC, if there is competent evidence in the record demonstrating the existence of energy and emissions benefits, those benefits must be balanced within the scope of § 484. Beyond the competent benefits evidence submitted by Group 3, the MPUC's CPCN order determining the existence and magnitude of energy and emissions benefits is a de facto "review comment" provided to Agencies, the competency of which cannot be questioned. The Agencies must respect the MPUC's findings under the bifurcated system of regulation.

²⁷ Emphasis added.

The DEP has recognized the MPUC's important role in analyzing the need for electric infrastructure before, for example, in permitting the Maine Power Reliability Program:

The necessity for the project is also the subject of a determination of the PUC. . . . The proposed project must also obtain approvals from the Independent System Operator of New England (ISO-NE), the regional transmission planning authority, and the PUC. Both ISO-NE and PUC require the applicant to demonstrate that the proposed project is a technically sound program for meeting the electrical need of the area.²⁸

In finding that the Maine Power Reliability Program avoided impacts to protected natural resources to the greatest extent practicable, the DEP accepted CMP's determination that "the transmission alternative, specifically the proposed project, meets the project need and purpose while offering the most electrically reliable and cost-effective route solution."²⁹ Increased reliability and lower costs are the two primary benefits associated with any CPCN. NECEC will provide both, in addition to a variety of other benefits.

The DEP has also appropriately weighed the public purpose and need for a project, and considered its private benefits, in the context of the Maine Turnpike Authority's toll upgrade in York, Maine. The DEP found that "the proposed activity is compatible with the existing visual quality, recreational uses, and the landscape characteristics found adjacent to the scenic resource," based, in part, on its consideration of "the significance and public purpose of the proposed project."³⁰ The DEP ultimately found the project's "wetland impacts not to be unreasonable,"³¹ despite the existence of a less environmentally damaging alternative. DEP agreed with intervenors that an all-electronic tolling ("AET") would be less damaging to the environment than open-road tolling ("ORT"), but found AET impracticable because the applicant produced "credible evidence" that using AET would, *inter alia*: (1) significantly reduce revenues, requiring a substantial

²⁸ Dep't Env'tl. Prot., Maine Power Reliability Program Order at 70–71.

²⁹ *Id.* at 71 (emphasis added).

³⁰ Dep't Env'tl. Prot., Maine Turnpike Authority York Toll Plaza Order at 5 (emphasis added).

³¹ *Id.* at 17.

surcharge; (2) cause billing difficulties, especially for out-of-state and Canadian users; and (3) be difficult to implement and integrate given the relatively low percentage of Maine users with E-ZPass devices.³² The factors leading to DEP’s impracticability determination are forms of public and private ORT benefits unrelated to the environment. In other words, ORT benefits include the applicant not having to levy a substantial surcharge (public), relative ease of billing (public and private), and relative ease of implementation (private). Beyond finding AET impracticable, the DEP further recognized that “at some point the applicant must decide on the tolling method and move forward to design the project, and that it is impracticable to continue to reconsider the original decision as to which tolling method should be developed.”³³ The DEP should similarly recognize that it is impracticable to allow Project opponents to continue to use delay tactics to prevent CMP from moving forward with NECEC. Building on its wetlands determination, the DEP also found “that the practicability of implementing an AET system is low, and that the impacts to significant vernal pools are reasonable in light of the public need for the project and the project purpose.”³⁴ These findings reflect an appropriate balancing of public and private benefits against project costs and should guide the Agencies’ NECEC analysis, along with *Uliano 1* and *2*, the bifurcated regulatory framework for transmission lines, and the MPUC’s specific benefits determination.

C. Opponents Continue to Seek Perfection and Make Beneficial Mitigation the Enemy, Contrary to the Purposes of the NRPA and Site Law (applicable to both Agencies)

In their briefs, opponents continue to employ the ideal of “perfection” to force rejection of NECEC. A few examples from Group 4’s brief demonstrates continued contortion of the

³² *Id.* at 16.

³³ *Id.* at 17 (emphasis added).

³⁴ *Id.* at 21 (emphasis added).

permitting process and the NRPA and Site Law reasonableness standards. The Agencies should reject the ideal of perfection embodied in Group 4's illogical arguments and require only practicable mitigation in light of NECEC's purpose and benefits.

i. The Appalachian Trail ("AT")

Group 4 argues CMP's vegetative buffering at the AT is both insufficient in scope and an admission of substantial impact. The tortured logic of the argument demonstrates that for Group 4, good is bad and better is worse, while perfect is unattainable. Group 4 first complains that CMP proposed vegetation plantings "along only one of the three crossings."³⁵ By necessary implication, vegetative buffering of a greater nature or scale would, then, provide a benefit by reducing adverse impacts and including vegetative buffering at two or all three crossings would be more beneficial. Yet in the next sentence, Group 4 argues that "[t]he inclusion of these plantings is an admission by CMP that the project will cause a substantially increased visual and user impact on the AT."³⁶ Group 4 attempts to use the implicitly beneficial but allegedly insufficient vegetative buffering of only one AT crossing as evidence of substantial adverse impacts at all AT crossings. Two sentences later, Group 4 alleges that "these plantings do not, and cannot, come close to buffering the existing use of the AT."³⁷ Thus, in a span of four sentences, Group 4 impossibly argues that vegetative plantings are inherently inadequate to buffer the substantial adverse impacts evidenced by CMP doing some, but not enough, beneficial vegetative plantings. There is no room for CMP to maneuver under this illogic. If CMP proposed planting buffers at two crossings, Group 4 would argue the "admission" is stronger evidence of adverse impacts, then complain about the insufficiency of buffering at only two rather than three locations, and still assert that no buffer

³⁵ Group 4's Br. 10 (emphasis added).

³⁶ *Id.* (emphasis added).

³⁷ *Id.* (emphasis added).

plantings could ever be adequate, even at three crossings. Only a perfect project could avoid this trap.

The absurdity of this argument is made clearer by the nature and history of the AT at this location. The P-RR subdistrict in question is designated as such precisely because of a transmission line owned by CMP. CMP allowed the AT to cross its corridor through the easement it granted to the National Park Service,³⁸ which easement created and continues to facilitate the “primitive recreational experience” sought to be conserved within the P-RR. Widening the existing 150-foot corridor by 75 feet to add a second overhead transmission line is CMP’s express reserved right in exchange, at least partially, for allowing the AT and related hiking on its land. The “existing use” that Group 4 claims should be buffered more—but can also never be adequately buffered—exists because of, not despite, the existing transmission line that is plainly visible and expected by all AT hikers.

ii. Beneficial Modifications

Group 4 also inconsistently argues that modifications to the Project by CMP are too late and insufficient, but also beneficial and necessary. In one instance, Group 4 states:

CMP has also failed to provide sufficient information about the actual pole heights and corridor management to allow a thorough and accurate evaluation of the scenic impacts from important locations. . . . By not providing this data, continually changing the heights and locations of poles, and introducing vague and changing proposals regarding “tapering” to address adverse impacts on fish and wildlife habitat, CMP has made it impossible to do a thorough analysis of the actual scenic impacts of this project.³⁹

This is an example of Group 4 using the ideal of perfection, not to properly improve the Project under the NRPA or Site Law, but to force its rejection. In effect, Group 4 suggests that CMP’s attempts to modify its complex project to reduce alleged environmental impacts during the permitting process are futile; CMP must prove its case based solely on a static application and

³⁸ CMP’s Br. 9–10.

³⁹ Group 4’s Br. 14–15 (emphasis added).

information made stale by the passage of time, changes to the environment, and lessons learned during the course of the proceedings from parties and regulators.

This argument is an extension of Dr. Publicover's theory espoused in his supplemental testimony:

[M]y responsibility is to evaluate and render an opinion on information in the record within my area of expertise. Because CMP has not amended its application to include these alternative techniques, with the requisite location-specific information, I am not willing to hypothesize on the potential impacts of a not-yet-proposed alternative mitigation strategy or alternative route. If the Applicant amends its application to include alternate techniques I would welcome the opportunity to evaluate and respond to these modifications. In the absence of a site-specific application from CMP, the remainder of my testimony is confined to a general discussion of the likely impacts of the proposed mitigation strategies on fragmentation.⁴⁰

This theory is short-sighted and hypocritical. Group 4 expects the Agencies to consider Dr. Publicover's "general discussion of the proposed mitigation strategies" despite him having never once visited the Project area⁴¹ and basing his conclusions on absolutely no primary research.⁴² Conversely, though, Dr. Publicover will not deign to hypothesize on CMP's site-specific, proceeding-tested proposed modifications because he does not seek an improved environmental outcome through the regulatory process; he seeks to use imperfection to justify rejection. If exceedingly complex projects proposed in dynamic environments were forced to rely solely on initial applications, regulatory rejection would be a foregone conclusion. The NRPA and Site Law, however, are premised not on perfect projects and a regulatory rejection machine, but an iterative process intended to improve projects using practicable mitigation to ensure no unreasonable impacts.

In another instance, Group 4 criticizes CMP's visual experts for basing their opinions on the assumption of taller structures that are 130 feet high. Group 4 ignores the reasonable basis for

⁴⁰ Apr. 26, 2019 Pre-filed Supplemental Test. of Publicover (Group 4) at 2 (emphasis added).

⁴¹ Tr. 79:3-9 (Day Session, Apr. 4, 2019).

⁴² Tr. 84:3-4 (May 9, 2019).

this assumption, that 130 feet is a “conservative estimate,”⁴³ “proxy height”⁴⁴ or “baseline”⁴⁵ for a hypothetical taller structure, above which negative visual impacts associated with any taller structure would only increase.⁴⁶ Instead, Group 4 argues that CMP should have done an analysis for every pole at every height:

They did not analyze the scenic impacts of poles that were 140, 150 or 160 feet tall. . . . Without providing a plan that shows specific pole heights and doing a thorough analysis of the scenic impacts of those poles, CMP failed to show that the project will not have an unreasonable adverse impact . . .

.⁴⁷

Group 4’s suggestion exemplifies the regulatory sclerosis forewarned by Group 3⁴⁸ and is the antithesis of the NRPA’s “efficient system of administering this article to minimize delays and difficulties in evaluating alterations of these resource areas”⁴⁹ and the Site Law’s “flexible and practical means by which the State, acting through the department, in consultation with appropriate state agencies, may exercise the police power of the State to control the location of . . . developments.”⁵⁰

Despite the previous examples, Group 4 encourages certain modifications made during the permitting process and after CMP’s initial application. For example, Group 4 states that:

At stream crossings, whether or not the crossings contain brook trout habitat, the only variable the Applicant considered altering to better protect brook trout habitat was buffer width—with 100-foot buffers proposed for brook trout streams, and 75-foot buffers proposed elsewhere. Other alternatives, in particular taller pole structures to maintain intact tree canopy, were implemented to protect aquatic habitat for Roaring Brook Mayfly and Northern Spring Salamander at only two locations, Mountain Brook and Gold Brook. Similar minor modifications to the route or to the size and location of structures could have been considered or implemented to avoid or reduce the impacts of lost riparian buffers on brook trout and salmon habitat but were not. These potential minimization techniques could have included utilizing taller poles to put the wires high enough that full forest canopy closure could be maintained; changing pole locations so that they were higher on slopes, to achieve the same full canopy effect; and minor route changes to cross at locations where impacts would be smaller or to avoid stream crossings altogether. CMP did not pursue any of these minimization techniques in its application.⁵¹

⁴³ *Id.* at 191:3.

⁴⁴ *Id.* at 205:22–206:2.

⁴⁵ *Id.* at 226: 7–13.

⁴⁶ *Id.* at 206:3–15.

⁴⁷ Group 4’s Br. 15.

⁴⁸ Group 3’s Br. 10–11.

⁴⁹ 38 M.R.S. § 480-A.

⁵⁰ 38 M.R.S. § 481.

⁵¹ Group 4’s Br. 59–60 (emphasis added).

Importantly, the modifications that Group 4 endorses in this instance were revisions to CMP's initial "imperfect" proposal.⁵² These modifications are held out as examples of what CMP "could have [] considered or implemented" along with "[s]imilar minor modifications to the route or to the size and location of structures." Why are these modifications that improve an imperfect project acceptable rather than reason for rejection?

Unconcerned with consistency, Group 4 later argues:

Abundant evidence . . . demonstrates that with minimal changes, the project could have provided for intact 35-foot tall vegetation at several critical stream crossings with high value for brook trout. By extension, this same practice could have been applied broadly to many or even most stream crossings across the entire corridor, even without changing structure locations or pole heights. By failing to even consider these minimization and mitigation measure [sic] until pressed to do so by intervenors and representatives from the Department and Commission, CMP failed to comply with the requirements of NRPA and the Site Law and its permit should be denied.

The Department should require CMP to revisit its application to do the minimization and mitigation required by law. Only at that point, when we understand the truly unavoidable impacts, should we revisit the appropriate amount of meaningful mitigation to compensate for those unavoidable losses. As it stands currently, the Applicant's proposals in this regard are inadequate and misguided.⁵³

In this instance, Group 4 argues that failure to consider certain modifications "until pressed to do so" is a per se failure to comply with the NRPA and Site Law that requires rejection. The invention of such a requirement flies in the face of the letter and spirit of both statutes. Compounding these inconsistencies, though, Group 4 also calls for CMP to "revisit its application."⁵⁴

Group 4 also emphasizes CMP's correction of a mistake made known at the May 9 hearing. Rather than acknowledge an improved environmental outcome, however, Group 4 twists CMP's words and argues impossibility of compliance based on the ideal of perfection. Group 4 states:

In response to questions later in the hearing from Mr. Beyer, CMP witness Goodwin testified that:

⁵² Feb. 28, 2019 Pre-filed Direct Test. of Goodwin (CMP) at 13 ("Accordingly, and upon consultation with MDIFW, CMP revised its proposal to incorporate taller structures and avoid clearing by allowing full height canopy within the 250-foot riparian management zone for Mountain Brook and Gold Brook as shown in Exhibit CMP-3-F. For all other streams with presence of Northern Spring Salamander and/or Roaring Brook Mayfly, assumed or known, MDIFW agreed that CMP's vegetation management practices and a contribution to the Maine Endangered and Non-game Wildlife Fund would adequately protect the habitat and species.").

⁵³ Group 4's Br. 64 (emphasis added).

⁵⁴ *Id.*

I guess a point of clarification, on the cold fisheries, whether they're currently known as a cold water fishery or known to be in the future, they're -- they -- I guess, let me rephrase that. All of the waterbodies that are currently known to be cold water fisheries will be provided the 100 foot riparian buffer on Segment 1. So if it comes to light that there are other cold water fisheries it would be applied to those as well.

This statement begs the question of how CMP could do that—and how permitting and reviewing agencies could monitor CMP’s performance—without clear information in the record about which streams contain brook trout and will receive such buffers. The simple answer is that they can’t. It is not clear whether “all of the waterbodies that are currently known to be coldwater fisheries” refers to those that have been identified by MDIFW, or only those where MDIFW’s input has been incorporated into CMP’s version of Exhibit 7-7.⁵⁵

This summary mischaracterizes CMP’s response to create a false impression of uncertainty. The record clearly establishes that CMP will apply a 100-foot buffer to “all brook trout fisheries whether or not those were identified in [CMP’s] chart.”⁵⁶ While certain types of streams (e.g., intermittent) would not get the proposed wider buffer, “that does not mean that . . . if new information was made available or if information was inadvertently omitted from the existing table that this table could not be updated with the appropriate buffers or the appropriate characteristics as advised by IF&W. . . . [N]ow that we are aware that . . . we have inadvertently missed certain stream characteristics . . . this update can be made.”⁵⁷ Group 4 makes CMP’s offer of additional beneficial mitigation the “enemy,” arguing that it would be impossible for the Agencies to monitor CMP’s performance without clear record information. This argument fails for multiple reasons.

Most obviously, the environment is in a state of constant flux, especially in the mosaic of industrial forestry activity of Western Maine. As such, the moment an application is filed, the environmental data upon which it is based is out-of-date. But that is not a reason to stop development. The NRPA and Site Law clearly account for continual change. The permitting process itself is a means to inform appropriately flexible mitigation conditions that reflect expected change. For example, Chapter 310 allows for the DEP to “require additional monitoring and

⁵⁵ *Id.* at 34 (emphasis added) (footnotes omitted).

⁵⁶ Tr. 325:9–14 (May 9, 2019).

⁵⁷ *Id.* at 331:24–332:18.

corrective action, or additional wetland restoration, enhancement or creation in order to achieve the compensation ratio as originally approved.”⁵⁸ This provision does not make granting a permit contingent on the facts as they existed at the time of application or close of the record. Further, Chapter 310 requires an applicant to have “a plan for interim reporting and remediation measures during monitoring of the restored or created wetland over a minimum of five years, which shall include contingency plans for . . . corrections if the project fails to meet project goals during that time.”⁵⁹ This is an on-going requirement specifically mandating contingencies for change. These and similar provisions are embodied in the DEP’s general authority to create terms and conditions for an NRPA permit, which expressly allows for “design changes to help insure success of the project,” “monitoring requirements,” and “mid-course correction or maintenance capability.”⁶⁰ The DEP has similar broad authority under the Site Law,⁶¹ and the Commission has similar broad authority under its enabling statute and rules.⁶² As such, Group 4’s argument that the record must contain all known brook trout habitats is not only wrong, it would lead to ineffective protection of brook trout. A condition reflecting only record evidence would not account for, e.g., stream channels changing, brook trout moving, and habitat shifting from other causes (like climate change). It could lead to protecting streams that in later fact have no brook trout, and not protecting streams that later do have brook trout.

As Group 4 arguably seeks under-protection of brook trout (as a delay/rejection tactic described above), it simultaneously seeks over-protection of brook trout in other regards. For

⁵⁸ 06-096 C.M.R. ch. 310 § 6(C) (2018) (emphasis added).

⁵⁹ 06-096 C.M.R. ch. 310 § 6(D) (2018).

⁶⁰ 06-096 C.M.R. ch. 310 § 8 (A), (D), (E) (2018) (emphasis added).

⁶¹ *See generally*, e.g., 06-096 C.M.R. ch. 375 (2016).

⁶² *See, e.g.*, Commission Rules of Practice, Ch. 4, 4.11(1)(c) (“A Commission determination to approve a request for certification may include reasonable terms and conditions that the Commission determines appropriate in order to fulfill the requirements and intent of the Commission’s statute, rules, and plans.”); *Land Use Districts and Standards*, 01-672 C.M.R. 10 (Chapter 10), section 10.23,I,3.d (“such other conditions are met that the LUPC may reasonably impose in accordance with the policies of the Comprehensive Land Use Plan.”).

example, Group 4 asserts that NECEC will unreasonably impact brook trout streams, in part, because the author of a study concluded that right-of-way clearing results in “a decrease from ideal salmonid habitat conditions.”⁶³ This is yet another example of Group 4 using perfection for rejection. Group 4 ignores the evidentiary chasm existing between the actual “no unreasonable impact” standard and the imaginary “maintenance of ideal” standard. If impacts were judged on a 100-point scale, with 100 being ideal, 75 very good, 50 suitable, 25 tolerable, and 0 intolerable, a decrease in ideal habitat would include going from 100 to 95. But such a decrease would not be unreasonable, especially when balanced with benefits. A decrease from 100 to 50 may not even be unreasonable, since 50 is still suitable and benefits may be significant and unique. Clearly, “ideal” is not the applicable standard, and a decrease from ideal cannot support a finding of unreasonable impacts.

iii. Climate Change

Group 4’s climate change argument based on Chapter 375, Section 2 epitomizes the use of perfection to obtain rejection. As explained in Group 3’s response to Group 4’s May 9, 2019 climate change comments, incorporated by reference herein,⁶⁴ Group 4 misconstrues nearly every substantive element of Chapter 375, Section 2⁶⁵ to argue that NECEC should be rejected because there is no concrete proof that it will cause a *reduction* in *global* greenhouse gas emissions.⁶⁶ Chapter 375, Section 2 prohibits an “unreasonable alteration of climate,” based on three elements related to: (1) the type of project regulated (“large-scale heavy industrial facilities”); (2) the geographic scope of regulation (“in the vicinity” or “the area” of the proposed facilities); and (3)

⁶³ Group 4’s Br. 27 (emphasis added).

⁶⁴ Group 3 Response to the Climate Change Comments Filed by Group 4, *supra* note 19.

⁶⁵ 06-096 C.M.R. ch. 375(2) (2016).

⁶⁶ Group 4’s Br. 49–51. Group 4 supports these claims by citing testimony in the Massachusetts Department of Public Utilities proceedings which stated that Hydro-Quebec *could* divert clean energies from New York to New England, in which case global greenhouse gas emissions “would not necessarily be reduced,” but “would enable a reduction in fossil generation and emissions within New England.” *Id.* at 52.

the type of effect regulated (“climatic characteristics such as rainfall, fog, and relative humidity patterns”). The standard is not that the developer of any project must reduce greenhouse gas emissions or create a global climate benefit, but that the developer of a regulated project not cause an unreasonable alteration of “climatic characteristics” “in the vicinity” of the project.⁶⁷ Even if NECEC were a “large-scale, heavy industrial facility,” which it is not, approval does not require proof of a reduction in global greenhouse gas emissions.

Considering just the geographic scope of the rule, 38 M.R.S. § 484(3), the statutory authority by which Chapter 375 was promulgated, is unambiguously confined to local impacts in “the municipality” in which a project is proposed and “neighboring municipalities,”⁶⁸ not global, regional, or even statewide impacts. Even if “vicinity” or “area” were wrongly construed to include the world, Chapter 375, Section 2 would still not require lowering greenhouse gas emissions or conferring a climate benefit. Such a requirement would be perhaps the most impracticable form of mitigation ever proposed. If global greenhouse gas emissions remained the same after NECEC, such a non-effect could not plausibly be considered evidence of a “unreasonable alteration of climate” because it is neither an “alteration” nor a “climatic characteristic” like increased fog. The non-effect, assuming it were an alteration of some sort, would be eminently reasonable in light of NECEC’s other cost, reliability and renewable energy benefits.

The Massachusetts Department of Public Utilities (“DPU”), on June 25, 2019, approved NECEC’s power purchase agreements. Relevant to climate change and Group 4’s arguments, the DPU concluded as follows:

[T]he Department finds that the PPAs provide for the procurement of firm hydroelectric energy in addition to what HQUS would otherwise be expected to deliver to New England through its ongoing, largely non-firm commercial trading activities and that Exhibit H strengthens HQUS’ commitment to deliver incremental hydroelectric generation on a firm basis for the 20-year term of the PPAs. Therefore,

⁶⁷ See Group 3 Response to the Climate Change Comments Filed by Group 4, *supra* note 19, at 4.

⁶⁸ 38 M.R.S. § 484(3) (emphasis added). See also Group 3 Response to the Climate Change Comments Filed by Group 4, *supra* note 19, at 5.

we find that the PPAs are consistent with the RFP's requirements regarding incremental hydroelectric generation and designed to ensure that ratepayers would receive the full benefit of the bid.⁶⁹

The DPU also concluded:

The Companies' cost-benefit model showed that the NECEC Hydro bid will provide a projected GHG emissions reduction of 36.61 MMTCO₂e for 2019 through 2040, relative to the Section 83D base case (Exhs. JU-1, at 44; JU-7, at 2). . . . The Department finds that the Companies' use of 2012 import data to model estimated GHG emissions reductions is a reasonable method to estimate benefits, both before contract implementation and before benefits are accrued (Tr. 1, at 48-50). Accordingly, The Department finds that the GHG emissions reduction benefits in the Companies' cost-benefit analysis are reliable estimates based on reasonable assumptions (Exh. JU-6, at 36-37; Tr. 2, at 217-218). . . . Although market conditions may cause HQUS's commercial delivery of hydroelectric power into New England outside of the PPAs to change from year to year and, therefore, affect the overall GHG emissions levels in the Commonwealth, the Department finds that the firm hydroelectric power delivered under the PPAs will create steady GHG emissions reduction benefits to Massachusetts.⁷⁰

The DPU is yet another in a long list of experts that disagrees with Group 4. Group 3 urges the Agencies to join them and reject Group 4's climate change argument.

D. Alleged Fragmentation Impacts are Reasonable When Balanced with NECEC's Benefits.

Group 3 does not agree with Group 6's conclusion that "the weight of the evidence" demonstrates unreasonable fragmentation impacts associated with NECEC.⁷¹ Group 3 disagrees with Group 6's reliance on pine marten as an umbrella species in need of "optimal habitat"⁷² and push for corridors that may end up being "bridges to nowhere."⁷³ Group 3 also disagrees with the order of priority of Group 6's mitigation proposals and the extent to which such proposals are necessary to mitigate unreasonable fragmentation impacts. However, it is important to note that Group 6 appears to have a reasonable understanding of how the NRPA and Site Law work and has generally been constructive in seeking to improve, rather than delay or kill, NECEC.

In its brief, Group 6 consistently uses phrases such as "as currently proposed" and "as presently proposed" to qualify its description of NECEC, in apparent recognition that the ideal of

⁶⁹ Mass. Dep't Pub. Util., D.P.U. 18-64, 18-65, 18-66 Order at 63.

⁷⁰ *Id.* at 64-65.

⁷¹ Group 6's Br. 18.

⁷² *Id.* at 5.

⁷³ Tr. 236:6-12 (May 9, 2019).

perfection is inconsistent with the dynamic nature of projects and the environment in which they are proposed. Its central position is that NECEC could be modified to mitigate alleged unreasonable impacts. Group 6 encourages the use of conditions to effect its desired modifications. Further, Group 6 references that CMP's position on fragmentation is based on Maine IF&W not identifying habitat fragmentation as a concern.⁷⁴ Basing mitigation on guidance from Maine IF&W cannot possibly be an unreasonable position, let alone a starting position. Group 6 then explains how it used the permitting process, specifically its pre-filed direct testimony and pre-filed supplemental testimony, to raise concerns on fragmentation, present evidence, and ask questions about ways to practicably mitigate its fragmentation concerns.⁷⁵ Thus, Group 6 used the NRPA and Site Law permitting processes in a constructive way that may help the Agencies to establish effective, flexible means of practicable mitigation. Group 6 did not make outrageous arguments about per se unreasonable impacts for which mitigation would be impossible, and, with the exception of advocating for co-location/undergrounding, did not advocate for outlandish mitigation strategies. Group 3 appreciates Group 6's respectful use of the process, its strategy to achieve an improved environmental outcome, and the tactics it employed.

If Group 6 had considered NECEC's benefits, as determined to exist by the MPUC, it might have joined Group 3 in supporting NECEC. At least one Group 6 member, Conservation Law Foundation ("CLF"), is fully aware of such benefits, as a supporter and direct beneficiary of the Stipulation approved by the MPUC in issuing a CPCN. For example, CLF is part of the consultative group that will direct the \$15 million NECEC Heat Pump Fund.⁷⁶ Similarly, CLF is a manager of the \$5 million Dirigo EV Fund that will facilitate the development of an electric

⁷⁴ Group 6's Br. 6.

⁷⁵ *Id.* at 2–6.

⁷⁶ Me. Pub. Util. Comm'n, Stipulation, at 24 (Feb. 21, 2019) (approved by the MPUC May 3, 2019).

vehicle network in Maine.⁷⁷ CLF will also help design a process for, and participate in, an up to \$2 million evaluation and report on “a suite of potential transmission and non-wires solutions (including but not limited to large scale solar and storage) . . . that would reduce existing and projected congestion at the Maine/New Hampshire Interface and at the Surowiec-South interface.”⁷⁸ For “cost effective and commercially viable transmission and non-wires solution(s) identified,” CMP will “propose such solution(s) in any applicable competitive solicitation . . . and, if such proposal is selected in such solicitation, seek all necessary permits and approvals to implement such solution(s),” bearing all commercial risk.⁷⁹ Moreover, CLF is part of a regional decarbonization collaborative that will analyze “the means by which the Northeast Region may achieve economy-wide decarbonization of zero emissions by 2050” and “develop a set of utility policies and actions, and state regulatory reforms, that can most effectively facilitate economy-wide decarbonization in the region.”⁸⁰ These and similar benefits will never materialize if the imposition of impracticable and costly conditions push NECEC beyond its economic tipping point. Group 3 respectfully suggests that some fragmentation is reasonable when balanced against NECEC’s benefits.

III. CONCLUSION

The DEP “shall grant a permit when it finds . . . the proposed activity meets the standards”⁸¹ under the NRPA and “shall approve a development proposal whenever it finds”⁸² the Site Law’s standards have been met. The standards are matters of reasonableness, requiring a balancing of costs with benefits under all relevant circumstances. NECEC’s opponents urge replacement of

⁷⁷ *Id.* at 25–26.

⁷⁸ *Id.* at 29–30.

⁷⁹ *Id.* at 30–31.

⁸⁰ *Id.* at 32–33.

⁸¹ 38 M.R.S. § 480-D.

⁸² 38 M.R.S. § 484.

reasonableness with an ideal of perfection that would obviate the need for balancing. Opponents' arguments are an attempt to fog the Agencies' "lens of modern sensibilities" with illogical and inconsistent arguments. The purpose of the NRPA and Site Law permitting processes is to improve the environmental outcomes for proposed projects, not to prevent development. Perfection is not attainable, but progress is. The Agencies should see through opponents' baseless perfection arguments and delay tactics and instead use the substantial information made available through the permitting processes to create sensible, effective, and flexible conditions to practicably mitigate NECEC's impacts that would not otherwise meet the applicable environmental standards, while allowing the Project to meet its purpose.

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Respectfully submitted,

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