STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.

v.

BUREAU OF PARKS AND LANDS, et al.

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT

APPENDIX – VOLUME II of II

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April 2, 2021

VIA ELECTRONIC FILING

The Honorable M. Michaela Murphy
Maine Superior Court
c/o Business and Consumer Court
205 Newbury Street, Ground Floor
Portland, ME 04101

Re: *Russell Black, et al. v. Andy Cutko, et al.*
Docket No. BCD-CV-20-29

Dear Justice Murphy:

Defendants Central Maine Power Company and NECEC Transmission LLC (together "NECEC") submit this letter brief in response to the Court's request for such briefing made during the Court conference of March 24, 2021. As requested by the Court, this letter brief addresses two issues: (a) whether additional documents should be added to the record and, if so, which such documents, and (b) the procedures the Court should adopt for resolution of this case.

NECEC Does Not Request Additional Documents Be Added to the Record

On Friday, November 20, 2020, Defendant Bureau of Parks and Lands ("BPL") filed the administrative record in this matter, consisting of nearly 150 documents totaling more than 1,700 pages.

On January 7, 2021, Plaintiffs moved the Court to amend the administrative record by striking only one document from it—*i.e.*, BPL's September 24, 2020 memo (the "BPL Memo")—and adding 12 additional documents. In the same motion, Plaintiffs moved that the Court supplement the record to include proposed (and to-date-never-submitted) affidavit testimony from six individuals and deposition testimony to be taken from BPL Director Andy Cutko and BPL employee David Rodrigues.

NECEC opposed Plaintiffs' motion on January 15, 2021, and incorporates that memorandum herein. NECEC does not propose the Court include any additional documents in the record.

During the most recent conference, Plaintiffs' counsel suggested Plaintiffs would request the Court amend the record to include testimony BPL Director Andy Cutko gave to a legislative committee on March 18, 2021. The Court should deny that request because that testimony relates to proposed legislation currently pending before the Legislature and not to the chief issue before the Court: whether the 2020 lease will give rise to a substantial alteration in the use of the land at issue.[1] As NECEC and the BPL pointed out in their respective prior briefing, legislative materials, such as committee testimony and draft bills, are citable legal material on which any party can rely regardless of the formal inclusion of such material in the record.

The Court Should Review the BPL's Decision or Remand to the BPL

Early in these proceedings, the Court ruled Plaintiffs' challenge to the 2020 Lease[2] could proceed both as a traditional APA challenge under M.R. Civ. P. 80C and as a civil claim under the Declaratory Judgment Act. *See* Order on Defendants' Motions to Dismiss Counts 1 and 2, dated December 21, 2020. The Court's subsequent rulings, including its ruling of March 17, 2021 ("March Order"), concerning the applicability of Article IX, Section 23, have narrowed this case to whether the BPL Memo sets forth findings sufficient to support the Court's review of the BPL's decision that the NECEC does not give rise to a substantial alteration in the use of the land and, thus, that the BPL appropriately granted the 2020 Lease without

[1] Director Cutko submitted both oral and written testimony to the Legislature on March 18th, and it is unclear which such testimony Plaintiffs seek to add to the record. To the extent Plaintiffs seek to add his oral testimony, no official transcript of that testimony exists, as the Legislature does not produce official transcripts of committee hearings. To the extent Plaintiffs seek to include any "transcript" of the March 18, 2021, hearing, such transcript has no official authority and NECEC does not concede it will be complete, accurate, or of evidentiary quality. The Court should exclude any transcript for that reason alone. *See also* NECEC Memorandum (January 7, 2021) at 13 n.7.

[2] The parties and the Court have not addressed the role of the 2014 Lease in this litigation over the course of their most recent filings, orders, and conferences. While factual matters concerning the 2014 Lease relate to the 2020 Lease and are appropriately reflected in the current administrative record, Plaintiffs nevertheless cannot obtain any relief in this case with respect to the validity of the 2014 Lease because that lease has been terminated and is no longer in force. Plaintiffs have not hidden their desire to pursue a ruling concerning the 2014 Lease in this litigation as an inappropriate means of infecting the issues under consideration in the separate, pending litigation over the DEP's permitting of the NECEC Project. The Court should not consider Plaintiffs arguments concerning the validity of the 2014 Lease any further.

obtaining prior legislative approval. The BPL's ultimate decision to issue the 2020 Lease was a paradigmatic example of "final agency action," the review of which the Legislature exclusively has committed to the procedures set forth in the APA and Rule 80C. *See, e.g., Estate of Pirozzolo v. Dep't of Marine Res.*, 2017 ME 147, ¶ 4, 167 A.2d 552 (treating appeal from DMR's issuance of lease as subject to 80C review and observing trial court's dismissal of duplicative claims for declaratory relief); *Cline v. Maine Coast Nordix*, 1999 ME 72, 723 A.2d 686 (rejecting challenge to DMR lease through declaratory judgment action, explaining that previous Rule 80C challenge was the appropriate forum for dispute). Accordingly, while Plaintiffs' declaratory judgment claim previously provided a vehicle for the Court to resolve the threshold legal issues addressed in its March Order, the remaining issues in the case are ones committed to resolution through the APA and Rule 80C, as Plaintiffs themselves seemed to concede during the last court conference when advancing various arguments under 5 M.R.S. § 11006.

The APA and associated case law provide the Court with clear guidance with respect to the specific potential courses of action before it for resolution of this case. Specifically:

First, Plaintiffs have asked the Court to strike the BPL Memo. There should be no mistaking the goal of the Plaintiffs' request: to completely remove the only findings in support of the BPL's decision from the record so that the Court may substitute its own judgment for that of BPL. Relevant case law from the Law Court makes clear Plaintiffs' approach has no basis. In Rule 80B or 80C appeals where there exists no reviewable agency findings, courts must remand the matter to the agency to state its rationale rather than "embark on an independent and original inquiry." *Mills v. Town of Eliot*, 2008 ME 134, ¶ 20, 955 A.2d 258 (citing *Chapel Rd. Assocs., LLC v. Town of Wells*, 2001 ME 178, ¶ 13, 787 A.2d 137). *See also Kurlanski v. Portland Yacht Club*, 2001 ME 147, ¶ 14, 782 A.2d 783 (same principle); *Harrington v. Inhabitants of Town of Kennebunk*, 459 A.2d 557, 561 (Me. 1983) (same principle). In other words, if the BPL Memo did not currently exist, the appropriate remedy would be for the Court to remand the matter to the BPL to create exactly the same sort of memo Plaintiffs now deride as "post hoc," rather than for the Court to render its own judgment on the matter. As discussed in NECEC's January 15, 2021, memorandum, the requirement of written agency findings aims to facilitate judicial review of the agency's action, a goal completely at odds with Plaintiffs' request to strike the BPL Memo entirely. Plaintiffs' request is all the more baseless considering no statute or rule compels the BPL to produce written findings in the first place and that, by all accounts, the BPL never has produced such decisions in the decades it has issued such leases. The BPL Memo is completely appropriate and can be evaluated by the Court in light of the other record materials. In the event the Court disagrees, *Mills v. Town of Eliot* and the cases cited above provide the appropriate remedy: remand to the BPL for a new statement setting forth the basis for its decision to grant the 2020 Lease.

Second, notwithstanding the foregoing, the Court need not reach the question of the BPL Memo if the Court determines the BPL should consider additional documents not previously presented to the BPL and relevant to the substantial alteration of use question. As stated above, NECEC adopts its previous briefing that the Court should deny the Plaintiffs' request to add various documents, affidavits, and deposition testimony to the current administrative record. If the Court disagrees, however, and concludes the BPL must consider any such material, then 5 M.R.S. § 11006(1)(B) provides the appropriate remedy: remand to the agency to consider that material and issue any new or modified agency findings. If the Court remands the matter to the BPL to consider new materials, then it need not address the status of the BPL Memo now because it will receive a revised statement of the BPL's findings, which revised statement would address the new factual issues presented by Plaintiffs and provide a clear basis for this Court's review and likely eventual review by the Law Court.

Third, in no event should the Court accept Plaintiffs' argument that the Court hear new evidence *de novo*. *See Suzman v. Comm'r, Dep't of Health & Hum. Servs.*, 2005 ME 80, ¶ 24, 876 A.2d 29 ("[n]either this Court nor the Superior Court … is free to make factual findings independent of those made by the agency"). In furtherance of their argument, Plaintiffs point to 5 M.R.S. §§ 11006(1)(A) and 11006(1)(D), neither of which provide a basis for the Court taking the extraordinary step of substituting its judgment for that of the agency. Section 11006(1)(A) applies only in the case of the failure or refusal of an agency to act, or where there are "alleged irregularities in procedure before the agency which are not adequately revealed in the record." The former does not apply because the BPL undoubtedly acted when it issued the 2020 Lease. The latter also does not apply because Plaintiffs never have identified any "irregularities in procedure" that are not adequately revealed in the record. Indeed, the Legislature never has required the BPL to follow or promulgate any rules with respect to its decision to issue leases of nonreserved or public reserved land,[3] and so there is no basis to claim the BPL deviated from applicable procedures. And despite trafficking in innuendo, Plaintiffs studiously avoided alleging bias in their First Amended Complaint and certainly never have supported any such claim. *Compare* First Amended Complaint at ¶ 82 *with* 5 M.R.S. § 11007(4) (showing Plaintiffs alleged each basis for overturning final agency action *except* bias). Finally, Section 11006(1)(D) does not apply because,

[3] While the BPL's governing statute grants the agency rulemaking authority, it does not require the BPL to adopt specific rules governing the issuance of leases. *See* 12 M.R.S. § 1803(6) (rulemaking provision). Even if the statute required the BPL to adopt such rules, the APA provides a remedy for an agency's failure to promulgate rules when required to do so, *see* 5 M.R.S. § 8058(1), and Plaintiffs have not sought such a remedy in this case, nor is NECEC aware of any previous instance where anyone has sought such a remedy with respect to the BPL.

while there was no required adjudicatory proceeding in this case, there also is no absence of an administrative record, as the statute requires.[4] Here, the BPL has filed an administrative record totaling more than 1,700 pages, only a few pages of which Plaintiffs have sought to strike and, indeed, which Plaintiffs have sought to supplement with several hundred more pages.

More fundamentally, to hold a *de novo* trial on whether the 2020 Lease gives rise to a substantial alteration in the use of the leased land, as Plaintiffs have urged, would contravene the Maine Constitution, the APA, and the Court's own rulings in this case. With respect to the latter, the Court already has held that the Legislature delegated authority to make the substantial alteration of use determination to the BPL—not to Maine's Superior Courts. *See* March Order at 2 ("BPL has been delegated authority to manage public lands and it is also required to make a determination whether the leases result in a substantial alteration to the uses of the public land.") and 16 ("BPL must exercise its delegated authority to make a determination on a case-by-case basis."). Even the Plaintiffs previously conceded the BPL must make this determination. *See* Plaintiffs' January 7, 2021, Motion at 3 (stating that the substantial alteration of use analysis was a "threshold issue for the Bureau"); Transcript of October 20, 2020, oral argument at 52:20—54:5, 58:7-25 (same). The Maine Code similarly states the Court "shall not substitute its judgment for that of the agency on questions of fact." 5 M.R.S. § 11007(2). And the Maine Constitution requires the courts to avoid wresting powers committed to the Executive branch. Me. Const. art. III, § 2. *See also* March Order at 2 ("The Court agrees with the parties that it must be mindful about the limits of authority of the three branches as they play out in this case.").

Fourth, in the event of a remand, the Court neither should vacate the 2020 Lease nor impose any particular process on the BPL, for the following reasons:

With respect to vacatur, the APA permits the Court to "reverse or modify" an agency action only upon finding the agency action to be unlawful for the specific reasons the APA identifies. *See* 5 M.R.S. § 11007(4)(C); *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566 (court vacates agency's action only after finding action to violate 5 M.R.S. § 11007(4)(C)). Here, the Court has made no such finding. In the March Order, the Court ruled only that Article IX, section 23 of the Maine Constitution required the BPL to make a substantial alteration of use analysis with respect to its leasing decisions. The Court did not hold the BPL failed to engage in such analysis and, otherwise, never has ruled on the legality of the

[4] Plaintiffs' reliance on *Blue Sky West, LLC v. Maine Revenue Services*, 2019 ME 137, 215 A.3d 812, is unavailing. In *Blue Sky West*, the record was "devoid of any factual findings," which is not the case here, and ultimately the parties consented to *de novo* fact finding before the Superior Court, which is also not the case here. *Id*. at ¶ 21.

BPL's leasing decision. Indeed, that is the ultimate issue in this case and not one that would be the subject of an interim decision. Nor would vacating the lease be appropriate were the Court to remand the matter merely for the BPL to issue a new decision or to consider new evidence. *See Mills v. Town of Eliot*, 2008 ME 134, 955 A.2d 258 (remanding permitting matter to local CEO to provide rationale for permitting decision, without vacating decision); *Kurlanski v. Portland Yacht Club*, 2001 ME 147, 782 A.2d 783 (remanding site plan approval to local planning board to complete site plan review, without vacating decision). Notably, although the APA provides a clear process for obtaining a stay of an agency decision pending judicial review, Plaintiffs have not sought it. *See* 5 M.R.S. § 11004 (stay procedures).

With respect to the process governing any remand proceedings, the BPL stated during the recent court conference it would provide notice of the remand and invite public comment on the matters under the BPL's consideration. NECEC agrees such a process would be appropriate, and notes that Plaintiffs Bennett, Black, and O'Neil have sponsored a bill in the Legislature requiring the BPL to employ no more than such a process when making substantial alteration of use decisions in the future. *See* L.D. 1075 (130th Legis. 2021). The Court need not and should not go any farther. Indeed, to require the BPL to adopt and follow specific procedures on remand would short circuit the BPL's rulemaking authority under Subchapter 2 of the APA, which itself requires public notice and comment, and violate the Maine Constitution's separation of powers provisions. *See* 5 M.R.S. § 8051; Me. Const. art. III, §§ 1-2. The Court's decision in last year's signature challenge, *Reed v. Dunlap*, No. BCD-AP-20-02 (Bus. & Consumer Ct. Mar. 23, 2020), should govern here. There, Reed moved the Court to take additional evidence concerning the Secretary of State's determination that opponents of the NECEC project collected sufficient signatures to place an anti-NECEC initiative before the Legislature. The Court denied Petitioner Reed's motion to take the evidence before the Superior Court but remanded the matter to the Secretary to take and consider the additional evidence. In doing so, the Court declined to require the Secretary to follow any specific procedures on remand and deferred to the Secretary's discretion as to what evidence should be considered and how, observing that the Secretary had "plenary power" over signature certification and that no person had a right to an adjudicatory proceeding before the Secretary with respect to that office's review of petition signatures. *Id.* at *4-5. Just as no statute or rules compel the Secretary to follow specific procedures with respect to the review of petition signatures, no statute or rules compel the BPL to follow specific procedures with respect to the grant of leases. Accordingly, the BPL's proposed notice and comment process goes above and beyond what the law requires, and the Court should require no more. *See also Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 39, 39 A.3d 74 (exercising discretionary interlocutory review, and vacating on separation of powers grounds, an order of the Superior Court that would have required additional agency procedures not required by statute, regulation, or due process);

Bar Harbor Banking & Tr. Co. v. Alexander, 411 A.2d 74, 77 (Me. 1980) ("The constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function.").

Finally, in proposing how the Court should resolve this case going forward, NECEC notes and adopts the Court's statement at the most recent conference that such proposal does not waive NECEC's positions with respect to the Court's prior rulings, including, but not limited to, the Court's rulings concerning standing and the applicability of Article IX, Section 23 to the BPL's leasing decisions.

Sincerely,

Nolan L. Reichl

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April 2, 2021

Hon. M. Michaela Murphy
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RE: Russell Black, et al., v. Andy Cutko, as Director of the Bureau of Parks and Lands, et al., *Docket No. BCD-CV-20-29*

Dear Justice Murphy:

In accordance with the Court's directive, Plaintiffs submit this letter identifying the additional evidence that Plaintiffs seek to introduce at trial (beyond what Plaintiffs previously identified in their Motion Regarding the Record filed on January 7, 2021 (hereinafter, "Motion Regarding Record")), the interim remedy the Court should provide given its Order on the Application of Art. IX, § 23 of the Maine Constitution to the Bureau of Parks and Lands' Authority to Lease Public Reserved Lots dated March 17, 2021 (hereinafter, "Order"), and how the case should proceed in light of that Order.

1. Additional Evidence the Court should consider

As the Court found in its Order, the proper Constitutional and statutory inquiry focuses on whether the new *uses* of the land will reduce or substantially alter the uses of the land set out in the Management Plan, without regard to the form that authorizes those uses (i.e. easement or lease). Because this is a Declaratory Judgment Action seeking to vindicate Plaintiffs' constitutional rights, the Court should hold a de novo hearing or alternatively take additional evidence and make the determination itself as to whether the transmission line corridor will reduce or substantially alter the uses of the public reserved lands of Johnson Mountain Township and West Forks Planation. In addition to the evidence in the record filed by BPL and the additional evidence described in Plaintiff's Motion Regarding Record, the Court should hear and consider the following:

- L.D. 471 in the current session, which proposes two amendments to 12 M.R.S §1852(4) in response to BPL's arguments in this case: 1) to expressly cross-reference section 598-A and 2) to legislatively deem that new transmission lines and similar linear facilities substantially alter public reserved lands within the meaning of the Constitution and that leases for such activities require 2/3 legislative approval. The bill summary makes clear that these are not new requirements but instead "confirms the Legislature's understanding of the applicability of the Constitution… and …section 598-A to leases of public reserved lands." A copy of L.D. 471 is attached as **Exhibit A**.
- The testimony of Director Cutko in opposition to L.D. 471 on March 18, 2021, mentioned during the telephonic conference with the Court on March 24, 2021. A link to the video

recording of Director Cutko's testimony (https://www.youtube.com/watch?v=RbZB3pl-QAU) and an unofficial transcript is attached as **Exhibit B**.

- A letter from the Agriculture, Conservation and Forestry ("ACF") Committee dated March 29, 2021, to the Commissioner of the Department of Agriculture, Conservation and Forestry and Director Cutko in response to the Director's testimony. The ACF Committee wrote the letter to "memorialize that the ACF Committee finds that any lease of public lots or other real estate designated under the Maine Revised Statutes, Title 12, section 598-A to CMP for the purposes of the New England Clear Energy Connect (NECEC) transmission corridor project for the transmission line . . . constitutes a substantial alteration of the uses of such real estate under the Constitution of Maine, Article IX, Section 23 and accordingly requires the approval of the lease by a vote of two-thirds of all members elected to each House of the Legislature." A copy of the ACF Committee's letter is attached as **Exhibit C**.
- Although perhaps not necessary to be included here since it is an official BPL production, the BPL video on public reserved lands. A link to the video (https://youtu.be/Im-uBEaTtEA) is attached as **Exhibit D**.

2. Remedies

In its Order, the Court flatly rejected the principal argument of BPL—that somehow leases were "categorically exempt" from the Constitution. Although BPL has asserted that its signature on the leases *implies* a determination that neither the 2014 Lease nor the 2020 Lease effects a reduction or substantial alteration to the uses of the public lots, it concedes that its so-called final agency action, the lease itself, fails to provide any determination of whether such a reduction or substantial alteration will be caused by the transmission line corridor. The Court, accordingly, must decide how that determination should be made and what the immediate consequences of BPL's failure to have made it are.

As a threshold matter, given that the Court has already decided that, at a minimum, the Bureau omitted a necessary prerequisite to execution of both the 2014 Lease and the 2020 Lease, the Court should expressly declare both leases invalid or at least suspend the effectiveness of the 2020 Lease pending resolution of the case.[1] To do otherwise would potentially allow CMP to start construction on the leased lands before any determination about the constitutional impacts of those activities had been made and before the Legislature had an opportunity to exercise its constitutional prerogative of approving such activity. The Legislature has made clear its interest in exercising that authority both during the 129th Legislature, as reflected in L.D. 1893 (included in our previous filing Plaintiffs' Motion Regarding Record), and in L.D. 471 and the letter from the ACF Committee to the Commissioner of the Department of Agriculture, Conservation and Forestry and Director Cutko described above.[2]

[1] The 2014 Lease is separately invalid because it was executed before issuance of a CPCN. Although that lease has since been terminated, the reliance on it both in the "Amended and Restated" 2020 Lease and the September 2020 post-hoc rationalization memo make declaratory relief still appropriate.

[2] The 129th Legislature adjourned because of Covid-19, and the First Session of the 130th Legislature adjourned because of procedural maneuverings around the budget, but in each Legislature, the Committee with jurisdiction over

The Court next should conduct a hearing and make a final determination as to whether the 2020 Lease would reduce or substantially alter the uses of the public reserved lands. The Court plainly has the authority to conduct such a proceeding and should exercise it here. *See, e.g.*, *Ex parte Davis*, 41 Me. 38, 53–54 (1856) ("And when, if ever, the executive or legislative departments have exercised in any respect a power not conferred by the constitution, on a proper submission of the questions arising thereon, we have seen that the judiciary is not only permitted but compelled to sit in judgment upon such acts, and bound to pronounce them valid or otherwise."); *Sharp v. City of Lansing*, 464 Mich. 792, 810–11, 629 N.W.2d 873, 883 (2001) ("This is profoundly misbegotten because the power of judicial review does not extend only to invalidating unconstitutional statutes or other legislative enactments, but also to declaring other governmental action invalid if it violates the state or federal constitution."); 16 C.J.S. Constitutional Law § 204 ("A court has the power to determine if a law conforms to the constitution and to declare a statute or government action invalid if it is unconstitutional.").[3]

Fitzgerald v. Baxter State Park Authority, 385 A.2d 189 (Me. 1978), presents an analogous circumstance. There, the plaintiffs brought an action to restrain the Park Authority from carrying out a program for cleaning and restoring certain areas of timber blowdown. Like the complaint in the instant case, the complaint in *Baxter* was for declaratory judgment, review of governmental action, and injunctive relief. There, the public trust and the public's rights as beneficiaries of Governor Baxter's deeds of trust were at issue, just as here the public trust and the public's rights as the owners for whom the public reserved lands are held in trust and managed are at issue. Rather than remand to the Park Authority, the trial court heard testimony from numerous witnesses (*i.e.* "[t]en witnesses, all trained in or expert in some field relating to forest management and ecology") and admitted more than forty exhibits, all of which the trial court relied upon in reaching its factual findings and legal conclusion. *Id.* at 200-01. More specifically, the evidence presented to the trial court at two hearings included the type of equipment that the Park Authority planned to use and the effect that the equipment would have on the park (*e.g.* crushing vegetation and disturbing the natural growth patterns). *Fitzgerald v. Baxter State Park Authority*, Docket No. 75-1110, slip op. at 6 (Me. Super. Ct., Ken. Cnty., Aug. 24, 1976).[4] Based on this information, the trial court made findings related to "the extensive environmental impact of the use of such equipment," *id.* at 7, and issued declaratory and injunctive relief. The Court should follow a similar procedure here.

As the Court explained in its Order, the constitutional amendment took "back from the executive branch authority previously delegated to it by the Legislature." Order at 7. "The

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BPL—and with a shared constitutional role in protecting the public lands—has made clear that BPL lacks the unilateral authority to execute the 2020 Lease, given the effect of the CMP Corridor on the public reserved lands.

[3] *See also*, *e.g.*, *Stoddard v. Pub. Utilities Comm'n*, 137 Me. 320, 19 A.2d 427, 428 (1941) ("If [an agency] exceeds its authority it acts without jurisdiction and its orders are of no effect and are subject to collateral attack.") (Internal citations omitted); *Soucy v. Northland Frozen Foods, Inc.*, No. CIV.A. AP-01-005, 2002 WL 746076, at *6 (Me. Super. Mar. 29, 2002) (agency director exceeded his statutory authority and, thus, decision vacated.). *Accord* 5 M.R.S. § 11007(C)(3) ("The court may: … [r]everse or modify the decision if the administrative findings, inferences, conclusions or decisions are: … made upon unlawful procedure").

[4] A copy of the Superior Court decision is attached as **Exhibit E** for the Court's convenience.

Legislature and the people of Maine – through the constitutional amendment – retracted some of the authority previously delegated to BPL." Order at 14. As a result of the constitutional amendment, "BPL is obligated to determine whether a particular action (including a lease for electric power transmission pursuant to section 1852(4)) reduces or substantially alters the uses of public reserved lands before it takes that particular action." Order at 15-16. "Unless such a determination is made by BPL, the Legislature's constitutional prerogative can be frustrated or even thwarted." Order at 9.

To date, as described above, the Bureau has unequivocally thwarted the Legislature's constitutional prerogative and will continue to do so unless this Court exercises its authority to make the substantial alteration determination. Remand is simply inappropriate.[5]

Although the Court has ample authority and indeed is required to conduct the proceedings and make the requisite determinations on the Declaratory Judgment counts, in an excess of caution in light of some conflicting authority from the Law Court, the Court can also and should hear further evidence and make a determination simultaneously under 5 M.R.S. § 11006. Section 11006 (1)(D) seems most applicable because there was no adjudicatory proceeding required prior to the Bureau's decision to enter into the lease and judicial review is precluded by the absence of a reviewable administrative record. In *Blue Sky W., LLC v. Maine Revenue Servs.*, 2019 ME 137, ¶ 20, 215 A.3d 812, 819–20, the Law Court explained that while the trial court usually confines its review to the record upon which the agency's decision was based, "the court is not always so limited" and is authorized to conduct a hearing de novo under 11006(1)(D). In *Blue Sky*, the agency was not required to conduct an adjudicatory hearing prior to its decision, the administrative record was devoid of any factual findings, and the decision was stated summarily. *Id.* at ¶ 21. Because the record was "insufficient to allow a proper judicial review of the agency's decision ... the court was entitled to accept additional evidence and adjudicate the matter de novo." *Id.*

Here, although BPL filed a record of more than 1,700 pages, it does not include a written or transcribed decision as to whether the transmission line will substantially alter the public lands. *See* Me. R. Civ. P. 80C(f). Moreover, it does not contain any factual findings with respect to whether the transmission line will substantially alter the public lands (aside from the impermissible 2020 post-hoc memorandum). The only page in the Bureau's proposed record that contemporaneously addresses substantial alteration is A.R. V0117,[6] which is an email from an attorney at Verrill who served as outside counsel to the Bureau in the 2020 lease negotiations and

[5] The situation presented here is entirely distinguishable from the situation in *Reed v. Dunlap,* No. BCD-AP-20-02 (Bus. & Consumer Ct. Mar. 23, 2020). There, in a case governed exclusively by Rule 80C, Reed argued strenuously and correctly that "an agency should not have unchecked authority to exclude relevant evidence from the record, and then reach a decision on only the basis of the evidence included in the record." However, Reed made that argument in a situation where the Secretary of State had "plenary" power to investigate, expressed a desire to investigate, but simply had no time to do so because of Reed's litigation tactics. In contrast, in this Declaratory Judgment action, the Court has already recognized that this is not just an 80C case, the Constitution returned to the Legislature authority previously delegated to the Bureau, and the Bureau's actions and inactions in this case (and the response of the ACF Committee) demonstrate that the Court's concern that "the Legislature's constitutional prerogative can be frustrated or even thwarted" is far from hypothetical. Given the circumstances in this case, the Court should exercise its clear authority to create the factual record in the first instance.

[6] The same email appears at A.R. V0128, V0159.

states "[w]ith input from Andy Cutko . . . [i]dea is to help show that this 2020 Lease does nothing to 'substantially alter' the leased premises now, while still providing a new leased agreement that is being executed after the 2019 CPCN." Although the Bureau's September 20, 2020 memorandum discusses substantial alteration, it is not a contemporaneous determination but rather an impermissible post-hoc rationalization of the agency's alleged decision and cannot properly be considered as part of the record in this case. *See* Plaintiffs' Motion Regarding Record at 2-8. Consequently, the record is insufficient for judicial review. *See Blue Sky W., LLC,* 2019 ME 137, 215 A.3d 812, 820, n.12. While the APA gives the Court discretion in most instances to "either remand for such proceedings as are needed to prepare such a record or conduct a hearing de novo," *Id.* (quoting 5 M.R.S. § 11006(1)(D)), here the dispute between the executive and legislative branches over a constitutional issue, the procedural irregularities, the Bureau's failure to act, and the history of lease negotiations weigh against remanding this case to the Bureau. Therefore, the Court should conduct a hearing de novo, at which time all parties would have the opportunity to present evidence upon which the Court can make the substantial alteration determination.[7] The constitutional stakes are too high to allow the Bureau unilaterally, without cross-examination, to make that decision.

While the situation here fits comfortably under 5 M.R.S. § 11006(1)(D), it also fits under section 11006(1)(A). As set forth in more detail in Plaintiffs' Motion Regarding Record (as well as throughout this litigation generally), Plaintiffs have made a *prima facie* showing of the Bureau's failure to act (*i.e.* make a substantial alteration determination) and of procedural irregularities. In short, the Bureau has not promulgated any rules, established any procedures, or developed any internal criteria to make a substantial alteration determination. Yet, pursuant to 12 M.R.S. § 1803(6), the Bureau "shall adopt, amend, repeal and enforce reasonable rules necessary to carry out the duties assigned to it, including, but not limited to, rules . . . [f]or the protection and preservation of . . . public reserved lands [and] [f]or observance of the *conditions and restrictions, expressed in deeds of trust or otherwise [e.g. Me. Const. art. IX § 23 and 12 M.R.S. § 598-A], of the ... public reserved lands . . . .*" (Emphasis added).[8]

Although CMP contends that the absence of rules, procedures and criteria means that the Bureau could not have engaged in any procedural irregularities, the very absence of rules,

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[7] The Bureau's contention that such a determination is implicit in the fact that the Bureau entered into the lease, even though the lease is silent on substantial alteration, confuses cause and effect—there is nothing about the mere fact of entering a lease that establishes that a determination about anything was made. Similarly, the claim that the lease is temporary and therefore not a substantial alteration or reduction is absurd on its face—100 foot poles that are contractually required to deliver power for at least 40 years can hardly be considered temporary; the Jackman Tie Line, for example, has been present on the same lots for over 58 years.

[8] Moreover, as referenced in the ACF Committee's letter, prior to entering into the 2020 lease, Director Cutko testified during committee proceedings that he intended to remedy the Bureau's lack of internal criteria for making substantial alteration determinations by developing criteria and sharing the criteria with the ACF Committee. ACF Committee Letter at 3. At the time Director Cutko entered into the lease in 2020, he was fully aware of L.D. 1893, and had testified that the Bureau needed to be more transparent in its substantial alteration determination and informing the Committee how the Bureau would do so. *See* Plaintiffs' Motion Regarding Record at 10-12. However, one week after the Legislature was forced to adjourn because of Covid, outside counsel for the Bureau, not authorized by the Attorney General's office, started negotiating the 2020 Lease with CMP. *See id.* at 9. After about a month of negotiations between unauthorized outside counsel and CMP, the Attorney General's office got involved to conclude the wordsmithing of the Lease. *See id.*

procedures and criteria constitutes a procedural irregularity in and of itself. Furthermore, the absence of a contemporaneous written or transcribed decision of substantial alteration is a procedural irregularity. *See Maine v. Shalala*, 81 F. Supp. 2d 91, 94 (D. Me. 1999) ("[I]t is also a well-settled rule of law that the agency must have provided a valid basis for its action at the time the action was taken."). Thus, "evidence thereon may be taken and determination made by the reviewing court . . . ." *Doane, M.D. v. State Dept. of Health and Human Services*, 2019 WL 10980581, at *2, n.3 (Me. Super. June 05, 2019) (citing 5 M.R.S. § 11006(1)(A)).

Additionally, "[c]ourts may vacate an agency's action if it results in '*procedural* unfairness.'" *Hopkins v. Dep't of Hum. Servs.*, 2002 ME 129, ¶ 12, 802 A.2d 999, 1002 (citing *Maine v. Shalala,* 81 F.Supp.2d 91, 95 (D. Me. 1999)). "It is true that *procedural* unfairness has been held by courts as a basis to overturn an agency action under the APA." *Maine v. Shalala*, 81 F. Supp. 2d 91, 95–96 (D. Me. 1999) (citing *U.S. v. District Council of New York City and Vicinity of United Bhd. of Carpenters and Joiners of America,* 880 F.Supp. 1051, 1066 (S.D.N.Y.1995)); *Accord* 5 M.R.S. § 11007(C)(3). As set forth above, this case is rife with procedural irregularities, all of which have created a procedural unfairness to the Plaintiffs who have been kept completely in the dark about the Bureau's silent substantial alteration determination and its back-door lease.

Conclusion

The Court has already determined the merits of the most central issue in this case. For the reasons above, and in Plaintiffs previous filings, the Court is the proper forum in which to take evidence and decide the constitutional issue about which the BPL and the ACF Committee are in active dispute. In the interim, the Court should expressly declare that the 2014 Lease and the 2020 Lease are invalid and that no actions can be taken under color of the 2020 Lease until the case is finally resolved.

Respectfully submitted,

/s/ James T. Kilbreth

James T. Kilbreth, Esq.
Attorney for Russell Black, et al.

Enclosures

cc: Lauren E. Parker, AAG
Scott W. Boak, AAG
Nolan L. Reichl, Esq.
Matthew O. Altieri, Esq.

Black v. Cutko

[Docket No. BCD-CV-20-29]

EXHIBIT A

130th MAINE LEGISLATURE

FIRST REGULAR SESSION-2021

Legislative Document **No. 471**

S.P. 177 In Senate, February 16, 2021

An Act To Require Legislative Approval for Certain Leases of Public Lands

Received by the Secretary of the Senate on February 11, 2021. Referred to the Committee on Agriculture, Conservation and Forestry pursuant to Joint Rule 308.2 and ordered printed.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator BLACK of Franklin.
Cosponsored by Senator: BENNETT of Oxford, Representative: O'NEIL of Saco.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA §1852, sub-§4, as enacted by PL 1997, c. 678, §13 and amended by PL 2011, c. 657, Pt. W, §7 and PL 2013, c. 405, Pt. A, §24, is further amended to read:

4. Lease of public reserved land for utilities and rights-of-way. ~~The~~ Subject to the provisions of section 598-A, the bureau may lease the right, for a term not exceeding 25 years, to:

A. Set and maintain or use poles, electric power transmission and telecommunication transmission lines and facilities, roads, bridges and landing strips;

B. Lay and maintain or use pipelines and railroad tracks; and

C. Establish and maintain or use other rights-of-way.

Any such poles, transmission lines and facilities, landing strips, pipelines and railroad tracks under this subsection are deemed to substantially alter the uses of the land within the meaning of the Constitution of Maine, Article IX, Section 23, and a lease or conveyance for the purpose of constructing and operating such poles, transmission lines and facilities, landing strips, pipelines and railroad tracks under this subsection may not be granted without first obtaining the vote of 2/3 of all the members elected to each House of the Legislature.

Notwithstanding Title 1, section 302 or any other provision of law to the contrary, this subsection applies retroactively to September 16, 2014.

SUMMARY

This bill requires the approval of 2/3 of all the members elected to each House of the Legislature for any use of public reserved lands for transmission lines and facilities and certain other projects. This provision applies retroactively to September 16, 2014. This bill confirms the Legislature's understanding of the applicability of the Constitution of Maine, Article IX, Section 23 and the Maine Revised Statutes, Title 12, section 598-A to leases of public reserved lands.

Black v. Cutko

[Docket No. BCD-CV-20-29]

EXHIBIT B

Exhibit B

An Act to Require Legislative Approval for Certain Leases of Public Lands: Hearing on L.D. 471 Before the Agriculture, Conservation and Forestry Committee, 130th Legis. (2021) (testimony of Andy Cutko, Director of the Bureau of Public Lands) *available at* https://www.youtube.com/watch?v=RbZB3pl-QAU (start time 13:08, end time 33:50).

PROCEEDING TYPE: Hearing

TITLE: Legislative Hearing on L.D. 471, An Act to Require Legislative Approval for Certain Leases of Public Lands

RECORDED ON: March 18, 2021

CLIENT: Drummond Woodsum Law

PARTICIPANTS:

Director Andy Cutko

(Beginning of recorded material.)

SENATOR DILL: Welcome, Mr. Cutko, Director Cutko. Would you introduce yourself, please?

DIRECTOR CUTKO: Yes, thank you, Senator Dill, and good morning. Senator Dill, Representative O'Neil, and Honorable Members of the Joint Standing Committee on Agriculture, Conservation and Forestry, I'm Andy Cutko and I'm the Director of the Department of Agriculture, Conservation and Forestry's Bureau of Parks and Lands and I'm speaking on behalf of the department in opposition to L.D. 471.

L.D. 471 would do two things. First, it would require two-thirds legislative approval of certain utility and other leases across public reserve lands. BPL has taken the position in the pending Black v. Cutko litigation that such approval is not required by the Maine Constitution, Article IX, Section 23, and by the Designated Lands Act, Title 12 M.R.S. 598-A.

Second, L.D. 471 would apply retroactively to September 16, 2014. For the reasons discussed below, we advise that the Legislature not amend 12 M.R.S. 1852, Subsection 4, to require two-thirds legislative approval of utility leases over public reserve lands.

As you may be aware, the Superior Court issued an order yesterday that disagreed with the Bureau's position

as to whether leases issued pursuant to Title 12 M.R.S. 1852, Subsection 4, are subject to two-thirds legislative approval. The Court also held that it is for the Bureau to decide whether leases issued pursuant to Title 12 M.R.S. 1852, Subsection 4, substantially alter the uses of public reserve lands. The ruling yesterday is just one component of this litigation that will continue to play out in court.

The Bureau's professional knowledge and experience with its land base and management plans is instrumental in determining whether a utility lease is consistent with the existing management intent of the public lot. Pursuant to the management planning requirements of Title 12 M.R.S. 1847, the Bureau's Forest and Land Management staff received public input and determined the range of public uses appropriate for each public lot. The utility lease, for example, may be compatible with public reserve land allocated primarily for timber management, such as the West Forks Plantation and Johnson Mountain Township public lots but not with public reserve land allocated primarily as a special protection area.

For the committee's reference, the Bureau's decision-making process with respect to leasing a small part of the West Forks Plantation and Johnson Mountain Township is described in the attached memo from September 24, 2020.

Fundamentally, familiarity with these kinds of nuances and the technical expertise of Bureau staff makes our staff best qualified to weigh these issues and make such determinations according to state statute and rules.

Second, the Legislature's potential reconsideration of a lease negotiated in good faith years ago sets a dangerous precedent and undermines public confidence in agency rules and decisions and the consistency by which they're applied and upheld. The Bureau has issued four leases that would presumably be impacted by this legislation. A lease initially approved years ago likely provides the lessee with vested rights, raising questions about the constitutionality of a retroactive application of L.D. 471 to the CMP lease and other leases issued by the Bureau pursuant to Title 12 M.R.S., 1854 subsection -- 1852, Subsection 4. Moreover, a retroactive reversal could significantly deter future project development, including renewable energy across the agency and regulatory spectrum.

Third, the bill establishes no size threshold for what constitutes a substantial alteration pursuant to Title 12 M.R.S 598-A. Accordingly, the legislation could have unintended consequences to minor leases, including one- or two-pole connections to residential leased camps or guywire attachments needed for abutting utility lines.

Finally the bill may conflict with the Maine Constitution. A similar bill in 1999 in the 119th Legislature, L.D. 383 at the time, would have amended Title 12 M.R.S. 1852, Subsection 7, to require two-thirds legislative approval of leases of public reserve lands to the federal government. That 1999 bill was determined to be unconstitutional by the Revisor's Office. Because of similarities to that bill, the committee may wish to consult with the Revisor's Office regarding the constitutionality of the 119th Legislature's L.D. 383 if L.D. 471 moves forward.

The Bureau has approved one major utility corridor lease since 2014 and that's a lease to Central Maine Power across Johnson Mountain and West Forks Townships. This lease was initially granted in 2014, as Senator Black mentioned, and was revised and amended in June 2020. As stated above, the Bureau's lease to CMP is the subject of a lawsuit, Black v. Cutko, pending in the Superior Court's Business and Consumer Docket. The Court is reviewing whether the Bureau's lease to CMP is valid. Because a court is reviewing the legality of that lease, the Department respectfully requests that the legislation be tabled until there is a final decision in this case. Furthermore, there's an abundance of documentation in the legal briefs for the case, including a lengthy

administrative record and materials provided in response to Freedom of Access Act requests that relate to the justification for the Bureau issuing the lease without the need for legislative approval. These documents are publicly available and may be provided to the committee upon request.

Thank you for your careful consideration of this legislation and thanks for listening to my lengthy testimony.

SENATOR DILL: Thank you. Questions? Representative Skolfield.

REPRESENTATIVE SKOLFIELD: Thank you, Senator Dill. Good morning, Director Cutko. Nice to see you this morning. I'm just wondering; a year ago, roughly, when we were discussing this, you became -- you came before our committee and I recall asking you about the original lease under the previous administration. If it were done under your watch, would you have done anything differently? And I think your reply at that time, I'm pretty sure what you said was yes, it would be, I wouldn't've done it that way. I'm just wondering since then, I know you were new at -- newer at the time, since then, what -- what changed your mind or what other considerations did you take to change that -- that approach when you said you would've done it differently? And it doesn't appear that that was quite

accurate, could you explain that for me? I'd appreciate it. Thank you.

DIRECTOR CUTKO: Yes, thank you for the question. I -- I'm not sure that your characterization of my comments from a year ago is -- is accurate. I think what I said when I was asked about the substantial alteration question was that I may or may not agree with the determination that was made in 2014. So, I'm not sure what you're -- about your characterization of my comments from a year ago. So, I haven't changed my mind and we did, in the Bureau, make a determination about substantially altered. That Bureau was provided in writing in September in the attached memo.

REPRESENTATIVE SKOLFIELD: Thank you, Director.

SENATOR DILL: Senator Maxmin?

SENATOR MAXMIN: Thank you, Mr. Chair, and thank you, Director Cutko. I'm really curious about this -- this meeting, this renegotiating of the lease that happened last year that Senator Black was talking about. Were you part of that process?

DIRECTOR CUTKO: I was part of that process, yes.

SENATOR MAXMIN: Can I ask another question, Mr. Chair?

SENATOR DILL: Sure.

SENATOR MAXMIN: Can you -- I'm curious why that was

a meeting that this committee wasn't notified about, that -- as far as I know, there was no public notification about, given the interest around this -- this particular discussion.

DIRECTOR CUTKO: Yes, as I mentioned in the testimony, our position is that leases did not require legislative approval and so that step was not taken.

SENATOR MAXMIN: One more question, Mr. Chair?

SENATOR DILL: Sure.

SENATOR MAXMIN: And the Department felt comfortable taking that position and pursuing closed-door negotiations despite the ongoing court case around this?

DIRECTOR CUTKO: As I said, our position is that leases were not -- did not require legislative approval.

SENATOR MAXMIN: Okay, thank you.

SENATOR DILL: Next is Representative Paul.

REPRESENTATIVE PAUL: Yes, thank you, Senator Dill, and thank you, Mr. Cutko, for being here today. The question I had was; did the Department of Agriculture or anyone have any input on the -- on this 2020 lease that was renegotiated last year?

DIRECTOR CUTKO: Yes, we were involved in that renegotiation.

REPRESENTATIVE PAUL: Okay, and one more question, if I could?

SENATOR DILL: Go for it.

REPRESENTATIVE PAUL: Actually, can you tell us who may have initiated this renegotiation of the lease?

DIRECTOR CUTKO: I'm going to decline to respond to that. The Bureau was involved in the renegotiation.

SENATOR DILL: Representative O'Neil.

REPRESENTATIVE O'NEIL: Thank you, Mr. Chair. Thank you, Director Cutko for your testimony. I think just before I get going, I want to -- well, I want to go back to the timeline and my first question is for the lease that was signed in June. When did the renegotiation start?

DIRECTOR CUTKO: I'd have to go back and look at my records. I could -- I could determine that for the work session.

REPRESENTATIVE O'NEIL: Do you think -- a follow-up, please, Mr. Chair?

SENATOR DILL: Sure.

REPRESENTATIVE O'NEIL: Would it be safe to say that -- that it was in process months before June when it was signed?

DIRECTOR CUTKO: I would have to go back and check our records again and -- and I guess I -- my question is I'm not quite sure how that relates to the proposed legislation.

REPRESENTATIVE O'NEIL: Okay, thank you for your reply. Mr. Chair, may I ask a follow-up?

SENATOR DILL: Sure.

REPRESENTATIVE O'NEIL: So, in your testimony, you talked about how it's for the Bureau to decide whether leases substantially alter public lands and what I'm curious about, you referenced the fact that -- that the Bureau issued some kind of documentation of -- of an evaluation in September. The lease itself was signed June 20th. What kind of evaluation did you engage in before that and I'm asking this question in the context of the fact that our committee had a robust conversation with you about -- about how we thought that this was a substantial alteration and I just want to underscore that that's the Legislature, you know, talking about legislative intent and making that clear. So, I'd be curious about the timeline there.

DIRECTOR CUTKO: I appreciate that, and I understand your concern. Again, I would have to check my records regarding the timeline for the renegotiation. So, I'd prefer not to comment beyond that. I will say that just because we did not reduce the determination in writing does not mean that that determination wasn't made. In other words, we had -- we did have discussion around this issue in relationship to the 2020 lease. However, it was

not reduced into writing until later. As you may recall, in the spring of a year ago, there were a lot of other things going on in the Bureau. We were dealing with an oncoming pandemic and shifting hundreds of people to remote working and doing our best to get the parks up and running and protecting the health and safety of our park staff and the public, so it was a very, very busy time, and I'm sure you'll appreciate that.

REPRESENTATIVE O'NEIL: Could I ask one more follow-up, please, Mr. Chair?

SENATOR DILL: One more and we'll switch to others, yeah. I can come back to you.

REPRESENTATIVE O'NEIL: All right, thanks. So, my -- my question is knowing that this was such a high-profile issue, that it was sparking such controversy across the state, that the committee of jurisdiction had already had a robust conversation with you about accountability and oversight, is it typical practice to not document such a high-profile decision, you know, to not document your consideration as to whether a substantial alteration had taken place before resigning a lease? Is that typical practice?

DIRECTOR CUTKO: Representative O'Neil, I can't speak to that. I've been in the position for less than two years, so I'm not able to address how the Bureau has --

has documented those issues in the past.

REPRESENTATIVE O'NEIL: Thanks for your reply. I'll come back after others have a chance.

SENATOR DILL: Representative Underwood.

REPRESENTATIVE UNDERWOOD: Yes, thank you, Director Cutko, for this morning. The Legislature is the ultimate authority in this matter and who is -- who in the Department, including yourself, was involved in this decision to go ahead with these leases?

DIRECTOR CUTKO: There were a number of other staff involved, Representative Underwood --

REPRESENTATIVE UNDERWOOD: Identify them, please.

DIRECTOR CUTKO: I'm going to -- I'm not sure that that is germane to the litigation or the legislation, so --

REPRESENTATIVE UNDERWOOD: We need to know what the -- we need to know what the thought process is on who's involved in order to determine what -- whether this was -- had any outside interests involved. If you could provide us with the names and I'm sure everybody would appreciate it, particularly -- particularly myself and also, I'm sure, the committee would, too, also. Thank you.

SENATOR DILL: Thank you, Representative Underwood, and perhaps Director Cutko can go back and have a discussion and maybe bring that back for work session if

appropriate. So, moving on, going on to Representative McCrea.

REPRESENTATIVE MCCREA: Yes, thank you, Mr. Chair. Thank you for being here, Director Cutko. I know it's probably not the most comfortable morning right now. Knowing -- I mean, you know full well I was here, there were several of us that were on the committee a year ago, and we had -- we did, as Representative O'Neil mentioned, we had a robust discussion about this. So, obviously, it is something that this committee felt strongly about. Having nothing to do with how people feel about the corridor or anything else, can you understand why this committee feels as though there -- it just feels as though there was an end-around. Can you understand why we would feel that way?

DIRECTOR CUTKO: First of all, Representative McCrea, I appreciate your empathy for my position. I understand the sentiments that are expressed by -- by the committee.

REPRESENTATIVE MCCREA: Okay, that's good. Thank you.

SENATOR DILL: Senator Maxmin.

SENATOR MAXMIN: Thank you, Mr. Chair. Just a couple more questions, Director Cutko. When the lease -- when the lease was renegotiated last year, did the Department or the Governor's office consult with the AG on that

process?

DIRECTOR CUTKO: Yes, the Attorney General's office was involved in the review of that.

SENATOR MAXMIN: A follow-up, Mr. Chair?

SENATOR DILL: Sure.

SENATOR MAXMIN: Can you share their reasoning or the advice that they gave you?

DIRECTOR CUTKO: There were numerous discussions with the AG's office, so I would decline to comment on that just because it's not specific, so -- and/or you could consult with the AG's office on -- on their input.

SENATOR MAXMIN: Okay, is there --

DIRECTOR CUTKO: I will -- as I said in the testimony, there is a lengthy administrative record and a number of Freedom of Information Act requests that total hundreds of pages of documentation on the decisions in 2014 and 2020, so that is all publicly available information.

SENATOR MAXMIN: Okay. And, one more question, Mr. Chair?

SENATOR DILL: Sure.

SENATOR MAXMIN: Director Cutko, I was -- I was wondering if you could -- you probably can't say, but I'm wondering if you can say why you -- you won't mention who initiated the renegotiation of the lease.

DIRECTOR CUTKO: I'm not sure that it's relevant to the legislation that we're discussing.

SENATOR MAXMIN: Okay.

SENATOR DILL: Are there any other questions for the Director? Representative O'Neil.

REPRESENTATIVE O'NEIL: Thank you, Mr. Chair. Director Cutko, one of my follow-ups is in your process you were saying that you engaged legal counsel as you were making this decision and that this advice took place orally rather than in a written form or in a memo. I'm wondering, kind of in that timeline, before signing in June, were you only engaging with the AG's office? Did you seek any outside counsel?

DIRECTOR CUTKO: Again, I'm not sure how that's directly relevant to the legislation.

REPRESENTATIVE O'NEIL: A follow-up, if I may, Mr. Chair?

SENATOR DILL: Sure.

REPRESENTATIVE O'NEIL: The reason this legislation is before us is because the committee made clear that we saw this as being a substantial alteration, we don't see any documentation of this taking place until September. The reason that we are having this conversation is because the Legislature is making clear this is a substantial alteration and we need accountability from the

administration on this project and moving forward. So, when I ask that question, I'm asking about your process and that -- and that is directly relevant to the public to know how you engaged in your analysis relating to whether it was a substantial alteration. So, when I ask you who you consulted with, that's absolutely information that the public is entitled to, and whether you engaged outside counsel leading up to that lease. This is public land we're talking about.

DIRECTOR CUTKO: I will thank you, Representative O'Neil, I will take that into consideration and I will try to provide that information at the work session.

REPRESENTATIVE O'NEIL: Thank you.

SENATOR DILL: Okay, anyone else? I thought I saw another hand, but it's disappeared now. Are there any other questions for the Director? All right, seeing none at this time, we will move back into testimony and I will apologize to Senator Bennett that I had him on my list but I didn't see him in the attendee list so I didn't think he was here. So, my apologies, Senator Bennett, he's a cosponsor of the bill. The floor is yours.

(End of recorded material.)

C E R T I F I C A T E

I hereby certify that this is a true and accurate transcript of the proceedings, which have been electronically recorded in this matter on the aforementioned date.

Jenny L. Knowles

Jenny L. Knowles, Transcriber

Black v. Cutko

[Docket No. BCD-CV-20-29]

EXHIBIT C

SENATE

JAMES F. DILL, DISTRICT 5, CHAIR
CHLOE S. MAXMIN, DISTRICT 13
RUSSELL BLACK, DISTRICT 17

KAREN S. NADEAU, LEGISLATIVE ANALYST
CHERYL McGOWAN, COMMITTEE CLERK

HOUSE

MARGARET M. O'NEIL, SACO, CHAIR
DAVID HAROLD McCREA, FORT FAIRFIELD
SCOTT LANDRY, FARMINGTON
LAURIE OSHER, ORONO
RANDALL C. HALL, WILTON
THOMAS H. SKOLFIELD, WELD
SUSAN BERNARD, CARIBOU
JEFFREY ALLEN GIFFORD, LINCOLN
JOSEPH F. UNDERWOOD, PRESQUE ISLE
WILLIAM D. PLUECKER, WARREN

STATE OF MAINE
ONE HUNDRED AND THIRTIETH LEGISLATURE
COMMITTEE ON AGRICULTURE, CONSERVATION AND FORESTRY

March 29, 2021

TO: Amanda E. Beal, Commissioner
Department of Agriculture, Conservation and Forestry
Andy Cutko, Director
Bureau of Parks and Lands

FROM: Senator Jim F. Dill, Senate Chair, JFD ksw
Representative Margaret M. O'Neil, House Chair, and mom ksw
Members of the Joint Standing Committee on Agriculture, Conservation and Forestry

SUBJ: Transmission Line Lease Between DACF, BPL and Central Maine Power

As you know, the Agriculture, Conservation and Forestry (ACF) Committee held a public hearing on March 18, 2021 for LD 471, An Act To Require Legislative Approval for Certain Leases of Public Lands. This bill, as well as LD 1893, An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes, from the 129th Legislature were introduced to address concerns relating to the lease of public lands to CMP for a transmission line through western Maine. These bills as well as others to come, namely LD 1075, An Act To Protect Public Lands, raise the question of whether the lease agreement between the State and Central Maine Power (CMP) required approval by two-thirds of the Legislature as required by the Constitution of Maine, Article IX, Section 23, which states:

> *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.*

To say the least, the ACF Committee was disappointed in Director Cutko's testimony opposing LD 471. As a result, last week, a majority of the ACF Committee voted (12 in favor, 1 opposed) to send this letter to you to memorialize that the ACF Committee finds that any lease of public lots or other real estate designated under the Maine Revised Statutes, Title 12, section 598-A to CMP for the purposes of the New England Clean Energy Connect (NECEC) transmission corridor project for the transmission line described in Public Utilities Docket No. 2017-00232 constitutes a substantial alteration of the uses of such real estate under the

Constitution of Maine, Article IX, Section 23 and accordingly requires the approval of the lease by a vote of two-thirds of all the members elected to each House of the Legislature.

It is our understanding that the Bureau of Parks and Lands (BPL) in December 2014 leased to CMP a 300-foot-wide, approximately one-mile-long transmission corridor bisecting public reserved lands in West Forks Plantation and in Johnson Mountain Township for a total of approximately 36 acres as part of a 145-mile, 1,200-megawatt, high-voltage, direct-current transmission line. The clearing and placement of large transmission towers and lines on an approximately one-mile-long strip of land across constitutionally protected public reserved lands is a substantially different use of these public lands and would substantially alter the uses of those lands identified in BPL's Upper Kennebec Management Plan. The Legislature was not given an opportunity to review or approve the 2014 lease to CMP of the above-mentioned designated public reserved lands.

In February of 2020, the ACF Committee made its position on the matter explicit to BPL Director Cutko when it unanimously supported LD 1893, as amended, in 2020. The amendment made the following findings:

> *Whereas, the clearing of and the placement of large transmission towers and lines on a 300-foot-wide, approximately one-mile-long strip of land across constitutionally protected and unique public reserved lands is a substantially different use of these public lands;*
>
> *Whereas, the Constitution of Maine, Article IX, Section 23 and implementing law, Title 12, section 598-A, require a vote of 2/3 of all the members elected to each House to approve any substantial alteration in the use of designated public lands;*
>
> *Whereas, the Legislature did not have an opportunity to review nor approve the 2014 lease or to Central Maine Power of the above-mentioned designated public reserved lands which will be substantially altered by the construction of a 145-mile, 1200-megawatt, high-voltage, direct-current transmission line, also known as the New England Clean Energy Connect project, passing through this portion, approximately 36 acres, of designated public reserved lands;*
>
> *Whereas, in order to protect and preserve the public's vital interests in its public reserved lands and ensure the Legislature's constitutional responsibilities with regard to those lands is not usurped or undermined by potentially invalid leases of those lands, it is immediately necessary to direct the termination of the 300-foot-wide, approximately one-mile-long transmission corridor across the West Forks Plantation and Johnson Mountain Township Maine Public Reserved Lands before the use of these lands is substantially and immutably altered;*

The ACF Committee later learned that the transmission line lease between BPL and CMP was renegotiated, amended, and signed by both parties in June 2020 without any communication or outreach to the Legislature. The Bureau's action is disappointing and gives the ACF Committee cause for great concern because the Bureau ignored the clear sentiment of the ACF Committee in renegotiating the lease without transparency and without first seeking the required legislative approval. This is especially true given that: (1) the Bureau renegotiated the lease only a few

months after it been made aware of the ACF Committee's view via both committee proceedings and unanimous committee action regarding LD 1893 and (2) during such proceedings, Director Cutko testified that he understood the level of public interest in the NECEC project, he acknowledged the need for transparency going forward, and he stated his intent to remedy the Bureau's lack of internal criteria for determining what constitutes a substantial alteration by developing such criteria and sharing it with the ACF Committee.

We send this letter to restate the ACF Committee's stance that the public lands in question are being substantially altered. In addition to undermining the ACF Committee's intent, the Bureau's decisions have undermined protections set in place by Maine people. The people of Maine amended our constitution to prevent substantial alteration of the lands that belong to them without a public process and without-obtaining the approval of two-thirds of the members of each House of the Legislature. In signing the lease, you have undermined their intent.

c: Members, Joint Standing Committee on Agriculture, Conservation and Forestry

Black v. Cutko

[Docket No. BCD-CV-20-29]

EXHIBIT D

Exhibit D

Discover Maine Public Lands: Maine DACF "The Maine Bureau of Parks and lands short film 'Untold Secrets' explores over the 600K beautiful acres of the Maine Public Lands' available at https://youtu.be/Im-uBEaTtEA (run time: 21:00, timber harvesting discussion start time: 11:00).

Black v. Cutko

[Docket No. BCD-CV-20-29]

EXHIBIT E

A340

Exhibit E

STATE OF MAINE
KENNEBEC, SS

SUPERIOR COURT
Civil Action
Docket No. 75-1110

CHARLES FITZGERALD, ET AL, Plaintiffs VS BAXTER STATE PARK AUTHORITY, ET AL, Defendants	FINDINGS AND ORDER FOR INJUNCTIVE RELIEF

This is a consolidated action brought by five (5) individual Plaintiffs against the Baxter State Park Authority and the Attorney General, the Director of the Bureau of Forestry and the Commissioner of Inland Fisheries and Wildlife in their capacities as members of the Authority. The Plaintiffs request Declaratory Judgment, review of governmental action and injunctive relief. The Plaintiffs seek to enjoin actions taken by the Authority to restore some 3.300 acres of Baxter State Park which in November of 1974 had been extensively *"blown down"* as a result of a concurrence of several natural events and conditions. They claim that the actions of the Authority violated the terms of Baxter's deeds of trusts which direct that the lands conveyed to the State in trust for the people of Maine " . . . *forever shall be kept in their natural wild state"* and as a *"sanctuary for wild beasts and birds."* [1]

---

[1] The restriction is contained in deeds appearing in the Private and Special Laws of: 1931, c. 23; 1933, c. 3; 1939, c. 1, c. 122; 1941, c.1,c.95; 1943, c.1,c.91; 1945, c. 1; 1947, c. 1; 1947, c.1; 1949,c.1,c.2; 1955, c.1,c.3,c.4; and 1963, c.1.

A hearing on the Plaintiffs' request for a preliminary injunction was held on January 15, 1976 and a decision was postponed until a full hearing could be held upon the request for a permanent injunction. Evidence submitted and testimony taken at both hearings are included in the record.

At this point the Court will not restate the events which gave rise to this lawsuit but will only refer to those facts necessary to support this decision.

After an extensive review of the record of this case, this Court now finds that the manner in which the Baxter Park Authority is presently carrying out and will in the future, pursuant to contractual commitments, carry out its plans to clear the blown-down areas violates the terms of the deeds of trust conveyed to the State by Governor Baxter. The Court bases its decision primarily upon the expression of Governor Baxter's intent appearing in the Private and Special Laws of Maine of 1955, c. 2 which, while authorizing the State to ". . . *clear, protect and restore areas of forest growth damaged by acts of nature such as blow-downs,*" requires the State *"to subordinate recreational values to wilderness values and to act in accordance with the best forestry practices*

This Court does not agree with Plaintiffs' contentions that the above mentioned act was either an impermissible modification of an irrevocable trust or inadmissible as a subsequent declaration of the grantor.

The general rule is that the settlor of a charitable trust has no power to compel or permit a deviation from the terms of a trust unless he has reserved a power of modification. Scott, Trusts

§ 367.2 p. 2844; cf. Porter v. Porter, 138 Me. 1 (1941)(similar rule for private trusts). There is, however no indication that P. & S. L. 1955, c. 2 is an attempted modification of the deeds of trusts by either Governor Baxter or the Legislature. By its own terms, the act purports to be only an interpretation of a phrase which occurs in the deeds of almost every parcel of land now comprising Baxter Park. Plaintiffs' contention was in response to the Defendants' argument that the act became a part of a "*continually evolving trust*" consisting of several writings. Since the Court is unable to find any authority for the latter proposition, the Court holds that P. & S. L. 1955, c. 2 is not a modification of the deeds of trust.

The Court also finds that the decision of the Baxter Park Authority to develop a plan to clear the blow-down and to award contracts pursuant to those plans was not rule-making as defined in Title 12 M.R.S.A. § 903. The decision, therefore, was not subject to the provisions of that section requiring certification by the Attorney General or publication in the areas' newspapers.

Plaintiffs' second major contention, that the act is an inadmissible subsequent declaration by the settlor, presents a closer question. The parole evidence rule prohibits the use of extrinsic evidence to show an intent of the settlor contrary to a written trust instrument. Scott, Trusts § 355 p. 2802. Cutting v. Haskell, 122 Me. 454 (1923). However, where a provision in an instrument is ambiguous or uncertain, the settlor's "*subsequent conduct may be examined to illuminate his intent at the time the ambiguous instrument was created.*" Canal National Bank v. Noyes,

348 A. 2d 232, (Me. 1975); cf. New England Trust Co. v. Sanger, 151, Me. 295, 302. Plaintiffs' have attempted to show that *"natural wild state"* has a peculiar and unambiguous meaning. They cite several cases including Nickols v. Commissioners of Middlesex County, 341 Mass. 13, 166 NE 2d 911 (1960) and Izaak Walton League of America v. St. Clair, 353 F. Supp. 698 (D. Minn.193) In Izaak Walton the Court construed the meaning of *"wilderness"* under various federal wilderness acts and found mining operations incompatible with wilderness cases. In Nickols the Court reconciled certain recreational uses with preservation purposes. Neither case stands for the proposition that the term *"natural wild state"* is certain and unambiguous. The deeds of trusts speak for both public recreational purposes and preserving a natural state. This Court cannot help but find some ambiguity and inconsistency on the face of the deeds. In light of the litigation generated by similar ambiguities in both Izaak Walton and Nickols, this Court finds that P. & S. L. 1955, c. 1 is admissible as evidence of the meaning of the phrase " *natural wild state.*"

The key phrases of P. & S. L. 1955, c. 1 at issue in this case are as follows:

> *The State of Maine is authorized to clean, protect, and restore areas of forest growth damaged by ACTS OF NATURE such as blow-downs, fire, floods, slides, infestation of insects and disease or other damage caused by ACTS OF NATURE in order that the forest growth may be protected, encouraged and restored. . .*
>
> *The area to be maintained primarily as a wilderness and recreational purposes are to be regarded as of secondary importance and shall not encroach upon the main objective of this area which is to be "Forever Wild". . .*

> *All work carried on by the State in connection with the above, shall be in accordance with the best forestry and wildlife practices and shall be undertaken having in mind that the sole purpose of the donor in creating this Park is to protect the forests and wildlife therein as a great wilderness area unspoiled by Man. . .*

It is clear that the authorization to clear, protect and restore damaged areas is critically modified and limited by the subsequent clauses. The question presented is whether the actions taken by the Authority in approving and executing the present contract to harvest the blow-down comports with the limitations prescribed by P. & S. L. 155, c. 2.

It should be emphasized at this point that the Court is not attempting to substitute its judgment concerning a *"limited"* managerial decision for that of the members of the Baxter State Park Authority. The Law Court in State v. Fin and Feather Club, 316 A. 2d 351 (Me. 1974), at 356, clearly prohibited courts from interfering with such decisions of executive officials which were *"not clearly arbitrary."* This Court does not find that the decision to clear the blow-down and the manner in which the clearing is to be carried out are *"limited managerial acts."* On the contrary, these decisions directly affect the terms of the Baxter Trust. No cases need be cited for the proposition that courts have the authority to interpret trust instruments and give direction to the trustees in performing their duties.

It is clear from the terms of the trust as interpreted by P. & S. L. 1955, c. 2, that the State is authorized to *"clear, protect and restore areas of forest growth damaged by Acts of Nature such as blow-downs."* The limiting phrases of that law which state

that the main objective is to maintain the areas of the park in a state described by the grantor as *"Forever Wild"*;that recreational purposes are to be subordinated to wilderness purposes; and that forestry practices must be undertaken with the objective of preserving a *"great wilderness unspoiled by man"*, make the manner of clearing or harvesting blow-down crucial.

After reviewing the extensive testimony presented by both sides, this Court finds that there are several aspects of the clearing operation which most significantly violate the terms of the trust. They are:

(1) the size and nature of the equipment being used to harvest the fallen trees;

(2) the fact that the present operation involves clearing of areas least likely to be visited by campers and hikers;

(3) the fact that only the trunks of the fallen trees are being removed and that highly flamable slash material will be left to decompose.

The evidence presented at both hearings established that the present operation utilized an extremely large commercial skidder to pull out the downed trees. Use of such a skidder would necessitate widening of roads in the park (P.99 Preliminary Injunction Hearing). Off road use of the skidder would result in crushing of vegetation and a disturbance in the natural growth patterns. There was also some evidence that the skidder was actually moved through the blow-down area rather than positioned at the outskirts (P. 22 Hearing for Permanent Injunction). Although the contract provided restrictions, not common in commercial contracts, which prohibited use of the skidder near streams, provided for reseeding of areas tracked by the skidder, and provided for

reconstruction of the roads, the Court finds that these restrictions are unsufficient to counter the extensive environmental impact of the use of such equipment.

The present operation involving the contract with Mr. Sproul provided for clearance of an area rarely visited by campers and hikers. Witnesses for both Plaintiffs and Defendants generally conceded that man presented the greatest forest fire hazard in the park. Since the prime reason for clearing the blow-down was to prevent forest fires, the benefit of clearing blow-down in such an area appears to be minimal when compared to the impact upon the wilderness.

Finally, because only tree trunks are to be removed pursuant to the present contract and branches, leaves, and small growth are to be left, the argument that the danger of forest fire would be reduced by the harvesting is severely undercut. The testimony, however, was contradictory upon this issue. Plaintiffs' witnesses argued that the slow decomposition of tree trunks which were not removed would increase the long-term danger of fire. On the whole, however, it did not appear from the testimony that the danger of fire was appreciably different were the trees to be cleared or left.

It is the opinion of this Court that Plaintiffs were able to show that the type of operation presently being carried on was of minimal protective value when compared to the environmental impact and the effect upon the nature of wilderness envisioned by Governor Baxter.

The actions taken by the Authority may have been the most "*practical in terms of getting the blow-down cleared in the most economical manner.*" This is not to say, however, that the Authority was motivated by economic gain or that they took no steps to protect the environment from the adverse impact of the clearing operation. This Court states only that the Authority did not sufficiently consider the wilderness emphasis apparent in both the trust deeds and the subsequent interpretation of P. & S. L. 1955, c. 2.

The question now is what steps may the Authority take to accomplish Governor Baxter's goals under the terms of his interpretation of "*Natural Wild State.*" This Court finds merit in Plaintiffs' suggestion that logging be permitted in those areas immediately adjacent to the roads and campgrounds where due to man's presence the danger of forest fire is greatest. Logging in those areas which already show evidence of man's presence would far less greatly disturb the natural wild state and would, in the Court's opinion, more closely coincide with the type of operation envisioned by Governor Baxter.

Accordingly, Plaintiffs' motion for a permanent injunction is hereby GRANTED. Defendants are prohibited from continuing to harvest blow-down in the manner in which the present operation is being conducted, to wit: with the use of heavy equipment. Further clearance may continue, but without the use of heavy equipment, and in such a manner as will not unduly disturb the terrain and natural environment. The Baxter State Park Authority may, however, proceed to develop, and contract, plans for clearance

of blow-down, which would more closely follow the terms of the trust deeds as they have been herein interpreted by the Court.

This order shall be binding upon the Defendants, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with the Defendants, by contract, or otherwise.

Issued by me at Augusta, Maine this 24th day of August, 1976 at 2:45 o'clock in the P. M.

Lewis I. Nalman

LEWIS I. NALMAN
JUSTICE SUPERIOR COURT

A TRUE COPY
ATTEST
Pearl Valerie Page
P. VALERIE PAGE

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: PORTLAND
Docket No.: BCD-CV-20-29

RUSSELL BLACK, *et al.*,
Plaintiffs,

v.

ANDY CUTKO, as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY,
Defendants.

PLAINTIFFS' MOTION REGARDING RECORD AND CREATION OF A FACTUAL RECORD

Pursuant to the Court's December 29, 2020 Order, Plaintiffs submit this motion regarding the record for purposes of allowing the Court to resolve the issues raised by the Bureau of Parks and Lands' ("BPL") unlawful 2014 and 2020 Leases of public reserved lands in West Forks and Johnson Mountain to Central Maine Power Company ("CMP"). Although at hearing or in briefing Plaintiffs intend to show that the Leases are unlawful for multiple reasons, including the execution of the 2014 Lease before issuance of a certificate of public necessity and convenience ("CPCN") as required by 35-A M.R.S. § 3132(13) and the term of the combined leases exceeding 25 years in violation of 12 M.R.S. § 1852(4), the principal issue before the Court is whether the leased activity effects either a reduction in or a substantial alteration to the uses of the leased property and accordingly requires the approval of 2/3 of the members of each House under Article IX, section

23 of the Maine Constitution. That issue is both legal and factual and requires consideration of evidence not included in the record currently before the Court, which is devoid of any consideration of this issue. The one arguable exception is the September 20, 2020, memorandum submitted by the Bureau, which is an impermissible post-hoc rationalization that the Court should not consider.

Typically, as explained below, these issues would be resolved at a hearing, which is why Plaintiffs suggested a preliminary injunction hearing be held (by Zoom of course), which could be converted to a permanent injunction and allow the Court to issue a final judgment. Since the Court made clear its preference for trying to resolve the case on a supplemented record, Plaintiffs set out below the elements of the record they deem essential to a decision in this matter.

I. The Administrative Record Filed by BPL is Both Under-and Over-Inclusive

a. The Record Filed by BPL Improperly Includes a Post-Hoc Rationalization[1]

The Bureau's post-hoc memorandum cannot properly be considered as part of the record in this case. The Bureau's attempt to submit it simply underscores why this case should not be treated as an appeal of an administrative decision but rather under the Declaratory Judgment Act.

As the United States Supreme Court recently reiterated, "[i]t is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)). "The basic

[1] Although the so-called "record" contains numerous irrelevant documents, on the theory expressed by the Court at the telephonic conference that the Court could simply give appropriate weight to whatever documents were in the "record," Plaintiffs do not here devote any time to arguing for the exclusion of any documents other than the September 20, 2020, post-hoc rationalization memo discussed above.

rule here is clear: An agency must defend its actions based on the reasons it gave when it acted." *Id.* at 1909.

The threshold issue for the Bureau prior to entering into the 2014 or 2020 Leases was whether the transmission line would reduce or substantially alter the public lands of Johnson Mountain Township or West Forks Plantation. *See* Me. Const. Art. IX, Sec. 23; 12 M.R.S. § 598-A. Yet the only portion of the 1800 page record that addresses the issue of substantial alteration is the Bureau's "post hoc determination in the form of a September 24, 2020 memorandum—compiled almost six years after the 2014 lease was signed, and several months after the 2020 lease was signed and while the motions to dismiss were pending . . . ." Order on Defendants' Motions to Dismiss Counts 1 and 2 ("Order on Defendants' Motion to Dismiss") at 8. In the face of a record devoid of any contemporaneous consideration of this threshold issue, the Bureau argues that its determination of no substantial alteration "can be readily inferred from the Bureau's decision to execute and issue the 2020 lease without first seeking or obtaining legislative approval." Director Cutko's and Bureau of Parks and Lands' Supplement to its Motion to Dismiss Filings at 4 (internal citations omitted).

Under the foundational principle set forth above, in a situation such as this where the agency's post-hoc rationalization cannot be tied to any contemporaneous record evidence, the post-hoc rationalization is not admissible. The foundational principle dates back to *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947), which the Court later relied upon in *Burlington Truck Lines v. Unites States*, 371 U.S. 156 (1962). In *Burlington*, the Court noted that "[t]here are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Id.* at 167. Absent any findings from the agency, the Court held that the litigation affidavits, amounting to post hoc rationalizations,

were an inadequate basis for review of the agency's decision. *Id.* at 168-69. Thereafter, in *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 409, 419–20 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), while the Court agreed with the agency that formal findings were not required, it nevertheless held that judicial review based solely on affidavits containing post-hoc rationalizations for the agency's decision were inadequate. Much like the post-hoc memorandum in the instant case, the affidavits in *Overton Park* were prepared by a former and current Secretary of Transportation in the absence of any agency findings for the purpose of demonstrating that the Secretary had made the decision in question and that the decision was supportable. *Id.* at 409.

As this Court previously noted, "BPL contends post hoc rationalizations are permissible additions to administrative records, citing three D.C. Circuit Court cases . . . but the Court notes that the cases cited by BPL contain important limitations that would have to be considered." Order on Defendants' Motion to Dismiss at 8. In the first case, *Rhea Lana, Inc. v. U.S.*, 925 F.3d 521, 524 (D.C. Cir. 2019), the court accepted a declaration from the agency decisionmaker because the declaration "largely echo[ed] the rationale contained in the contemporaneous record." This Court further noted, however, that the *Rhea Lana* decision explained that the D.C. Circuit has "barred consideration of post hoc materials when they present an entirely new theory, or when the contemporaneous record discloses no basis for the agency determination whatsoever . . ." and that it "permit[s] consideration of post hoc materials when they illuminate[] the reasons that are [already] implicit in the internal materials." Order on Defendants' Motion to Dismiss at 8-9 (citing *Rhea Lana*, 925 F.3d at 524). Unlike the record in *Rhea Lana*, the record in this case does not contain any contemporaneous rationale for the Bureau's supposed determination that the transmission line would not substantially alter the public lands. Moreover, the memorandum was

prepared, in part, by Director Cutko, who was not the decisionmaker at all relevant times to the memorandum, and who has testified "now that I am aware of the utilities requirement, I would think you want to follow the law and get that secured prior" in reference to the CPCN requirement. Ex. 8, *An Act To Require a Lease of Public Land To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes: Working Session on L.D. 1893*, 129th Legis. (2020) (testimony of Cutko). Lastly, while Mr. Rodrigues was at the Bureau when the 2014 lease was executed, his testimony regarding L.D. 1893 demonstrates that he was not the decisionmaker. *Id.* (testimony of Rodrigues).

The Bureau's reliance on *Olivares v. Transp. Sec. Admin.*, 819 F.3d 454 (D.C. Cir. 2016) is similarly misplaced. There, the court permitted the government to submit an after-the-fact declaration prepared by the official who made the final decision that also "cite[d] internal materials that TSA had before it at the time when the determination was made . . ." that express "TSA's reasoned, contemporaneous explanation for its decision." *Id.* at 460-461, 463. In so holding, the Court explained, "[t]he critical point is that the [post-decision writing] contains no new rationalizations; it is merely explanatory of the original record, and thus admissible for our consideration." *Id.* at 464 (quotation marks and citations omitted). By contrast, the contemporaneous record in this case does not support or reflect the Bureau's rationalization in the post-hoc memorandum. Unlike the declaration in *Olivares*, the post-hoc memorandum does not cite to any materials that the Bureau considered at the time of its supposed determination nor does it explain anything in the contemporaneous record. Finally, *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6-7 (D.C. Cir. 2006), prescribes similar limitations including that consideration of "rationalizations offered for the first time in litigation affidavits and arguments of counsel" is improper. (Internal citation omitted.)

The common thread running through all of these cases is the requirement of a contemporaneous record that sets forth, at least to some extent, the agency's reasoning at the time it made its decision. "Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating positions. Permitting agencies to invoke belated justifications, on the other hand, can upset the orderly functioning of the process of review, forcing both litigants and courts to chase a moving target." Order on Defendants' Motion to Dismiss at 8-9 (quoting *Dep't of Homeland Sec.*, 140 S. Ct. at 1909). *See also Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 28 (1st Cir. 2020) (citing *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019) for the proposition that "the requirement of reasoned explanation for agency action means that there cannot be a disconnect between the agency's decision and its explanation for that decision"); *City of Taunton, Massachusetts v. United States Envtl. Prot. Agency*, 895 F.3d 120, 127 (1st Cir. 2018) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.")).

Under the Declaratory Judgments Act, there is no question that the Court is permitted to allow additional evidence and conduct a hearing de novo. M.R. Civ. P. 57. Although *Overton Park* and other cases permit remanding to the agency to provide an explanation for an inadequately articulated decision, a "court may require the administrative officials who participated in the decision to give testimony explaining their action" and in a situation where "there are no such formal findings . . . it may be the only way there can be effective judicial review is by examining the decisionmakers themselves . . . ." *Overton Park*, 401 U.S. at 420. Accordingly, even if the Court were to proceed with all or a portion of this case under the Maine Administrative Procedure

Act, it may allow supplementation of the record with additional evidence upon finding that the evidence is material and could not have been presented to the agency. 5 M.R.S. § 11006(1)(B). *See also York Hosp. v. Dep't of Human Servs.*, 2005 ME 41, ¶¶ 20-21, 869 A.2d 729, 735. In addition, in a case such as this where an adjudicatory proceeding prior to the lease was not required, and where effective judicial review is precluded by the absence of a reviewable administrative record, the court is expressly authorized to conduct a hearing *de novo*. 5 M.R.S. § 11006(1)(D). *See also Blue Sky W., LLC v. Maine Revenue Servs.*, 2019 ME 137, ¶ 20, 215 A.3d 812, 819–20 (explaining that where an adjudicatory hearing was not required, "administrative record [was] devoid of any factual findings, and the agency's decision [was] stated summarily" the "record was therefore insufficient to allow a proper judicial review of the agency's decision" and "the court was entitled to accept additional evidence and adjudicate the matter de novo"). Such a *de novo* hearing—not a post-hoc memorandum created after the lawsuit has been filed—is the appropriate method for creating a judicial record on an issue that was ignored by the agency.

Whether this case proceeds as a Declaratory Judgment action or as an 80C case—and the Court has indicated that it is proceeding on both tracks—if there ever were a case where the Court should conduct a hearing *de novo*, this is the case. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (explaining that deference to an agency is not appropriate "when the agency's interpretation conflicts with a prior interpretation . . . or when it appears that the interpretation is nothing more than a convenient litigation position . . . or a post hoc rationalization[n] advanced by an agency seeking to defend past agency action against attack . . . .") (internal citations and quotations omitted)); *see also State of Maine v. McCarthy*, No. 1:14-CV-00264-JDL, 2016 WL 6838221, at *2 (D. Me. Nov. 18, 2016) (contemplating circumstances where remand to an agency is not appropriate but supplementing the record is appropriate). Here, the

post-hoc memorandum conflicts with Assistant Attorney General Parker's July 25, 2018 memorandum to the former Bureau Director regarding the 2/3 legislative vote requirement, announces a new distinction between leases and easements, and is undoubtedly a convenient litigation position and defense of its past decisions. The post-hoc memorandum demonstrates that the Bureau has nothing of substance to add to the record regarding the issue of substantial alteration, thereby making a remand futile.[2] It further demonstrates that the Bureau has prejudged Plaintiffs' proposed evidence of substantial alteration and has taken great measures to ensure its desired outcome in this case. The only way to achieve a legitimate and fair inquiry into whether the transmission line will reduce or substantially alter the public lands at issue is to have this Court act as the neutral factfinder.

b. The Record Filed by BPL Omits Relevant Documents Necessary for the Court to Consider the Issues Before It

The "record" filed by BPL includes thousands of pages, many of which appear to be irrelevant to the issues in this lawsuit, and yet excludes other documents that either shed light on the documents that are included in the record or directly speak to the central issue of this lawsuit. Those documents include the following, all of which should be included in the record:

1. Assistant Attorney General Lauren Parker's July 25, 2018, memorandum to the BPL Director, attached as **Exhibit 1,** stating that "the Bureau needs 2/3 legislative approval to lease part of Cold Stream Forest for a transmission line if a transmission line will 'substantially alter' Cold Stream Forest. 12 M.R.S.A. § 598-A," and concluding that there

[2] The record also includes emails to and from Mr. Rodrigues from July and August 2020, in which he explains, among other things, "[Director Cutko] and I are working on the lease issues at West Forks PLT and Johnson Mountain TWP." A.R. VIII0111. The substance of the emails addresses the uses of the public lands subject to the lease. A.R. VIII0109-111. Given that Mr. Rodrigues was collecting this information after the Bureau decided to enter into the 2014 and 2020 Leases, it appears that the Bureau did not have this information when it made its supposed determination regarding substantial alteration. In any event, the record tellingly does not include any contemporaneous documents regarding this information.

"is no question that a transmission line will alter the physical characteristics of Cold Stream Forest." Ex. 1 at 6**.**

2. The April 24, 2020 Authorization for Outside Counsel, attached as **Exhibit 2**, that expressly limits the scope of the authority of attorneys at Verrill to represent BPL stating "As an example legal review of any proposed lease shall remain within the purview of the Attorney General's office," *id.* at 1., together with the email of Assistant Attorney General Lauren Parker dated April 28, 2020, also attached as **Exhibit 2**, that states "I am not aware that the AG has authorized Anthony Calcagni to work on the lease between the Bureau and CMP." Given that the "record" includes numerous emails from Verrill, including from Anthony Calcagni, these additional materials must be included in order for the Court to evaluate the widespread procedural and substantive infirmities that led to execution of the 2020 Lease without legislative approval.

3. The Certificate of Public Necessity and Convenience ("CPCN") issued for this project, attached as **Exhibit 3**. The CPCN establishes that the "expected life" of the NECEC is at least "40 years," which is in excess of the 25 years for which BPL is authorized to grant under the statute it invokes for the 2020 Lease. *Id.* at 12, Figure II.1, 75-76. Furthermore, compliance with the CPCN is expressly incorporated in paragraph 3 of the 2020 Lease and is relevant to the issue of whether the use of the lots has been or will be substantially altered. The 2020 Lease itself, however, contemplates a 25 year lease of the public reserved lands—the maximum length of time permitted by statute. *See* 12 M.R.S. § 1852(4) ("The bureau may lease the right, for a term not exceeding 25 years to set and maintain or use poles, electric power transmission and telecommunication facilities . . ."). In the absence of the CPCN, the Court cannot address the illegality of the 2014

Lease, which BPL issued roughly *five years* before CMP obtained the required CPCN, *see* 35-A M.R.S. § 3132(13), nor can it address whether the 2020 Lease complies with the time limitations of 12 M.R.S. § 1852.

4. The May 2020 Department of Environmental Protection permit for the NECEC, attached as **Exhibit 4,** which predates the 2020 Lease and identifies environmental impacts of the proposed utility line use that were ignored by BPL. These identified environmental impacts are relevant to the issue of whether the use of the lots has been or will be substantially altered.

5. L.D. 1893 and Amendment A thereto, attached as **Exhibit 5**. Although BPL has included numerous reports to the Legislature in an apparent attempt to suggest that the Legislature somehow approved of its leasing decision, along with two pages of Defendant Cutko's testimony in January 2020 before the Committee on Agriculture, Conservation and Forestry on L.D. 1893, titled "An Act To Require a Lease of Public Land To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes," *see* A.R. VIII0113-114, nowhere in the almost 1800 pages is there any discussion, before the Committee, or internally, of Amendment A to that L.D. Amendment A would have expressly canceled the CMP lease and required negotiation of a new lease and legislative approval, yet nowhere does BPL seem to have commented on that significant change—at least not in the "record." That Amendment passed out of Committee unanimously, but the Legislature did not vote on it because of the Covid-related adjournment.

6. The Bangor Hydro Memorandum of Intent dated March 24, 2005, attached as **Exhibit 6**, should be included in the record. This is a noticeable omission because the

Bureau relies on a separate lease, A.R. VI0012 and easement, A.R. VI0020, to Bangor Hydro to support its contention that it did not need to seek legislative approval for the leases to CMP, *see* A.R. I0067-68. Yet the legislative resolve approving the Bangor Hydro easement expressly states that "[t]he parcel is currently occupied by the Bangor Hydro-Electric Company, as lessee, pursuant to a Utility Line Lease dated February 15, 1990, as modified by a memorandum of intent dated March 24, 2005," A.R. VI0031. This Letter of Intent speaks to the lease, not the easement, and together with the Resolve, shows that the legislative approval was ultimately sought for the contemplated lease transaction, which took the ultimate form of an easement. As discussed further below, this transaction and its significance with regard to any Bureau position regarding the need for legislative approval of easements versus leases should also be the subject of additional supplemental evidence in the form of testimony from former Deputy Director Alan Stearns, who was involved in this transaction.

7. Correspondence between former Deputy Director Alan Steans and Director Andy Cutko regarding the Bureau's former approach to legislative approval of leases, attached as **Exhibit 7**. The Bureau attempts to include information in its post-hoc memorandum regarding the thinking of individuals involved in the 2014 Lease and the 2020 Lease, and then it includes the 2007 Bangor Hydro material in apparent support of some newly announced long-standing position of the agency, but it omits the contradictory understanding of the former Bureau official involved in the 2007 Bangor Hydro transaction.

8. Testimony of BPL Director Andy Cutko and others, including David Rodrigues, both before the legislature regarding the lease transactions, as well as the Cutko

testimony before the Department of Environmental Protection regarding the NECEC, should be included in the record. The testimony is attached as **Exhibit 8.**[3]

9. The attachments to Plaintiffs' Complaint, including the press clippings and the summaries of legislative resolves relating to conveyances of public lands attached as **Exhibit 9,** should be included in the record. These demonstrate the historic mismanagement of the public lands that led to the Constitutional Amendment at issue in this litigation, as well as examples of legislative approvals of proposed transactions involving public lands and uses much less significant in stature than CMP's proposed corridor that nevertheless went before the Legislature. These should be included in the record so the Court can evaluate BPL's arguments that leases are somehow different than easements and can better understand the types of matters that come before the Legislature under Article IX, Section 23 of the Maine Constitution.

10. Additional Legislative Resolves.[4] Plaintiffs have identified additional legislative resolves, attached as **Exhibit 10**, relating to leases and to matters much less significant in stature than CMP's proposed transmission line that nevertheless went before the Legislature, which also help show how the Bureau and the Legislature have historically treated their obligations under Article IX, Section 23 of the Maine Constitution.

11. The Legislature's request for documents, and BPL's response thereto (both attached as **Exhibit 11**), in connection with L.D. 1893 should be before the Court. The

[3] The audio files of testimony relating to L.D. 1893 are available online at the following links, but Plaintiffs have attached transcripts of the relevant portions for the Court's convenience: http://sg001-harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200121/-1/13889) (January 21, 2020); http://sg001-harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200218/-1/14054 (February 18, 2020); http://sg001-harmony.sliq.net/00281/Harmony/en/PowerBrowser/PowerBrowserV2/20200305/-1/14177 (March 5, 2020).

[4] Plaintiffs are, of course, free to cite to legislation whether or not it is in the record. Plaintiffs have included these documents as exhibits for ease of reference, and reserve the right to cite to other legislative measures.

Legislature asked for materials "relating to the determination that the lease of public lands on the West Forks Plantation and Johnson Mountain Township in Somerset County by CMP did not constitute a reduction or substantial alteration of those lands . . ." Director Cutko responded by providing three documents to the Legislature, and it is important for the Court to have this context and understanding of the documents BPL thought related to this request back in February 2020.

12. CMP's lease with the Passamaquoddy, attached as **Exhibit 12**, should also be before the Court. It is likewise a lease of lands for the Corridor and provides a useful comparison with the payment CMP paid to BPL for the 2014 and 2020 Leases.

II. Plaintiffs Should Be Permitted to Submit Additional Evidence Regarding Substantial Alteration and BPL's Lack of Consideration Thereof

Plaintiffs will show that the 2014[5] and 2020 Leases are invalid and unlawful because BPL failed to consider whether CMP's planned transmission line would substantially alter the leased lands and failed to obtain the constitutionally mandated 2/3 vote of approval of the State Legislature for any substantial alteration to public reserved lands. Me. Const. art. IX, § 23; 12 M.R.S. § 598-A. To so demonstrate, Plaintiffs will offer testimony by affidavit from the following individuals:

- Alan Stearns, who served as Deputy Director of BPL from January 2007 to March 2011, will testify about BPL's historic practices, including that—contrary to BPL's assertions in the 2020 Memorandum—the Bureau did not have a policy or position to seek legislative approval only for easements, but not for leases, of public reserved lands. He will also testify about his own experiences at BPL, including a lease and easement granted to Bangor Hydro in 2007. He will also testify about the value of the public reserved lands in West

[5] The 2014 Lease is also invalid and unlawful because BPL issued it before CMP had obtained the requisite CPCN.

Forks and Johnson Mountain, including their relationship to numerous abutting or nearby conservation lands.

- Ed Buzzell, who was born in Maine, owns land in Moxie Gore, is a member of Natural Resources Council of Maine, and has been a Registered Maine Guide intermittently since 1974, will testify about the substantial alteration the Corridor will effect on the recreational uses of the public reserved lands and on the wildlife who live there. Mr. Buzzell will testify about the negative scenic effects of the Corridor, which he will be able to see from his property, and about the negative effects the Corridor will have on his business. As a hunter, fisherman, and recreational user of the public reserved lands, Mr. Buzzell will also testify about the substantial alteration the Corridor will have on wildlife who live in and around the public reserved lands, including the deer and fish populations.
- Ron Joseph, who worked from 1978 through 2010 as a wildlife biologist for the Maine Department of Inland Fishers and Wildlife and the U.S. Fish and Wildlife Service and is also an avid birder and the author of a chapter in *Birdwatching in Maine: A Site Guide*, will offer testimony regarding how the Corridor will affect wildlife and recreational opportunities in the public reserved lands in West Forks and Johnson Mountain. He will testify in detail about the Upper Kennebec Deer Wintering Area, which is a critical part of the wildlife management aspect of the Upper Kennebec Region Management Plan and on which the Corridor will work a substantial alteration. He will further testify about the negative effect the Corridor will have on the deer population in the leased lands and the surrounding area because of the fragmentation the Corridor will cause.
- Roger Merchant is a licensed professional forester and a photographer. He will testify regarding the substantial scenic alterations that the Corridor will cause on the public

reserved and surrounding lands, and the related negative effects on the recreational uses of the public reserved lands. He will also testify about forest fragmentation and the edge effects from the Corridor, the environmental impacts of which will extend deeper into forests adjacent to the Corridor itself, including how this connects with and impacts public reserved lands on or adjacent to the Corridor.

- Jeff Reardon, who holds a degree in biology and has worked at Trout Unlimited of Maine for 20 years, will testify about the substantial alteration the CMP Corridor will cause to the trout population in the Western Maine Mountains, including those in the ponds on the public reserved lands that feed into Tomhegan Stream and Cold Stream. He will also offer testimony regarding how the new Corridor will fragment trout habitat throughout the region. He will also testify about the Upper Kennebec Region Management Plan, having served on the Committee that drafted it.
- Todd Towle, a fishing guide, member of the Natural Resources Council of Maine, outdoorsman, and lifelong Maine resident, will testify about the substantial alteration the Corridor will work on the public reserved lands, as well as the effect it will have on the surrounding tributaries and streams, including Tomhegan Stream. He will explain how Maine is the last stronghold in the nation for brook trout and how the Corridor will substantially alter—and harm—the trout population. He will also testify about how the Corridor will substantially alter the recreational uses of the public reserved lands, including the effects on scenery and on his business.

In the absence of a hearing with testimony from these witnesses and BPL Director Andy Cutko and BPL employee David Rodrigues, both of whom signed the 2020 Memorandum purportedly justifying the 2014 and 2020 Leases, Plaintiffs request an opportunity to depose

Messrs. Cutko and Rodrigues. As reflected in Exhibits 8 and 11, these witnesses have made various representations inconsistent with the positions they argue in the September 2020 Memorandum. Plaintiffs are entitled to explore these varying positions in a deposition. If the Court excludes the September 2020 Memorandum, Plaintiffs would not seek to depose them but rather rely on Assistant Attorney General Parker's affirmation at the telephonic conference that the September 2020 Memorandum is the only evidence of any consideration of the substantial alteration question and that there is no other evidence in the record of any such consideration.

CONCLUSION

The Court cannot decide the issues before it without a complete record. Ideally the Court would schedule a hearing at its earliest convenience, hear from the witnesses, close the record, and allow for post-hearing briefs to be filed no later than seven days after the completion of the hearings. It could then enter a final judgement on all the legal and factual issues. Alternatively, the Court should allow the supplementation of the record proposed herein and set a shortened summary judgment briefing schedule with Plaintiffs filing two weeks after the Court determines the final record, Defendants two weeks thereafter, and Plaintiffs' reply due one week after Defendants' brief is filed. To make this schedule possible, Plaintiffs are submitting the additional documentary evidence they believe appropriate herewith and are prepared to submit the affidavits described above within five days of the Court's ruling allowing them to do so.

Dated at Portland, Maine this 7th day of January 2021.

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Maine Rule of Civil Procedure 7(b)(1) Notice

Any opposition to this motion must be filed no later than 21 days after the filing of the motion unless another time is provided by these Rules or set by the Court. Failure to timely file an opposition will be deemed a waiver of all objections to the motion.

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS AND CONSUMER DOCKET
Location: PORTLAND
Docket No.: BCD-CV-20-29

RUSSELL BLACK, *et al.*,
Plaintiffs,

v.

ANDY CUTKO, as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY,
Defendants.

[PROPOSED] ORDER

Having considered Plaintiffs' motion regarding the creation of a factual record and Defendants' briefs, the Court grants Plaintiffs' motion and will hold a virtual hearing to consider *de novo* the issues raised in this case on _____.

Date: _____

_____
Justice

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-2020-94

RUSSELL BLACK, *et al.*,

Plaintiffs

v.

ANDY CUTKO as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY,

Defendants

DIRECTOR CUTKO'S and BUREAU OF PARKS AND LANDS' MOTION TO DISMISS COUNTS I AND II WITH INCORPORATED MEMORANDUM OF LAW

NOW COME Defendants Director Cutko and the Bureau of Parks and Lands (collectively, the Bureau) and move to dismiss Counts I and II of the captioned matter pursuant to M.R. Civ. P. 12(b)(6). Plaintiffs' first amended complaint, which challenges the Bureau's issuance of a lease effective June 23, 2020, to Central Maine Power Company (CMP), pleads three counts: Declaratory Judgment (Count I), Injunctive Relief (Count II), and, in the alternative, Review of Final Agency Action (Count III). Of these counts, only Count III is potentially viable.

The Bureau's decision to lease to CMP is final agency action. The Maine Administrative Procedure Act (the MAPA) provides the exclusive means of judicial review of final agency action.

Thus, the lease is subject to judicial review pursuant to only the MAPA. This Court should therefore dismiss Counts I and II for failure to state a claim.

If, however, Plaintiffs are correct that the lease is not final agency action subject to MAPA review, this Court would dismiss Count III pursuant to M.R. Civ. P. 12(b)(6) for failure to state a claim, which would leave only Plaintiffs' preferred Counts I and II. But Counts I and II standing alone are deficient. They request relief—a declaration and an injunction—without ever pleading any viable cause of action. Unanchored by a cause of action, Counts I and II fail, and must be dismissed pursuant to M.R. Civ. P. 12(b)(6).

In support of its motion the Bureau states as follows.

PUBLIC RESERVED LANDS: LEGAL FRAMEWORK

The Bureau of Parks and Lands is charged with "carry[ing] out the responsibilities of State Government relating to[,]" and "[h]as jurisdiction, custody and control over and responsibility for managing[,]" various classifications of public lands, including public reserved lands. 12 M.R.S. §§ 1802, 1803(1); *see* 12 M.R.S. § 1801(8) (defining "public reserved lands"). The Bureau manages public reserved lands pursuant to a multiple use mandate, which mandate includes commercial timber harvesting, and in accordance with management plans developed by the Bureau with input from the public and other state agencies. 12 M.R.S. § 1847(1)-(2); *see* 12 M.R.S. § 1845(1) (defining "multiple use"). The Bureau may sell resources harvested from public reserved lands and may lease public reserved lands to specified entities or for specified purposes, including for electric power transmission and industrial and commercial purposes. 12 M.R.S. §§ 1848, 1852.

Public reserved lands are a type of "designated lands." 12 M.R.S. § 598-A(2-A)(D). Designated lands "may not be reduced or its uses substantially altered" except upon a 2/3 vote of the Legislature. Me. Const. art. IX, § 23; 12 M.R.S. § 598-A. "'Reduced' means a reduction in the

acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S. § 598(4). "'Substantially altered' . . . means changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which the land is held by the State." 12 M.R.S. § 598(5). "The essential purposes of public reserved . . . lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." *Id.*

PROCEDURAL BACKGROUND

Effective December 15, 2014, and pursuant to 12 M.R.S. § 1852(4)(A), the Bureau leased to CMP a 300-foot-wide by approximately one-mile long corridor on the West Forks Plantation and Johnson Mountain Township public reserved lands for purposes of a transmission line corridor (the 2014 lease). (Compl. ¶ 43 & Ex. A.) Because the Bureau determined that the 2014 lease does not reduce or substantially alter the West Forks Plantation or Johnson Mountain Township public reserved lands, it did not seek or obtain 2/3 legislative approval of the 2014 lease. (Compl. ¶ 53.) *See* Me. Const. art. IX, § 23; 12 M.R.S. §§ 598, 598-A. Effective June 22, 2015, and pursuant to section 2 of the 2014 lease, the Bureau and CMP amended the 2014 lease to increase the annual rent, following an appraisal, to $3,680 from $1,400. (Compl. ¶ 45 & Ex. A.) No person sought judicial review of the 2014 lease (or of the 2014 lease as amended by the 2015 amendment), until Plaintiffs filed their original complaint in this matter on June 23, 2020, five and a half years after the Bureau and CMP executed the 2014 lease.

On June 23, 2020, the Bureau and CMP executed an amended and restated transmission line lease (the 2020 lease) for the same use and premises covered by the 2014 lease. (Compl. ¶ 4 & Ex. B.) The primary difference between the 2014 lease and the 2020 lease is the annual rent. (Compl. ¶ 5 & Ex. A & B.) The 2020 lease increases the annual rent payment to $65,000 from $3,680. (Compl. ¶ 50 & Ex. A & B.) As with the 2014 lease, the Bureau determined that the 2020

lease does not reduce or substantially alter the West Forks Plantation or Johnson Mountain Township public reserved lands, and thus did not seek or obtain 2/3 legislative approval of the 2020 lease. (Compl. ¶¶ 6, 53.) *See* Me. Const. art. IX, § 23; 12 M.R.S. §§ 598, 598-A.

On July 17, 2020, Plaintiffs filed their first amended complaint, which challenges the 2020 lease instead of the 2014 lease. Plaintiffs' first amended complaint (the Complaint) pleads three counts. Count I does not articulate a cause of action. (Compl. ¶¶ 59-76.) Rather, Count I seeks a declaration pursuant to the Declaratory Judgments Act, 14 M.R.S. §§ 5951-5963, that the 2020 lease violates Me. Const. art. IX, § 23 and 12 M.R.S. § 598-A and is therefore ultra vires because it was not approved by 2/3 of the legislature. (Compl. ¶¶ 59-76.) Nor does Count II articulate a cause of action. (Compl. ¶¶ 77-79.) Rather, Count II seeks an injunction prohibiting CMP from exercising its rights under the 2020 lease and enjoining the Director from transferring the 2020 lease from CMP to NECEC Transmission LLC.[1] (*Id.*) Pleaded in the alternative to Counts I and II, Count III seeks review of the 2020 lease pursuant to the MAPA and a declaration that the 2020 lease contains errors of law; is the result of unlawful process; exceeds the Bureau's statutory authority; is arbitrary, capricious, or characterized by an abuse of discretion; and is unsupported by substantial record evidence. (Compl. ¶¶ 80-82.) Plaintiffs plead Count III in the alternative because, for reasons divorced from the MAPA's definition of final agency action, Plaintiffs do not believe that the 2020 lease is reviewable pursuant to the MAPA. (Compl. ¶ 80.)

Contrary to Plaintiffs' averments, the 2020 lease is encompassed by the MAPA's broad definition of final agency action, and is thus reviewable pursuant to the MAPA alone.

[1] An Order of the Maine Public Utilities Commission dated May 3, 2019, requires CMP to transfer to NECEC Transmission LLC, the Project, which includes the lease between the Bureau and CMP. *Central Maine Power Co.*, Request for Approval of CPCN for the New England Clean Energy Connect, No. 2017-00232, Order at 91 (Me. P.U.C. May 3, 2019), *aff'd by NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 1, 227 A.3d 1117.

Consequently, this Court should dismiss Counts I and II. If this Court agrees with Plaintiffs that the 2020 lease is not subject to MAPA review, then the Court should dismiss the captioned matter in its entirety because, absent Count III, the Complaint does not plead any viable cause of action.

ANALYSIS

The Bureau moves pursuant to M.R. Civ. P. 12(b)(6) to dismiss Counts I and II because they fail to state a claim upon which relief may be granted. On a Rule 12(b)(6) motion, the Court "view[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Andrews v. Sheepscot Island Co.*, 2016 ME 68, ¶ 8, 138 A.3d 1197. "In construing statutes, [the Court] first consider[s] the plain language 'and . . . interprets statutory principles according to their unambiguous meaning unless the result is illogical or absurd.'" *Mutty v. Dep't of Corrections*, 2017 ME 7, ¶ 9, 153 A.3d 775.

To determine which counts of the Complaint may proceed, this Court must first determine whether the 2020 lease is reviewable pursuant to the MAPA because MAPA review, except where inadequate, is exclusive.

I. Counts I and II Should Be Dismissed Because the 2020 Lease Is Reviewable Pursuant to Only the MAPA.

The MAPA affords judicial review to persons aggrieved by final agency action: "Except where a statute provides for direct review . . . or where judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court" as provided by 5 M.R.S. §§ 11001-11007. 5 M.R.S. § 11001. When a decision of an executive branch agency is reviewable pursuant to the MAPA, the MAPA provides "the 'exclusive process for judicial review unless it is inadequate.'"

Antler's Inn & Rest. v. Dep't of Pub. Safety, 2012 ME 143, ¶ 14, 60 A.3d 1248 (quoting *Gorham v. Androscoggin Cty.*, 2011 ME 63, ¶ 22, 21 A.3d 115).

Plaintiffs aver that the 2020 lease is not subject to MAPA review because the Bureau has not promulgated rules governing its leasing of public reserved lands, does not provide notice to abutters or the public about possible leases, and does not create an administrative record related to its leasing decisions. (Compl. ¶ 80.) Such averments are inapposite. The availability of MAPA review depends in the first instance on whether the 2020 lease is "final agency action."[2] 5 M.R.S. § 11001; *Brown v. Dep't of Manpower Affairs*, 426 A.2d 880, 883 (Me. 1981). Procedural considerations extraneous to the broad, unambiguous definition of final agency action have no place in determining whether the 2020 lease is final agency action.[3] *See Brown*, 426 A.2d at 883-84.

A. The 2020 Lease is Final Agency Action.

"'Final agency action' means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S. § 8002(4). Final

[2] Not all final agency action is subject to MAPA review. For example, final agency action is not subject to MAPA review if petitioners are not aggrieved, if the petition for review of final agency action was not timely filed, or if the decision from which petitioners appeal is by its nature the type of executive branch decision that is inherently unreviewable. 5 M.R.S. §§ 11001(1), 11002(3); *Brown v. Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me. 1981) ("Some executive action is by its very nature not subject to review by an exercise of judicial power."). Additionally, final agency action may be reviewable in part, but not in whole. Koch & Murphy, *Administrative Law & Practice*, § 12.10 (3d ed. Feb. 2020 update).

[3] Because the Legislature has not directed the Bureau to promulgate rules related to its leasing of public reserved lands, and Plaintiffs have not averred otherwise, it is unclear what relevance that has to the captioned matter. Regardless, concerns about applicable rules may be addressed through MAPA review. 5 M.R.S. § 11007(4)(C)(1)-(3). Concerns about notice to the public and abutters, who are not parties to the 2020 lease (*cf.* Compl. ¶ 80), are encompassed by 5 M.R.S. § 11007(4)(C)(1), (3). Concerns about the content and sufficiency of the administrative record sound in 5 M.R.S. § 11006. What constitutes the record is prescribed by 5 M.R.S. § 11005; the Bureau is not required to compile a record in some certain form in anticipation of some person seeking review of final agency action.

agency actions are not limited to adjudicative decisions. *Brown*, 426 A.2d at 883. An agency decision need not include specific fact-findings to constitute final agency action. *Bailey v. Dep't of Marine Res.*, 2015 ME 128, ¶ 5, 124 A.3d 1125. "All [that] the definition [of final agency action] requires . . . is that the agency decision . . . resolve 'all questions necessarily involved in the underlying subject matter.'" *Id.* (quoting *Wheeler v. Me. Unemployment Ins. Comm'n*, 477 A.2d 1141, 1146 (Me. 1984)).

This would not be the first time a court has determined that a decision to lease is final agency action. In *Brown v. Department of Manpower Affairs*, the Law Court concluded that a "state agency decision to award a [lease] contract after competitive bidding is 'final agency action.'" 426 A.2d at 882-83. Because the competitive bidding statute did not provide further recourse within the agency the Department's decision to "award the lease contract . . . in effect became 'dispositive of all issues, legal and factual'" and affected the rights and duties of the awardee. *Id.* at 883-84.

So too with the 2020 lease. Subsection 4(A) of the Bureau's public reserved lands leasing statute, 12 M.R.S. § 1852, states: "The bureau may lease the right, for a term not exceeding 25 years, to . . . [s]et and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing stripes." The Bureau's execution of the 2020 lease is no doubt a decision by an agency. Once the Bureau executed the 2020 lease with CMP, that decision to lease became dispositive of all legal and factual issues. That decision also affects the legal rights and duties of the parties to the lease. And it is a decision for which the public reserved lands leasing statute does not provide further recourse within the agency. Thus, the Bureau's decision to lease to CMP a 300-foot-wide by one-mile long segment of public reserved lands for electric power transmission is "final agency action." 5 M.R.S. § 8002(4).

B. Judicial Review of the 2020 Lease Is Confined to the MAPA.

Because the 2020 lease is final agency action, review of the 2020 lease is confined to MAPA "except where a statute provides for direct review" or where MAPA review is inadequate.

1. Aside from the MAPA, No Statute Affords Direct Review of the 2020 Lease

The Complaint identifies no statute that provides for direct review of the 2020 lease. Title 12 M.R.S. § 1852 and 12 M.R.S. § 598-A are silent regarding review of Bureau decisions to lease public reserved lands for the purposes enumerated in 12 M.R.S. § 1852. Neither 12 M.R.S. § 1852 nor 12 M.R.S. § 598-A states, for example, that any person affected by a leasing decision of the Bureau may seek declaratory relief. *Cf., e.g.,* 23 M.R.S. § 3028(1) ("Any person affected by a presumption of abandonment . . . *may seek declaratory relief* to finally resolve the status of such ways.") (emphasis added). The Legislature's silence should not be construed as providing for direct review of the 2020 lease. *See Paul v. Town of Liberty*, 2016 ME 173, ¶ 12, 151 A.3d 924 (holding that 23 M.R.S. § 3028 affords direct review because it "specifically and expressly authorizes parties to challenge a road abandonment determination by seeking declaratory relief, independent from any relief that may also be available pursuant to Rule 80B.").

Although Count I invokes the Declaratory Judgments Act (the DJA), 14 M.R.S. §§ 5951-5963, the DJA, like 12 M.R.S. §§ 1852 and 598-A, does not create a cause of action, much less authorize direct review of the 2020 lease. Because the 2020 lease is final agency action, and because the Complaint identifies no statute which affords direct review of the 2020 lease, MAPA review is exclusive unless it is inadequate.

2. MAPA Review is Adequate and Therefore Exclusive

When the Legislature has provided in statute a direct means by which an agency decision "can be reviewed in a manner to afford adequate remedy, such direct avenue is intended to be

exclusive." *Paul*, 2016 ME 173, ¶ 12 n.4, 151 A.3d 924 (quoting *Colby v. York Cty. Comm'rs*, 442 A.2d 544, 547 (Me. 1982)). The direct review afforded by 5 M.R.S. §§ 11001-11008 is exclusive unless it is inadequate and a "'court action restricting a party to [MAPA review] will cause that party irreparable injury.'"[4] *Cayer v. Town of Madawaska*, 2016 ME 143, ¶ 16, 148 A.3d 707 (quoting *Colby*, 442 A.2d at 547); *see* M.R. Civ. P. 80B advisory committee's notes to February 15, 1983 order amending Rule 80B ("[T]he question is . . . whether under any construction of the rule the issues raised in the independent action could be litigated and the relief sought could be granted under Rule 80B.").

Count I asks this Court to declare the 2020 lease ultra vires because the Bureau did not seek or obtain 2/3 legislative approval of the 2020 lease, which Plaintiffs contend is required by Me. Const. art. IX, § 23 and 12 M.R.S. § 598-A. Restated, Count I asks this Court to declare that the Bureau violated a provision of the Constitution – Me. Const. art. IX, § 23, violated a statutory provision – 12 M.R.S. § 598-A, and exceeded the Bureau's statutory authority to lease public reserved lands. To redress these alleged violations, Plaintiffs ask this Court to reverse—i.e., declare ultra vires—the Bureau's decision to execute the 2020 lease. The review and relief sought by Count I falls squarely within the review and relief available pursuant to 5 M.R.S. § 11007(4)(C)(1) and (2). Because the MAPA provides Plaintiffs with an adequate remedy, MAPA review of the 2020 lease is exclusive, and Count I must be dismissed.

In an attempt to prevent CMP from complying with the Public Utilities Commission Order granting CMP a certificate of public convenience and necessity and from building the NECEC

[4] MAPA review "is inadequate when an alleged deprivation of civil rights occurs before, and not as a part of, the action or inaction for which a plaintiff seeks review." *Cayer*, 2016 ME 143, ¶ 16, 148 A.3d 707. The Complaint does not aver that MAPA review is inadequate.

corridor, Count II asks this Court to enjoin CMP from exercising its rights under the 2020 lease and to enjoin the Bureau from transferring the 2020 lease from CMP to NECEC Transmission LLC.[5] (Compl. ¶¶ 78-79.) *See supra* n.1. If the 2020 lease is ultra vires as Plaintiffs contend and this Court pursuant to 5 M.R.S. § 11007(4)(C) reverses the Bureau's decision to execute the 2020 lease, there will be no 2020 lease to transfer. Thus, prevailing on Count III would effectively award Plaintiffs the relief they seek through Count II. Because the review and relief Plaintiffs seek through Count II is available through the MAPA, Count II must be dismissed.

II. In the Alternative, the Entirety of the Captioned Matter Should Be Dismissed for Failure to State a Claim.

If Plaintiffs are correct that the 2020 lease is not final agency action subject to MAPA review (Compl. ¶ 80), Count III should be dismissed. *See* M.R. Civ. P. 12(b)(6). Aside from Count III, which is Plaintiffs' only potentially viable count, the Complaint pleads no other valid cause of action grounded in statute or common law. Consequently, dismissal of Count III would doom the entire Complaint. *See Edwards v. Black*, 429 A.2d 1015, 1016 (Me. 1981) ("In order to state a claim upon which relief can be granted, a complaint must aver either the necessary elements of a cause of action or facts which would entitle a plaintiff to relief upon some theory."); *see also Plimpton v. Gerrard*, 668 A.2d 882, 885 (Me. 1995).

A. Count I must be dismissed: The Declaratory Judgments Act does not create an independent cause of action.

Count I is a stand-alone request for a declaration that the 2020 lease is ultra vires because it violates Me. Const. art. IX, § 23 and 12 M.R.S. § 598-A. (Compl. ¶¶ 59-76.) Count I offers as

[5] Section 10 of the 2020 lease authorizes CMP to assign its interest in the 2020 lease to NECEC Transmission LLC without the Bureau's consent; in other words, that consent is already embedded in the 2020 lease. (Compl. Ex. B.)

its cause of action the DJA. The Law Court has stated consistently and repeatedly, however, that the DJA does not create an independent cause of action. *See Sold, Inc. v. Town of Gorham*, 2005 ME 24 ¶ 10, 868 A.2d 172, 176 ("A declaratory judgment action cannot be used to create a cause of action that does not otherwise exist."); *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996) ("We have stated that the purpose of the Declaratory Judgments Act is to provide a more adequate and flexible remedy in cases where jurisdiction already exists."); *Sch. Comm. Of Town of York v. Town of York*, 626 A.2d 935, 942 (Me. 1993) ("All courts require the declaratory plaintiff to show jurisdiction and a justiciable controversy." (quoting *Hodgdon v. Campbell*, 411 A.2d 667, 670 (Me. 1980)); *Hodgdon*, 411 A.2d at 669 ("The statute does not create a new cause of action; its purpose is 'to provide a more adequate and flexible remedy in cases where jurisdiction already exists.'" (quoting *Casco Bank & Trust Co. v. Johnson*, 265 A.2d 306, 307 (Me. 1970)); *Berry v. Daigle*, 322 A.2d 320, 326 (Me. 1974) ("The Declaratory Judgments Act does not create a new cause of action; it merely authorizes a new form of relief."); *see also United Cannabis Patients & Caregivers of Me. v. Me. Dep't of Admin. & Fin. Servs.*, CV-2020-73, slip op. at 6-7 (Me. Sup. Ct., Ken. Cty., Aug. 20, 2020) ("[T]he Plaintiffs may not use the Declaratory Judgments Act to confer jurisdiction on the court where it does not otherwise exist.").

As the Law Court has made clear, the DJA simply provides a remedy—declaratory relief—ancillary to some valid cause of action. Count I is thus untethered to any valid cause of action, and this Court should dismiss it for failure to state a claim.

B. Count II must be dismissed: Injunctive relief is not a cause of action.

Count II is a stand-alone request for injunctive relief. (Compl. ¶¶ 77-79.) But there is no "injunction" cause of action under Maine law. *Cf. Taylor v. Phillip Morris, Inc.*, 2001 WL 1710710 (Me. Super. May 29, 2001) (describing an "injunction" as a form of relief and a "cause

of action" as a mechanism that provides for legal remedies). Rather, an injunction is a form of relief—or remedy—that a Court may provide. *Bangor Historic Track, Inc. v. Dep't of Agriculture*, 2003 ME 140, ¶ 11, 837 A.2d 129 ("[I]njunctive relief is an equitable remedy.").

Although the Complaint's statement of this Court's jurisdiction cites 14 M.R.S. § 6051(13) (Compl. ¶ 31), that passing reference to 14 M.R.S. § 6051(13) does not save Count II. Title 14 M.R.S. § 6051 codifies the Superior Court's equitable jurisdiction; it does not relieve Plaintiffs of their obligation to plead a viable cause of action. "Before the rights of the parties can be determined in equity, there must be a cause of action within the jurisdiction of the equity court to hear and determine." *American Oil Co. v. Carlisle*, 63 A.2d 676, 679 (Me. 1949). Although *American Oil Co.* predates the Maine Rules of Civil Procedure, "[t]he merger of law and equity accomplished by . . . adoption of the . . . [r]ules . . . is a procedural merger that did not change the substantive prerequisites to a grant of equitable relief." *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 78-79 (Me. 1980). Because Count II seeks a remedy without pleading a cause of action, M.R. Civ. P. 12(b)(6) mandates its dismissal.

C. The Complaint does not plead a quiet title action.

Despite not including a count to quiet title, the Complaint's statement of this Court's jurisdiction to review the 2020 lease also cites 14 M.R.S. §§ 6651 et seq. (Compl. ¶ 31.) Sections 6651-6662 of Title 14 comprise Chapter 723, Proceedings to Quiet Title.[6] The Complaint does not identify what estate in what part of the leased premises each Plaintiff claims, nor does it identify the source of the estate each Plaintiff is trying to recover. *See* 14 M.R.S. § 6651. Nor do any of

[6] Title 14, Chapter 723 of the Maine Revised Statutes encompasses varied scenarios such as summary proceedings, petitions to remove easements, actions by owners of wild land, action by abutters of discontinued rights of way, and extinguishment of mineral rights. Because Plaintiffs make no effort whatsoever to explain how their challenge to the 2020 lease sounds in a quiet title action, the Bureau limits its discussion to 14 M.R.S. § 6651 "Summary Proceedings."

the counts seek a declaration that some or all of the Plaintiffs own a particular estate in the leased premises. Although a quiet title action is a valid cause of action where there are allegations of disputed ownership, relief for which may be obtained pursuant to the DJA, the Complaint is devoid of averments that, even in the best light, plead a quiet title claim.

D. The Complaint does not plead a real action.

Despite not including a count for a real action, the Complaint's statement of this Court's jurisdiction to review the 2020 lease also cites 14 M.R.S. §§ 6701 et seq. (Compl. ¶ 31.) Sections 6701-7503 of Title 14 comprise Chapter 725, Real Actions. A real action enables the recovery of "[a]ny estate in fee simple, in fee tail, for life or for any term of years." 14 M.R.S. § 6701. "[A] real action is only available to one out of possession who can prove an estate in the realty that entitles him to recover possession." *Lewien v. Cohen*, 432 A.2d 800, 802 (Me. 1981). "It thus requires distinct allegations in the complaint," which allegations must "readily distinguish a real action from [a] statutory quiet title action[]." *Id.* The pleading elements of a real action "are prescribed by M.R. Civ. P. 80A(c)." *Id.* The Complaint, however, does not "clearly describe the demanded premises," nor declare on each Plaintiff's own seizen within 20 years then last past, nor allege a disseizen by the Bureau, nor set forth the estate which each Plaintiff claims in the premises. *See* M.R. Civ. P. 80A(c). Nor do any of the counts seek a declaration that some or all of the Plaintiffs own a particular estate in the leased premises. In other words, the Complaint also fails to plead a real action.

E. Rules of Civil Procedure 57, 65, and 80A are not causes of action.

Finally, the Complaint's statement of jurisdiction invokes Maine Rules of Civil Procedure 57 (Declaratory Judgment), 65 (Injunctions), and 80A (Real Actions) as conferring jurisdiction on this Court to review the 2020 lease. (Compl. ¶ 31.) They do no such thing. The Rules of Civil

Procedure are aptly named. They are, as their title proclaims, rules of procedure. The rules "neither abridge, enlarge nor modify the substantive rights of any litigant." 4 M.R.S. § 8. They do not supply a cause of action. *See Cushman v. Perkins*, 245 A.2d 846, 851 (Me. 1968) ("Our rules of Civil Procedure are intended to simplify pleading but they do not eliminate the necessity of averring the essential facts of a plaintiff's cause of action."). Specifically, "Rule 57 addresses the procedure for obtaining a declaratory judgment under Maine's version of The Uniform Declaratory Judgments Act." Harvey, *Maine Civil Practice* § 57:1 (3d ed. Oct. 2019 update). "Rule 65 lays down procedural rules for the issuance of injunctions." *Id.* § 65:1 ("The grounds for issuance of injunctions, sometimes referred to as equitable 'jurisdiction,' are beyond the scope . . . of Rule 65."). "Rule 80A sets forth the[] procedural rules" that govern "actions brought to recover an estate in real property." *Id.* § 80A:2. Because the Maine Civil Rules of Procedure do not confer jurisdiction, the Complaint's reference to Rules 57, 65, and 80A cannot save Plaintiffs from the deficiencies of their Complaint.

CONCLUSION

For the reasons set forth above, the 2020 lease is final agency action, which is reviewable pursuant to the MAPA alone. The Bureau requests that this Court dismiss Counts I and II for failure to state to claim upon which relief can be granted.

Respectfully submitted,

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NOTICE

Pursuant to Rule 7(b)(1), notice is hereby given that any matter in opposition must be filed no later than 21 days after the filing of the enclosed motion unless another time is provided by the Maine Rules of Civil Procedure or set by the Court. Your failure to file a timely opposition will be deemed a waiver of all objections to the motion, which may be granted without further notice or hearing.

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
DOCKET NO. BCD-CV-20-29

RUSSELL BLACK, et al.,

Plaintiffs

v.

ANDY CUTKO as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

BUREAU OF PARKS AND LANDS, STATE OF MAINE, DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY,

and

CENTRAL MAINE POWER COMPANY,

Defendants

MOTION TO DISMISS WITH INCORPORATED MEMORANDUM OF LAW

Pursuant to Maine Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Central Maine Power Company ("CMP") moves to dismiss the First Amended Complaint ("FAC") in this action.

After regulatory approvals from numerous regulatory bodies following years-long processes, and even a failed and unconstitutional attempt to overturn the Maine Public Utilities Commission's ("PUC") approval of the New England Clean Energy Connect project (the "NECEC") via citizens' initiative, Plaintiffs seek in this action to invalidate a lease the Bureau of Parks and Lands ("BPL") entered into with CMP for the use of 32 acres of remote, isolated land falling in Johnson Mountain Township and West Forks Plantation (the "Lease"). This attempt must fail for the following reasons:

First, Plaintiffs' claims for declaratory and injunctive relief in Counts I and II cannot stand because the BPL's decision to grant the leasehold interest at issue constitutes final agency action for which the Maine Administrative Procedure Act ("APA") and Rule 80C of the Maine Rules of Civil Procedure provide the exclusive avenue of review. *See Kane v. Comm'r of the Dep't of Health & Human Servs.*, 2008 ME 185, ¶¶ 2, 30-32, 960 A.2d 1196 (civil claims duplicative of an administrative appeal must be dismissed).

Second, once properly considered as an APA and Rule 80C appeal of final agency action, the Court should dismiss the remaining count of the FAC, Count III, because Plaintiffs lack standing under the APA to pursue such an appeal. The Plaintiffs fall into three discrete groups: (a) current and former legislators, (b) a collection of private citizens, and (c) the non-profit organization Natural Resources Council of Maine ("NRCM").

The legislators lack standing because individual members of the Legislature cannot assert claims based on an alleged injury to the Maine Legislature *as an institution*, which is precisely what these Plaintiffs allege here.

The private citizens lack standing for numerous reasons. None alleges ever having sought or owned the leasehold interest at issue, or otherwise alleges owning any property rights in the land at issue. Nor do any of these Plaintiffs allege owning any property rights in any land abutting either the leased land or even the lots of public reserved lands that surround the leased land. Although three of these Plaintiffs allege having used certain public reserved lands in Western Maine, none alleges having used the specific 32-acre parcel of land subject to the Lease. Finally, no Plaintiff alleges suffering any injury directly as a result of the BPL's decision to grant the Lease, which lease does not allow CMP to exclude any of the Plaintiffs from accessing the land at issue. Any injury the Plaintiffs may claim with respect to the land at issue does not

concern the transfer of intangible property rights memorialized by the Lease per se, but, rather, *the use* to which CMP proposes to put the leased land, a question committed to the judgment of the Maine Department of Environmental Protection ("DEP"), whose permitting decision numerous of the Plaintiffs already have challenged and continue to challenge.

Finally, NRCM lacks standing because it has failed to allege that any of its members have a sufficient interest in the leased land or suffered a particularized injury due to the Lease.

Having failed to stop the NECEC through the permitting and initiative process, the Plaintiffs seek to shoehorn their general opposition to the project into the FAC. But the claims set forth therein are not the appropriate vehicles for the Plaintiffs' grievances and the Court should dismiss them accordingly.

BACKGROUND

The Lease

The BPL leased CMP a 300-foot-wide-by-nearly-one-mile-long strip of certain public reserved lands, 32.39 acres in total, located in Johnson Mountain Township and West Forks Plantation. *See* FAC ¶ 51 & Ex. B.[1] The leased land falls within two large lots of public reserved lands in Johnson Mountain Township and West Forks Plantation comprising a total of 1,244 acres. *See* Me. Dep't of Agric., Conservation, and Forestry, Bureau of Parks & Lands, Upper Kennebec Region Management Plan at p. 81 (June 2019), *available at* https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/u

[1] The Court will find the leased land described and depicted in the exhibits appended to the final pages of the Lease, which the FAC refers to as "Exhibit B," although the document does not bear a label. For the Court's convenience, CMP attaches hereto three satellite photographs from Google Earth showing the boundaries of the leased land in yellow and the boundaries of the surrounding public reserved land in black. *See* attached Exhibits 1-3. The Court also may find useful two maps created by BPL at https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/upper_kennebec_region.html.

pper_kennebec_region.html.[2] Those two lots of public reserved land, combined with the nearby 8,000-plus acre Cold Stream Forest lands, *see id*. at 43, form a portion of a large swath of more than 9,000 acres of public reserved land in Western Maine.

The BPL executed the operative Lease on June 23, 2020.[3] *See* FAC, Ex. B. The Lease provides a leasehold interest in land that, if otherwise permitted, will host less than one mile of the NECEC, a 145-mile long high voltage direct current transmission line that will run from Quebec to an interconnection with the New England grid in Lewiston, Maine. *See* FAC ¶¶ 41-43. The Lease is expressly "non-exclusive," in that it does not give CMP the right to exclude anyone, including the Plaintiffs, who may have the right to access the leased land.[4] *See* FAC, Ex. B at 1 (referring to "non-exclusive" nature of Lease). The DEP recently permitted CMP to use only a small portion of the leased land for the NECEC project, such that the remainder of the leased land will remain undisturbed by the project. *See* DEP, Findings of Fact and Order, Site Location of Development Act and Natural Resources Protection Act Order ("DEP Order"), at *1 (May 11, 2020) (limiting clearing around transmission line to "54 feet at its widest point"), *available at* https://www.maine.gov/dep/land/projects/necec/index.html.

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[2] This Court may consider this official public document, as well as the published orders and findings of the various executive agencies discussed herein, at the motion to dismiss stage. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 10, 843 A.2d 43.

[3] Plaintiffs make several allegations concerning the now-superseded 2014 lease entered into between CMP and BPL concerning the same land. *See* FAC ¶¶ 43-49, 55-57. Plaintiffs allege that this 2014 lease constituted an *ultra vires* action by the BPL because BPL issued the lease prior to issuance of a certificate of public convenience and necessity ("CPCN") by the PUC. *See id*. ¶¶ 55-56. Plaintiffs abandon this ground for challenging the 2020 Lease, recognizing that a CPCN was issued in May 2019 and determined by the Law Court to have been a valid exercise of the PUC's authority in *Nextera Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 1, 227 A.3d 1117.

[4] Maine citizens have a statutory right to reasonable use of public reserved lands. *See* 12 M.R.S. § 1846(1).

Regulatory and Litigation Background

The NECEC has faced significant regulatory oversight and obtained numerous required approvals, including:

- On May 3, 2019, the PUC issued a CPCN. The PUC's decision followed testimony from numerous witnesses, including some of the Plaintiffs, at three public witness hearings, 1,350 public comments, and six evidentiary hearings, at which Plaintiff NRCM, as an intervenor in the proceeding, participated. *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, ¶ 1, 227 A.3d 1117. The Law Court affirmed the PUC's determination. *Id.*

- On June 25, 2019, the Massachusetts Department of Public Utilities ("DPU") approved the long-term contracts for energy and transmission service over the NECEC. The DPU's order followed a 10-month proceeding, which included a public hearing at which a representative of NRCM testified, extensive discovery concerning the NECEC, and three days of evidentiary hearings. *See Petition of Nstar Elec. Co. d/b/a Eversource Energy for Approval by the Dep't of Pub. Utilities of A Long-Term Contract for Procurement of Clean Energy Generation*, No. 18-64, 2019 WL 2717778, at *77 (June 25, 2019).

- On January 8, 2020, the Land Use Planning Commission of the Department of Agriculture, Conservation & Forestry issued a Site Location of Development Act Land Use Certification. *See* DEP Order at App. H. Among the ten groups of Intervenors before the Commission were Plaintiffs Edwin Buzzell, Old Canada Road, and NRCM. *See id*. at App. B.

- On May 11, 2020, the DEP issued a Site Location of Development Act permit, Natural Resources Protection Act permit, and Water Quality Certification. *See* DEP Order.

- On August 13, 2020, the Law Court ruled unconstitutional a proposed citizens' initiative to require the PUC to amend its findings and reject CMP's request for a CPCN. *Avangrid Networks v. Sec'y of State*, 2020 ME 109, ¶ 2, __A.3d__. The Law Court reasoned that the initiative would have mandated an executive action by the PUC, and as such would have exceeded the legislative authority of Maine citizens. *Id.* ¶ 35.

Several of the Plaintiffs intervened before the DEP in the process of its "29-month regulatory review, which included six days of evidentiary hearing and nights of public testimony," and several others testified before the DEP concerning impacts on Maine's natural resources. *See, e.g.*, DEP Order at App'x B-2 (identifying Plaintiffs Edwin Buzzell, Greg Caruso, and NRCM as intervenors in DEP proceedings). Plaintiff Haynes, for example, testified concerning the effects of the NECEC on the Old Canada Road Scenic Byway. *Id.* at 34.

Plaintiffs Towle and Caruso testified concerning the effect of the NECEC on wildlife in the area. *Id.* at 69. The Department found that the NECEC "will not have an unreasonable adverse effect on scenic uses or character of the Upper Kennebec River," *id.* at 38, and that "the project will not result in an unreasonable cumulative interference with the existing scenic or aesthetic use of Old Canada Road," *id.* at 54. The DEP found that any impacts on fisheries and wildlife in the area would be mitigated by strategic vegetation management and other efforts. *Id.* at 57, 82.

These Plaintiffs, and numerous other individuals, have challenged the DEP's permitting decision. That challenge remains pending before the Board of Environmental Protection and likely will make its way back to this Court. *See* Nat. Res. Council of Me. Request for Bd. of Envt'l Prot. Review of NECEC and, Alternatively, Appeal of the Department's Order Approving NECEC, Dep't Order Nos. 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 (Me. Bd. of Envt'l Prot., June 10, 2020); Petition for Review of Final Agency Action Pursuant to M.R. Civ. P. 80C, *West Forks Plantation et al. v. State of Maine, Dept. of Envt'l Prot.*, SOM-AP-20-04 (Me. Super. Ct. June 8, 2020) (80C appeal brought by Plaintiff Buzzell).

Allegations of the Complaint

Plaintiffs allege that the Lease is invalid because, prior to its issuance, the BPL did not obtain approval of 2/3 of the Maine Legislature, which Plaintiffs allege is required pursuant to the Maine Constitution.[5] *See* FAC ¶¶ 58, 60, 73. The persons who seek to prosecute this

[5] The Legislature has expressly authorized the issuance of leases on public reserved lands for electric power transmission. *See* 12 M.R.S. § 1852(4). In contrast to the *sale* of public reserved lands, *see* 12 M.R.S. § 1851, the Legislature has not required that such leases be subject to 12 M.R.S. § 598-A, which is the enabling legislation through which Article IX, Section 23 is enforced. For these reasons and others, including that the Lease does not authorize or reflect a substantial alteration in the property at issue, CMP denies the claim that legislative approval of the Lease was required.

argument consist of nine current or former state legislators (the "Legislator Plaintiffs"), 10 private citizens (the "Private Plaintiffs"), and one organization, NRCM. *See id*. ¶¶ 7-26.

The Legislator Plaintiffs assert no personal connection to the property at all, alleging only that they have "been deprived of [their] constitutional right to vote on the 2020 Lease pursuant to Article IX, Section 23 of the Maine Constitution," notwithstanding that some of these Plaintiffs are former legislators who do not sit in the current Legislature.[6] *Id*. ¶ 14.

Numerous of the Private Plaintiffs similarly allege no connection to the Lease or the land at issue. None of the Private Plaintiffs alleges having sought the leasehold interest from the BPL or having been denied it. *See id*. ¶¶ 17-26. No Private Plaintiff alleges owning any property interest in the land at issue, owning a property interest in any land abutting the land at issue, or even owning a property interest in any land abutting the two lots of public reserved lands that surround the leased property. *Id*. Although certain Private Plaintiffs allege using lands "in and around the public reserved lands that are the subject of BPL's Lease," *see e.g., id*. ¶ 17, not one of these Plaintiffs alleges using the specific parcel of 32 acres that is subject to the Lease. Similarly, no Private Plaintiff alleges the BPL's decision to grant the Lease has or will injure them, separate and apart from the DEP's decision to authorize CMP to use the land for the purposes of operating the NECEC. *See id*. ¶¶ 17-26.

Finally, Plaintiff NRCM alleges that "[m]any of NRCM's members have used, and plan to continue to use, the public reserved lands in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides." *Id*. ¶ 16. But NRCM does not allege that any of its members

[6] Plaintiffs Bennett, Saviello, and Harlow are former state representatives and senators. *See* FAC ¶¶ 8, 9, 13. Plaintiffs Black, Ackley, Berry, Grignon, O'Neil, and Pluecker presently serve in the Legislature. *See id*. at ¶¶ 7, 10-12, 14, 15.

have used or will use the leased land at issue, and fails to allege that any of its unnamed members have suffered or will suffer any injury as a result of the BPL's decision to grant the Lease. *Id.*

The Relief Sought

In Count I, Plaintiffs seek a declaration that "the proposed transmission line would effect a substantial alteration in the use of designated lands, thus requiring 2/3 legislative approval," that the lease at issue was *ultra vires*, and that "no future transfer or assignment of the Lease can be made." FAC ¶ 76 & Wherefore Clause, ¶¶ A-C. In Count II, Plaintiffs request an injunction prohibiting CMP from undertaking any activities on the land subject to the lease, and prohibiting the BPL or its Director Andy Cutko from executing a transfer of the lease to NECEC Transmission, LLC. *See id.* ¶ 79. Finally, in Count III, which Plaintiffs plead in the alternative, Plaintiffs seek review of the final agency action pursuant to 4 M.R.S. § 11001 *et seq.* and Rule 80C of the Maine Rules of Civil Procedure. *See id.* ¶ 80.

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint and examines whether the plaintiff has pleaded facts which may satisfy the elements of the plaintiff's chosen causes of action. *Geller v. David M. Banks Realty, Inc.*, No. CV-04-703, 2005 WL 2715453, at *2 (Me. Super. Ct. May 16, 2005). Although the Court must treat Plaintiffs' material factual allegations as true for the purposes of this motion to dismiss, it is "not obliged to accept conclusory allegations and legal conclusions that are bereft of any supporting factual allegations." *Courtois v. Me. Pub. Emps. Ret. Sys.*, No. AP-11-26, 2012 WL 609567, at *1 (Me. Super. Ct. Jan. 17, 2012).

"The standard applicable to a Rule 12(b)(1) motion to dismiss for lack of standing is different than that applicable to a Rule 12(b)(6) motion to dismiss for failure to state a claim."

Mun. Review Comm. v. USA Energy Grp., LLC, No. BCD-CV-15-22, 2015 WL 4876449, at *2 (Me. B.C.D. June 03, 2015) (Horton, J.). Because this Court's subject matter jurisdiction depends on each Plaintiff's standing, the Court "make[s] no favorable inferences in favor of the plaintiff such as [it does] when reviewing a motion to dismiss for failure to state a claim upon which relief can be granted." *Tomer v. Me. Human Rights Comm'n*, 2008 ME 190, ¶ 9, 962 A.2d 335. Moreover, in construing this motion, the Court may consider "any material outside the pleadings submitted by the pleader and the movant." *Davric Me. Corp. v. Bangor Historic Track, Inc.*, 2000 ME 102, ¶ 6, 751 A.2d 1024 (quoting *Hodgdon v. United States*, 919 F. Supp. 37, 38 (D. Me. 1996).

ARGUMENT

I. The Court should dismiss Counts I and II because the APA and Rule 80C provide the exclusive means for challenging the Lease.

The APA provides that "[e]xcept where a statute provides for direct review or review of a pro forma judicial decree by the Supreme Judicial Court or where judicial review is specifically precluded or the issues therein limited by statute, any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court." 5 M.R.S. § 11001. The term "final agency action" means "a decision by an agency which affects the legal rights, duties, or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S. § 8002. Even the most mundane and seemingly insignificant administrative decision, including when unaccompanied by any specific findings of fact, constitutes final agency action that may be challenged only pursuant to the procedures set forth in the APA and Rule 80C. *See Bailey v. Dep't of Marine Res.*, 2015 ME 128, 124 A.3d 1125 (issuance of elver transaction card constitutes final agency action, even where such issuance did not include findings of fact).

The Law Court repeatedly has held an executive agency's decision to issue a lease to constitute "final agency action." In *Brown v. Dep't of Manpower Affairs*, 426 A.2d 880, 883-84 (Me. 1981), the plaintiff challenged the Department's compliance with the competitive bidding process for leases. The Law Court explained that the decision to grant a lease constitutes a "final agency action" for purposes of 5 M.R.S. § 8002. *Id.* at 884 (determination to confer a lease "fits the literal definition of 'final agency action'"). The Law Court dispensed with appellants' argument that a final agency action subject to review must involve some adjudicatory proceeding, explaining that the Legislature in enacting the APA provided a broader definition of "final agency action" than that recommended by a Model State Administrative Procedure Act, and that a lease fixes the applicant's "legal rights, duties, or privileges" within the meaning of 5 M.R.S. § 8002. *Id.*

The Law Court addressed this issue again in *Cline v. Maine Coast Nordix*, 1999 ME 72, ¶ 13, 728 A.2d 686. There, the plaintiffs brought a declaratory judgment action seeking to clarify the rights granted under an aquaculture lease by the Department of Marine Resources, which lease the plaintiffs characterized as "incompatible with" the rights granted them under a fishing license. *Id.* ¶ 10. The Law Court rejected the plaintiffs' effort to use a declaratory judgment action to bring such a challenge, explaining that the plaintiffs' previously-dismissed Rule 80C appeal was the appropriate forum for challenging the agency's determination. *Id.* ¶ 13. *See also Estate of Pirozzolo v. Dep't of Marine Res.*, 2017 ME 147, ¶ 4, 167 A.2d 552 (treating appeal from Department of Marine Resources' issuance of a lease as subject to 80C review and observing trial court's dismissal of duplicative claims for declaratory relief); *Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 12, 974 A.2d 303, 307-08 (affirming dismissal of a challenge to the BPL's issuance of a lease on the ground that the appeal was untimely); *Sewall v. Spinney*

Creek Oyster Co., Inc., 421 A.2d 36, 39-40 (Me. 1980) (treating a lease to raise oysters in the York River as a final agency action). In short, the APA and Rule 80C provide the exclusive procedural vehicle for challenging final agency action. *See Fisher v. Dame*, 433 A.2d 366, 372 (Me. 1981) ("[W]hen a legislative body has made provision, by the terms of a statute or an ordinance, for a direct means by which the decision of an administrative body can be reviewed in a manner to afford adequate remedy, such direct avenue is intended to be exclusive."). Counts I and II of the FAC, seeking declaratory and injunctive relief, therefore must be dismissed.

Even were the Court to construe Counts I and II of the complaint as "independent claims," a framing even the Plaintiffs reject given their argument that Count III is an alternative to Counts I and II, the Court still should dismiss these claims because they are even less "independent" than those at issue in *Cline*. In Counts I and II, Plaintiffs seek a declaration and injunctive relief on the grounds that the BPL failed to follow Section 23 of Article IX of the Maine Constitution and that the lease was therefore *ultra vires*. *See* FAC ¶¶ 73-74, Wherefore Clause ¶ C. In their alternative claim for relief pursuant to Rule 80C, however, Plaintiffs assert the same theory—that the "2020 Lease contains legal errors, is the result of unlawful process, is an exercise of authority beyond that granted to BPL by statute, and/or is arbitrary, capricious, or characterized by an abuse of discretion, and is unsupported by substantial evidence in the record." *Id*. ¶ 82; *see also* 5 M.R.S. § 11007(4)(C). As such, there is no daylight between Plaintiffs' claims for injunctive and declaratory relief and Plaintiffs' alternative Rule 80C claim. Accordingly, Plaintiffs' duplicative claims in Counts I and II must be dismissed. *See Cline*, 1999 ME 72 at ¶ 13; *Kwasnik v. State Unemployment Ins. Com'n*, No. AP-04-020, 2004 WL 3196301 at *2 (Me. Super. Ct. Oct. 5, 2004 (dismissing duplicative claims from Rule 80C appeal); *Save*

Our Sebasticook, Inc. v. Baldacci, No. Civ.A. CV-04-184, 2005 WL 2723809 (Me. Super. Ct. Mar. 25, 2004) (dismissing claims as subject to Rule 80C review).

Plaintiffs attempt to evade the foregoing reasoning by taking the unusual step of including prophylactic legal argument in their pleading, wherein they argue that Rule 80C must not apply because the BPL lacks rules or procedures through which it determines a lease to be proper, did not provide notice of the Lease to abutters (notwithstanding that none of the Plaintiffs allege to be an abutter), and does not create a sufficient agency record. *See* FAC ¶ 80. These arguments, even if true, only underscore why this matter should proceed under the APA and Rule 80C, however, as they concern the sufficiency of the BPL's compliance with the APA's standards and not whether the APA and Rule 80C apply as a threshold matter.

II. The Plaintiffs lack standing under the APA to challenge the BPL's decision.

Although the APA and Rule 80C provide the only means of challenging the BPL's decision to issue the Lease, these particular Plaintiffs nevertheless lack standing under the APA to bring such a challenge. Only an "aggrieved" person may challenge a final agency action. 5 M.R.S. § 11001(1). A person is "aggrieved" under the APA "if that person has suffered particularized injury—that is, if the agency action operated prejudicially and directly upon the party's property, pecuniary or personal rights." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378. Harms "experienced by the public at large" are not particularized. *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984).

None of the Plaintiffs meets these criteria.

A. The Legislator Plaintiffs lack standing to seek relief for an injury allegedly suffered by the Legislature as an institution.

Although the Law Court has not had occasion to address the specific issue, under well-reasoned federal jurisprudence, individual legislators do not have standing to challenge an

"institutional injury" suffered by one or both houses of the Legislature as a whole. *See Raines v. Byrd*, 521 U.S. 811, 821 (1997). This principle makes sense: the judiciary should not be placed in a position of adjudicating disputes between various members of the Legislature, and certainly should not be placed in a position of adjudicating disputes between the executive branch and a small faction of disappointed legislators. *Cf. Wright v. Dep't of Def. & Veterans Servs.*, 623 A.2d 1283, 1285 (Me. 1993) (refusing to adjudicate matters on separation of powers basis where doing so "would involve an encroachment upon the executive or legislative powers.").

In *Raines*, the Supreme Court addressed a challenge to the Line Item Veto Act brought by six members of congress (four senators and two congressmen) alleging that the Act diluted their voting power. *Raines*, 521 U.S. at 814. The Court held that individual legislators lacked a sufficient "personal stake" in the outcome of the litigation, and therefore were not the "proper part[ies] to bring [the] suit." *Id.* at 818. It explained that where legislators challenge an institutional injury—that is, one that "runs (in a sense) with the member's seat"—they lack a sufficiently particularized stake in the outcome to sue as individuals. *Id.* The Supreme Court and at least one circuit court have recently re-affirmed the holding in *Raines*. *See Arizona State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800–01 (2015) (affirming *Raines* stands for the rule that individual members of legislature lack standing to challenge institutional injury suffered by all members of a legislative body); *Kerr v. Hickenlooper*, 824 F.3d 1207, 1214 (10th Cir. 2016) (individual legislators alleging institutional injury do not have standing).

Here, the Legislator Plaintiffs seek to vindicate an alleged injury that is not personal to them in any way but, rather, one suffered, if at all, by the Legislature as a body. Despite artfully labelling their respective injuries as the deprivation of the "constitutional right to vote on … the 2020 Lease," *see, e.g.*, FAC ¶ 7, no such right is personal to any legislator but, rather, one that

"runs (in a sense) with the member's seat." *Raines*, 521 U.S. at 818. The Legislator Plaintiffs, thus, purport to arrogate to themselves the authority to prosecute claims properly held by the Legislature as a whole or, at a minimum, by each house of the Legislature, without any authorization by the Legislature or either of its two houses. This they cannot do.

Put in terms the Law Court has stated, the Legislator Plaintiffs, like the legislators in *Raines*, are not the best suited plaintiffs to bring this action. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 ("[W]e may limit access to the courts to those best suited to assert a particular claim."). Far from it: a few disappointed legislators and former legislators do not and cannot speak for the Legislature as an institution. This Court should not serve as a forum to address their individual grievances concerning the availability of a legislative vote.[7]

B. The Private Plaintiffs lack standing because they have not alleged a cognizable interest in the Lease or any particularized injury.

None of the Private Plaintiffs allege a sufficient "property, pecuniary or personal right" in the Lease or land at issue and, even if they had, the Private Plaintiffs have failed to allege any "particularized injury" to that property interest that flows "directly" from the BPL's decision to grant the Lease. *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378.

a. The Private Plaintiffs allege no cognizable interest in the Lease.

None of the Private Plaintiffs alleges any of the traditional, cognizable interests in the land or the Lease such as would situate them as "aggrieved" parties under the APA. None of these plaintiffs alleges that they sought from the BPL, or were denied, a leasehold interest in the

[7] The foregoing applies with even more force with respect to those Legislator Plaintiffs who do not hold a seat in the current Legislature. *See* FAC ¶¶ 8, 9, 13. These Plaintiffs' claims must be dismissed for the simple reason that, in light of the fact the Lease was adopted in 2020, these Plaintiffs never would have had any role in voting on the Lease, even if such a vote had been required, and, accordingly, nothing this Court could do would provide them with relief. *See Collins v. State*, 2000 ME 85, ¶ 6, 750 A.2d 1257 ("To have standing, a party must show they suffered an injury that is fairly traceable to the challenged action and that is likely to be redressed by the judicial relief sought.").

land at issue; that they otherwise own any property interest in the land at issue; that they own any property interest in land abutting the land at issue; or even that they own any property interest in land abutting the two lots of public reserved land that surrounds the land at issue. *See* FAC ¶¶ 16-26. Indeed, all of the Private Plaintiffs allege living in municipalities other than those—West Forks Plantation and Johnson Mountain Township—that contain the leased land. *Id*.

The best many of the Private Plaintiffs can muster is a general interest in Maine's woods or opposition to the NECEC generally.[8] *See id*. ¶¶ 19-25. Such allegations are plainly insufficient to confer standing under the APA. *See Nergaard v. Town of Westport*, 2009 ME 56, ¶¶ 19-21, 973 A.2d 735 (holding that appellants were not "persons aggrieved" where they did not allege any potential harm different from any other resident of Westport Island). Nor can the Private Plaintiffs' general statutory right to access the land— a right shared equally by all members of the public—alone suffice to confer standing. *Id.*

Three of the Private Plaintiffs—Edwin Buzzell, Greg Caruso, and Todd Towle—attempt to allege an interest in the leased land by virtue of their alleged historical use of certain public reserved lands in the area. *See* FAC ¶¶ 17-18, 26. Scrutiny of their allegations shows that these Plaintiffs do not allege having used the leased land, however, but rather, at best allege some unquantified historical use of certain surrounding public reserved lands, in a manner insufficient to give them any interest that could be prejudicially impacted by the Lease. Specifically:

[8] Plaintiffs use sleight of hand to give the impression some enjoy a close nexus to the leased land. For instance, Plaintiff Clifford Stevens alleges that the "transmission line corridor abuts the lands Mr. Stevens uses to operate his business and would be visible to his customers." FAC ¶ 25. But the "transmission line" is proposed to be 145 miles long, and Plaintiff Stevens does not allege that the less-than-one mile span at issue is one that he abuts. Nor does Plaintiff Stevens allege that his customers ever would see the transmission line as it passes over the leased land. Plaintiff John R. Nicholas, Jr. similarly alleges that he "owns property in Upper Enchanted Township approximately two miles from the proposed transmission line corridor," *id*. ¶ 23, without alleging his proximity to the land at issue. Numerous others plaintiffs do not get even this far. *See, e.g., id*. ¶ 21 (Plaintiff Cathy Johnson alleging only that she "has spent her leisure time hiking and canoeing in Maine's North Woods since 1971, and plans to continue to do so").

Plaintiff Edwin Buzzell alleges he has worked as a commercial whitewater rafting outfitter "in and around the public reserved lands that are the subject of BPL's Lease with CMP." FAC ¶ 17. The phrase "lands that are subject of BPL's Lease with CMP" apparently seeks to leave the impression of some nexus between Buzzell and the specific land described in the Lease. Plaintiffs Greg Caruso and Todd Towle seek to leave a similar impression, alleging they served as guides for fishing and whitewater rafting, among other activities, with respect to the public reserved lands "that are the subject of BPL's Lease with CMP." *Id*. ¶¶ 18, 26. But the leased land contains no navigable water, so it simply is not possible that any of these individuals worked as rafting guides on the leased land. *See id*., Ex. B at pp. 14-17; Exs. 1-3 (attached). Accordingly, the best interpretation of these allegations is that each Plaintiff previously used some of the nearby public reserved lands, rather than the specific land at issue.

In making these allegations concerning use of nearby land, the foregoing three Private Plaintiffs may attempt to rely upon *Fitzgerald v. Baxter State Park Authority* ("Baxter"), 385 A.2d 189 (Me. 1978), to support the position that their alleged past use of lands "in and around" the land at issue suffices to establish a property interest on which they may premise their claim of standing. These Plaintiffs' allegations, however, do not suffice even under *Baxter*, which stands for the proposition that one who evidences both "substantial" historical use of state park land and "substantial" intended future use of that land has standing to challenge an agency action that will result in a particularized injury to that individual's use of the affected land. *Id.* at 197 ("All five of the individual plaintiffs have in the past been substantial users of Baxter State Park and intend to use it substantially in the future."). None of these three Plaintiffs has alleged any such "substantial" historical or future use. Indeed, unlike the plaintiffs in *Baxter*, Plaintiffs

Buzzell, Caruso, and Towle do not allege that they ever have used the specific land at issue or specify what public reserved lands they have used.

For example, Plaintiff Buzzell does not allege that he has ever travelled, whether recreationally or professionally, on the 32 acres of land that are subject to the Lease. FAC ¶ 17. Rather, Plaintiff Buzzell alleges that the entire proposed transmission line corridor will affect his hunting and destroy views from his home. *Id*. But he does not allege that his land abuts the leased land, nor that his land abuts the lots of public reserved lands on which the leased land sits. *Id.* Plaintiff Buzzell also does not allege even that he can view the leased land from his home.[9] *Id.* Instead, he alleges that his view will be affected by "the transmission line" without any reference whatsoever to the 32 acres of leased lands. *Id.* Plaintiff Buzzell thus attempts to shoehorn a challenge to the DEP's findings concerning scenic vistas into this action without regard to the fact that the present complaint purports to concern 32 acres of land that Plaintiff Buzzell does not allege he can see from his home. *See* DEP Order at 55-56.

Plaintiff Towle alleges that he operates a fishing and guiding business on the Kennebec River, and that "[t]he proposed transmission line corridor will affect the temperatures of Cold Stream Pond—home to native trout—located in Johnson Mountain Township and will be visible to his clients while participating in recreational activities." FAC ¶ 26. Plaintiff Towle does not

[9] According to his testimony before the DEP, Mr. Buzzell's land is located at 645 Lake Moxie Road, West Forks, Me. *See* Dep't of Envt'l Prot., Application for Site Location of Development Act Permit and Nat'l Res. Prot. Act Permit for the New England Clean Energy Connect (Feb. 28, 2019) (testimony of Edwin Buzzell), *available at* https://www.maine.gov/dep/ftp/projects/necec/hearing/pre-filed-testimony/Intervenor%20Group%2010/2019-02-28%20Pre-Filed%20Testimony-%20Edwin%20Buzzell.pdf; *Capral v. L'Heureux*, 2017 ME 50, ¶ 10, 157 A.3d 795, 797 ("Courts may take judicial notice of pleadings, dockets, and other court records where the existence or content of such records is germane to an issue in the same or separate proceedings."). According to Google Earth, Buzzell's property is more than 5 miles away from the leased land as the crow flies. *See Rooney v. Sprague Energy Corp.*, 495 F. Supp. 2d 135, 138 (D. Me. 2007) (taking judicial notice of the distance between two points); *United States v. Peavy-Wright*, 424 F. Supp. 3d 139, 142 (D. Me. 2019) (taking judicial notice of the time to travel between two points).

allege his clients will view the NECEC on the leased land, or that the presence of the NECEC on the leased land will affect the water temperatures of Cold Stream Pond. *Id.* Such an allegation would be incredible in any event, as, again, the NECEC does not cross any navigable waterways in the 32 acre section of land subject to the Lease. Instead, like Buzzell, Plaintiff Towle's allegations suggest he seeks to use this lawsuit as a general challenge to the environmental impacts of the NECEC as a whole, after failing to prevail before the DEP.

Plaintiff Caruso likewise alleges he "has worked as a guide to thousands of guests in and around the public reserved lands that are the subject of the Lease and plans to continue to do so." *Id.* ¶ 18. Again, this allegation does not concern the leased land. *Id.*

In sum, not one of these three Private Plaintiffs alleges having used the 32-acre parcel of land that is subject to the Lease. To hold that these three Plaintiffs have standing under *Baxter* would be to open the floodgates and permit any user of any of the more than 400,000 acres of public reserved lands throughout the state to challenge an agency decision affecting any single acre of public reserved land anywhere in the state. *Baxter* stands for no such proposition.

b. The Private Plaintiffs do not allege a particularized injury resulting "directly" from the BPL's decision to grant the Lease.

Central to *Baxter's* holding was the parties' express stipulation that the plaintiffs there had suffered an injury. *Baxter* at 197. No such stipulation exists in this case, and the Private Plaintiffs otherwise have not alleged how the BPL's decision to grant CMP a leasehold interest directly prejudices their interests. Accordingly, the Private Plaintiffs lack standing even if the Court finds they have a cognizable interest in the Lease or the land at issue.

As noted, to be "aggrieved" under the terms of the APA, a plaintiff must show that the challenged agency decision "operated prejudicially and *directly* upon the party's property, pecuniary or personal rights." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378

(emphasis added). None of the FAC's specific allegations concerning the Private Plaintiffs refers to any injury they have suffered, let alone one resulting "directly" from the BPL's decision to grant the Lease. *See* FAC ¶¶ 17-26. The closest the FAC comes to articulating any injury suffered by the Private Plaintiffs appears in Paragraph 75, which includes the vague allegation that the Lease "would interfere with the [Plaintiffs'] rights as trust beneficiaries and owners of the public reserved lands and their respective abilities to continue engaging in recreational and commercial activities and, in some cases, the use and enjoyment of their properties, in West Forks Plantation and Johnson Mountain Township." But the transfer of intangible property rights via the Lease, alone, cannot possibly serve to injure any of the Private Plaintiffs, as the Lease does not exclude the Plaintiffs from the leased land or otherwise limit their statutorily-authorized use of and access to it. *See id.*, Ex. B at 1 (reference to non-exclusive easement). Indeed, CMP has owned a leasehold interest in this land since 2014 and the Plaintiffs allege no resulting injury.[10] *See id.*, Ex. A (2014 lease).

The FAC otherwise makes the Private Plaintiffs' true concerns apparent: the Private Plaintiffs dislike CMP's intended future *use* of the leased land and purport to claim some injury as a result of such future use. Plaintiffs confirm as much by seeking in this case an injunction against "CMP undertaking any activities on the lands." FAC at p.20. But any injury the Private Plaintiffs have suffered or may suffer as a result of the *use* of the land at issue is not an injury that flows "directly" from the Lease, but rather from the DEP's permitting decisions. *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d 378. As discussed, numerous of the Private Plaintiffs have

[10] The BPL informed the Legislature of the 2014 lease via a regular annual report. *See* Me. Dep't of Agric., Conservation & Forestry, Bur. Of Parks & Lands, FY 2015 Annual Report to the Joint Standing Comm. on Agric., Conservation & Forestry: Maine Public Reserved, Nonreserved, and Submerged Lands, at 27 (Mar. 2016), *available at* https://www.maine.gov/dacf/parks/publications_maps/docs/2015landsannualreport.pdf. Plaintiffs Black and Saviello both allege having served in the Legislature at that time, *see* FAC ¶¶ 7, 9, and yet neither took any action with respect to the 2014 lease until now.

participated in the DEP's proceedings, including serving as parties to those proceedings and to the appeal pending before the BEP. Those proceedings, not this one, remain the appropriate forum for the Private Plaintiffs to challenge the intended future use of the leased land.

C. NRCM's claim to standing fails for the same reasons.

NRCM alleges its members "have used, and plan to continue to use, the public reserved land in and around Johnson Mountain Township and West Forks Plantation for outdoor recreation, such as fishing, hunting, and hiking, as well as in their work as outdoor guides." FAC ¶ 16. "[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Conservation Law Found. v. Town of Lincolnville*, No. AP-00-3, 2001 WL 1736584 at *6 (Me. Super. Ct. Feb. 28, 2001) (Hjelm, J.) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 180 (2000)). None of the Private Plaintiffs who allege to be NRCM members has standing in his or her own right, *see* FAC ¶¶ 17, 21-22, and NRCM therefore cannot establish standing on the basis of these individual co-plaintiffs. Nothing in NRCM's allegations set forth at Paragraph 16 supports its standing, either. NRCM alleges no connection between it or its members and the leased land, and NRCM does not plead any injury it or its members suffered directly from the lease of that land. Accordingly, NRCM lacks standing as well.

CONCLUSION

The Court should dismiss the First Amended Complaint in its entirety.

DATED: August 28, 2020

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Central Maine Power Company

NOTICE

In accordance with M.R.Civ.P. 7(b)(1), any matter in opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice of hearing.

EXHIBIT 1

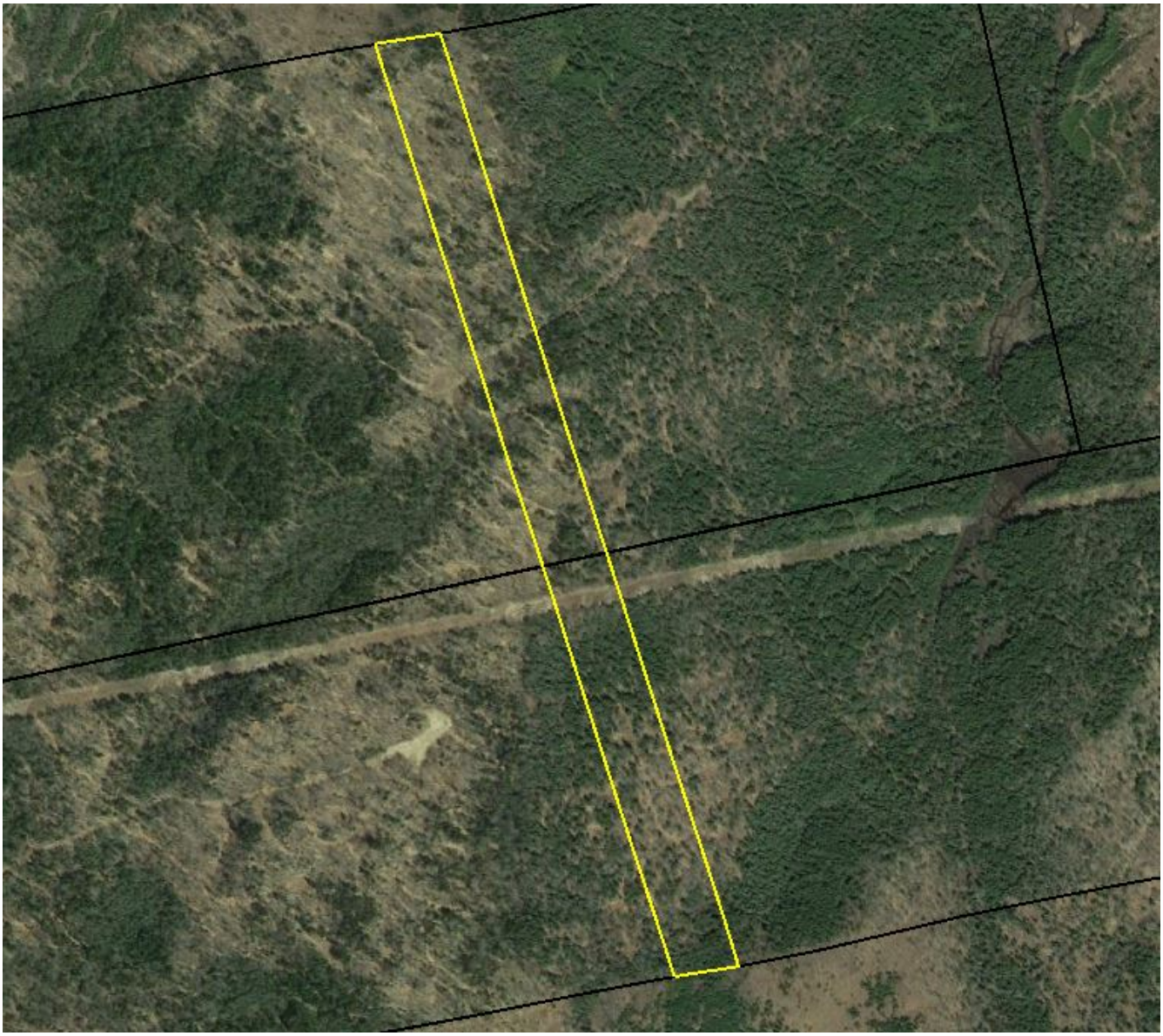
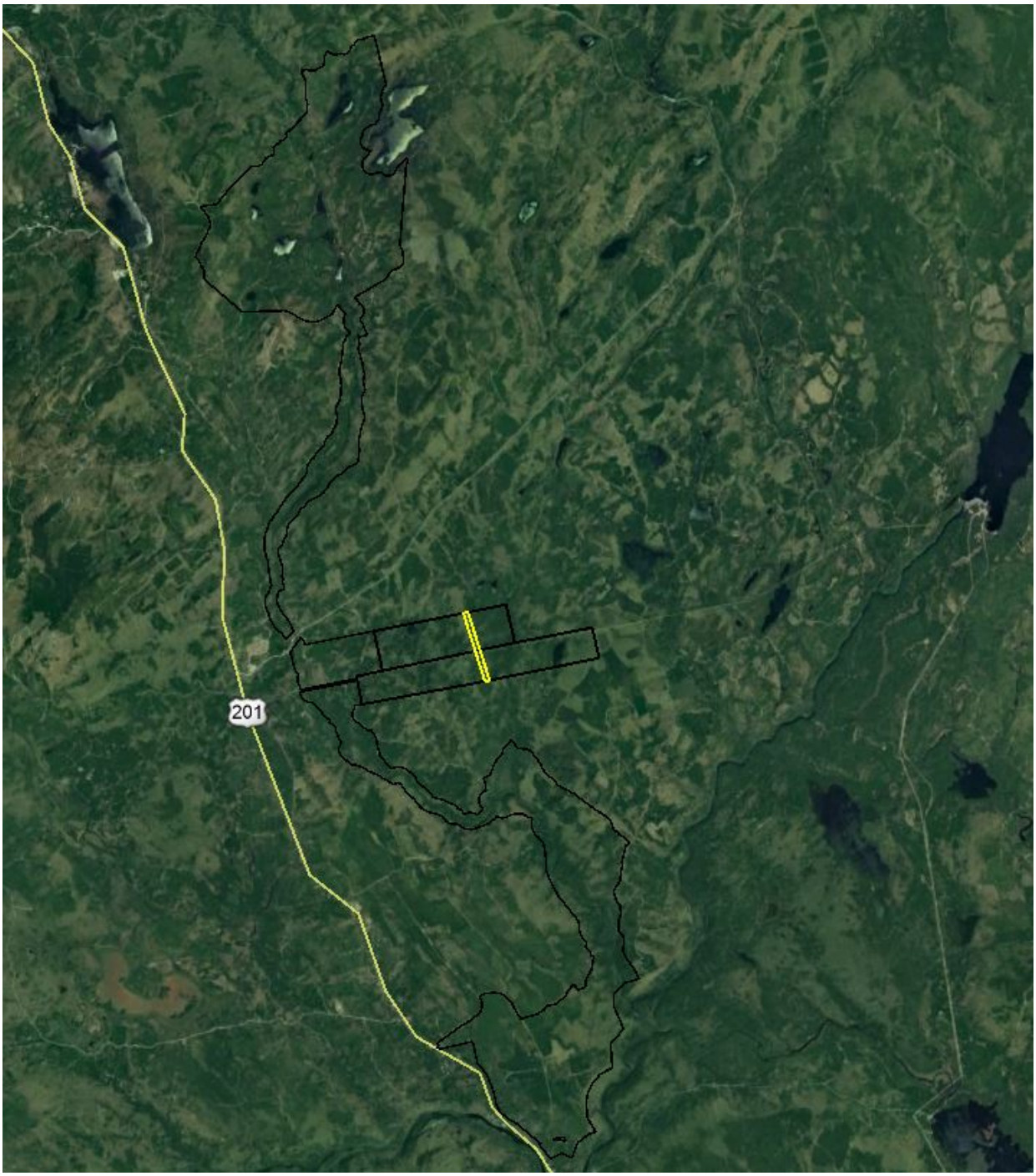


EXHIBIT 2

EXHIBIT 3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STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-20-94

Russell Black, Richard A. Bennett, Thomas B. Saviello, Kent Ackley, Seth Berry, Chad Grignon, Denise Harlow, Margaret O'Neil, William Pluecker, Natural Resources Council of Maine, Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes o/b/o Old Canada Road National Scenic Byway, Cathy Johnson, Ron Joseph, John R. Nicholas Jr, George Smith, Clifford Stevens, and Todd Towle,

Plaintiffs,

v.

Andy Cutko as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

and

Central Maine Power Company,

Defendants.

MOTION PURSUANT TO RULE 80C(i)

Out of an abundance of cause, Plaintiffs file this motion pursuant to Maine Rule of Civil Procedure 80C(i), requesting the Court to specify the future course of proceedings be set pursuant to a standard scheduling order. As set forth in our Complaint, Plaintiffs do not believe that this action falls under Rule 80C but have included Count III as an alternative claim for relief under 5 M.R.S. § 11001 *et seq*. and Rule 80C solely to protect their rights.

This action arises out of the Bureau of Parks and Lands' ("BPL") decision to lease public reserved lands to Central Maine Power Company ("CMP") for a transmission line without first obtaining the requisite legislative approval required by Article IX, Section 23 of the Maine Constitution. BPL and CMP first entered into a lease for the public reserved lands in 2014 and entered into an amended and restated lease on June 23, 2020. First Amended Complaint ¶¶ 1, 43. Because BPL entered into both leases in violation of the Maine Constitution they both—and particularly at issue now the 2020 Lease—are *ultra vires* and cannot stand. Accordingly, Count I of the First Amended Complaint states a claim for declaratory judgment in violation of Me. Const. Art. IX, sec. 23, and Count II states a claim for injunctive relief.

As referenced above, Plaintiffs also included Count III as an alternative claim for relief under 5 M.R.S. § 11001 *et seq*. and Rule 80C solely to protect their rights. Plaintiffs do not believe that this action falls under Rule 80C because (i) BPL has no rules relating to leases of public lands (in contrast to the rules it has adopted with respect to leases of submerged lands); (ii) BPL does not provide notice to abutters or the public about possible leases and accordingly persons affected by such a lease lack any meaningful opportunity to participate and, as a result, a lease does not resolve the rights of all parties as required by the Maine Administrative Procedures Act ("APA"); (iii) BPL does not create a record as the APA requires that allows a reviewing court to determine whether its actions were arbitrary or supported by substantial evidence; and (iv) the constitutional constraints on the alienation of public rights in public reserved lands is not the type of review contemplated by the APA.

If, however, this Court concludes that Rule 80C applies, Plaintiffs respectfully request that the court issue an order specifying that the future course of proceedings be set pursuant to a standard scheduling order.

Dated at Portland, Maine this 27th day of July, 2020.

/s/ David M. Kallin[1]
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NOTICE

Any opposition to this motion must be filed not later than twenty-one (21) days after the filing of this motion unless another time is provided by Rule 7(b)(1) of the Maine Rules of Civil Procedure or set by the court. Failure to file timely opposition will be deemed a waiver of all objections to this motion, which may be granted without further notice or hearing.

[1] This electronic signature is authorized by Section G of PMO-SJC-2 (rev. June 5, 2020).

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-20-94

Russell Black, Richard A. Bennett, Thomas B. Saviello, Kent Ackley, Seth Berry, Chad Grignon, Denise Harlow, Margaret O'Neil, William Pluecker, Natural Resources Council of Maine, Edwin Buzzell, Greg Caruso, Charlene Cummings, Robert Haynes o/b/o Old Canada Road National Scenic Byway, Cathy Johnson, Ron Joseph, John R. Nicholas Jr, George Smith, Clifford Stevens, and Todd Towle,

Plaintiffs,

v.

Andy Cutko as Director of the Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

Bureau of Parks and Lands, State of Maine, Department of Agriculture, Conservation and Forestry,

and

Central Maine Power Company,

Defendants.

ORDER

Upon consideration of Plaintiffs' Motion pursuant to Rule 80C(i), the motion is hereby **GRANTED**, this matter shall proceed pursuant to a standard scheduling order.

Dated: _____, 2020

_____
Justice, Superior Court

Doc 7159 Bk 5562 Pg 75
Recorded: Somerset County Jun 25,2020 08:32A
Register of Deeds Laura L Price

AMENDED AND RESTATED TRANSMISSION LINE LEASE

BETWEEN

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY BUREAU OF PARKS AND LANDS

and CENTRAL MAINE POWER COMPANY

This Amended and Restated Transmission Line Lease ("Lease") is made by and between the State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, (the "Lessor"), acting pursuant to 12 M.R.S. § 1852(4), and Central Maine Power Company, a Maine corporation with its principal place of business at 83 Edison Drive, Augusta, Maine (the "Lessee"). For the considerations hereinafter set forth, the Lessor hereby leases to Lessee, and Lessee hereby takes from the Lessor, the non-exclusive use of that portion of the West Forks Plantation and Johnson Mountain Township (T2 R6 BKP WKR) Public Reserved Lands in Somerset County, Maine described in Exhibit "A" and shown on Exhibit "B" attached hereto and incorporated herein, being a three hundred (300) foot wide transmission line corridor containing 32.39 acres and located on a portion of the aforementioned Public Reserved Lands. The described transmission line corridor, together with the improvements now or hereafter to be placed thereon, is referred to as the "Property" or "Premises," and is subject to the following terms and conditions:

1. Term:

a. This Lease shall be in effect from the date of execution of this instrument for a term of twenty-five (25) years, which term expires on March 31, 2045.

b. Lessor reserves the right to terminate this Lease at any time during the term hereof to the extent permitted under the provisions contained in paragraph 13 Default.

c. Lessee has the right to terminate this Lease upon at least ninety (90) days prior written notice to Lessor, or such lesser notice period as agreed to by Lessor in writing.

d. Any notice required by this paragraph, whether by Lessee or Lessor, shall be sent postage pre-paid, registered or certified mail, return receipt requested, to the party at the address set forth in paragraph 24.

2. Rent. Lessee shall pay to the Lessor rental as follows:

An annual payment of $65,000.00. The first payment shall be due on the date of execution of this Lease (the "Initial Payment") and subsequent annual payments shall be made on or before April first of each following year. Lessee shall, within the first twelve months of this Lease, commission an appraisal of the Premises and of the fair market value of the annual rent for the Premises. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. In the event the appraised fair market value of the annual rent for the Premises is higher than the Initial Payment set forth above, then the parties shall amend this Lease to retroactively increase the Initial Payment due hereunder to the fair market value indicated by the appraisal. Lessee agrees to pay the cost of the appraisal.

The annual payment shall be adjusted each year in accordance with the increase in the Consumer Price Index as published by the Bureau of Labor Statistics, United States Department of Labor over the preceding one year period; provided, however, that in no event shall the annual payment for any given Lease year be less than the annual payment for any previous Lease year. As used herein, the "Consumer Price Index" means the Consumer Price Index for All Urban Consumers (CPI-U), All items in U.S. city average, all urban consumers, not seasonally adjusted, Base Period 1982-84=100. Such Index shall be adjusted as necessary to properly reflect all changes in the Base Period, using such conversion factors as may be available from the United States Government. In the event the Consumer Price Index shall not be published by the United States Government, the successor or substitute index published by the United States Government shall be used for the foregoing computation.

In addition, Lessee shall pay to Lessor the negotiated market price of the timber present on the Premises based on mill scale and stumpage value at time the corridor is harvested for the construction of the utility corridor.

3. Use. The Property shall be used by the Lessee as follows: to erect, construct, reconstruct, replace, remove, maintain, operate, repair, upgrade, and use poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity ("Facilities"), all as the Lessee, its successors and assigns, may from time to time require upon, along, and across said Property; to enter upon the Property at any time with personnel and conveyances and all necessary tools and machinery to maintain the Premises and Facilities; the non-exclusive right of ingress to and egress from the Premises over and across roads and trails crossing the adjacent land of the Lessor, in accordance with paragraphs 5.a and 6.k below; to transmit electricity and communication, as conditioned below, over said wires, cables, or apparatus installed on Lessee's Facilities. All such use by Lessee shall be in compliance with the State of Maine Public Utilities Commission Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation dated May 3, 2019 (Docket No. 2017-00232) (the "CPCN"). Lessee shall own all communication facilities and such facilities shall be for Lessee's use in its business as a public utility and Lessee may also provide communication facilities and services consistent with the Broadband Benefit set forth in the May 3, 2019 Stipulation approved as part of the CPCN. In the event Lessee desires to provide capacity to others on Lessee's communication facilities, Lessee shall first obtain Lessor's written approval, which shall not be unreasonably withheld. Lessor may adjust the rent at such

time as Lessee provides communication capacity to others. The rent adjustment is to be determined by an appraisal paid for by Lessee. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. Lessee shall engage the agreed upon Appraiser within ninety (90) days of said agreement. Lessee shall ensure that Lessor is provided with a copy of the appraisal within ten (10) days of receiving completed appraisal. Lessee shall not sub-lease or contract the communication facilities for any other commercial use. The Lessor further grants to said Lessee the right to establish any and all safety and reliability regulations applicable to said transmission line corridor which said Lessee deems necessary and proper for the safe and reliable construction and maintenance of said structures, wires, and apparatus and for the transmission of electricity.

4. Quiet Enjoyment. So long as Lessee pays the rent, performs all of its non-monetary obligations, and otherwise complies with the provisions of this Lease, the Lessee's possession of the Premises for its intended use will not be disturbed by the Lessor, its successors and assigns except as otherwise provided under the terms of this Lease. Notwithstanding any provision to the contrary herein, Lessor reserves the right to enter onto the Premises at any time and from time to time to inspect the Premises.

5 Access:

a. It is agreed by the parties to this Lease that Lessor is under no obligation to construct or maintain access to the Premises, notwithstanding any provisions of any federal, state, and local law to the contrary. However, the Lessee shall be allowed to cross Lessor's abutting land by using Lessor's Forest Management Roads for access to the Premises for construction, maintenance, and repairs, subject to reasonable restrictions and regulations imposed by Lessor, and the rights of others using said roads. Upon reasonable advance notice to Lessee, Lessor reserves the right to close, lock, or otherwise restrict access along or through the Forest Management Roads at any time it appears reasonably necessary to protect the safety of persons or property. Such situations include, but are not limited to, spring mud season or periods of high fire danger. Lessee shall immediately repair to the Lessor's satisfaction any damage to the road caused by Lessee at Lessee's sole cost and expense. Lessor is under no obligation to provide maintenance to the road. If Lessee wishes to undertake performing repairs or upgrades to the Forest Management Roads, Lessee must acquire prior written approval from Lessor. Lessee shall acquire Lessor's prior written approval for the construction or use of any other access location across Lessor's land abutting the Premises.

b. The Lessor expressly reserves the right for itself or its guests, servants, or agents to pass and repass over the described Premises at any and all times with machinery and equipment necessary for the operation or conduct of Lessor's uses as such uses may from time to time exist, provided that: said uses will comply with the above referenced safety regulations, and will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies; that the Lessor shall provide Lessee with at least three business days prior written notice if Lessor will be on the Premises with construction or logging equipment; and that such use will not unreasonably interfere with the rights of Lessee herein conveyed.

6. Lessee Covenants. The Lessee covenants as follows:

a. No buildings, either permanent or temporary, may be constructed or placed upon the described Premises, except temporary structures during construction of the Facilities, such as field trailers.

b. Crossing mats for stream or wetland crossings shall not be made of ash or hemlock, so as to avoid introduction of invasive pests associated with these species.

c. No hazardous or toxic waste substance or material, residual pesticides or fertilizers, other than organic compost, shall be used or kept upon the Premises, nor shall any livestock or poultry be kept temporarily or permanently thereon. Pesticides, herbicides, and chemical defoliants registered for use in Maine may be applied to the Premises only after acquiring prior written approval from Lessor and only by trained applicators working under the supervision of applicators licensed by the State of Maine in formulations and dosages approved by the Environmental Protection Agency and Lessor. One month prior to all pesticide applications, Lessee shall provide information to Lessor, including, but not limited to pesticides, herbicides, and chemical defoliants to be used, dates and methods of application, application locations, and reasons for use.

d. There shall be no vegetation removal that would result in less than 50% aerial coverage of woody vegetation and stream shading within 25 feet of a stream.

e. There shall be no vegetation maintenance or disturbance within a 50-foot radius around the high water boundary of a significant vernal pool from March 15 – July 15; provided, however, that Lessee may take all appropriate actions with regards to vegetation management to ensure that Lessee is in compliance with all federal and state laws, rules, and regulations imposed upon Lessee as the owner and operator of the Facilities.

f. Lessee shall not make any strip or waste of the Premises or of any other lands of Lessor. Vegetation clearing within the Premises for Lessee's Facilities shall be limited to standards approved by the Maine Public Utilities Commission and shall encourage a ground cover of woody species with a maximum mature height approaching but not exceeding 15 feet. Lessee shall make every effort to minimize clearings and cutting of vegetation.

g. Lessee acknowledges that lease of the Premises by the Bureau of Parks and Lands, Department of Agriculture, Conservation and Forestry is unique, and that in authorizing the Lease under 12 M.R.S. § 1852(4)(A), Lessor requires that Lessee shall make every reasonable effort within the Premises to be in conformance with the Maine Department of Inland Fisheries and Wildlife "Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects", "Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects", "Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects", and "Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW

Projects", all dated March 26, 2012, copies of which are attached to this Lease, or the publication's most current version.

h. Lessee shall not kindle any outside fires on the Premises or any other land of the Lessor. Lessee agrees to assist with any means at Lessee's disposal in putting out fires occurring on the Premises or adjacent areas, and to report promptly such fires to Lessor or the manager of the Bureau's Western Public Lands Office and to the appropriate authorities.

i. Lessee agrees to maintain the Premises in a neat and sanitary manner and so as not to be objectionable or detract from the aesthetic values of the general area. Lessee shall not discharge on the Premises, including into any body of water, wetland, or groundwater, any untreated or partially treated sewage, wash water, black water, gray water, or slop water. No non-forest waste including, but not limited to, broken equipment, spilt fuels, fluids and lubricants, fluid and lubricant containers, equipment parts, tires, debris, garbage, or trash shall be deposited, discharged, dumped, or buried upon the Premises or other property of Lessor. In addition, Lessee covenants that it bears the responsibility for any noncompliance with all federal, state, and local laws and regulations governing septic and other waste disposal resulting from Lessee's activities and Lessee shall indemnify and hold harmless Lessor from and against any and all actions, suits, damages, and claims by any party by reason of noncompliance by Lessee with such laws and regulations. Such indemnification shall include all Lessor's costs, including, but not limited to reasonable attorney fees.

j. Forest woody waste (e.g., wood chips and stumps) may be disposed of on the Premises, but may not be disposed of in piles. Stumps shall be buried in "stump dump" holes, except that small numbers of stumps (four or less) may be left aboveground.

k. Lessee shall not build permanent roads on the Premises without obtaining prior written approval from the Lessor; provided, however, that Lessee may construct one (1) temporary road to facilitate the construction of the transmission line (tree clearing, pole setting, wiring) substantially in the location depicted in Exhibits "C-1", "C-2" and "C-3" attached hereto and incorporated herein. At the time construction is completed, the temporary road shall be dismantled and put to bed or converted to permanent access trails. All access trails shall be built to Best Management Practices (BMP) standards as shown in the "Maine Motorized Trail Construction and Maintenance Manual" written by the Bureau of Parks and Lands Off-Road Vehicle Division, dated May 2011 and all roads shall be built pursuant to those Best Management Practices (BMPs) standards pertaining to forest management and road construction practices set forth in the publication entitled, "Best Management Practices for Forestry: Protecting Maine's Water Quality," prepared by the Maine Department of Agriculture, Conservation and Forestry, Maine Forest Service, in such publication's most current version at the time of the grant of this Lease, and as the same may be further amended, supplemented or replaced after the date of the execution of this Lease.

Prior to start of construction, Lessee shall provide an Access and Maintenance Plan to Lessor for review and approval. This plan shall provide details and maps on

proposed roads, permanent and temporary, access points, temporary trails, and maintenance access, and descriptions of any proposed bridges, temporary or permanent.

l. Natural Plant Community, wetland and Significant Vernal Pool field surveys of the Premises must be conducted by Lessee or Lessee's designee prior to any construction on the Premises. Lessee shall send to Lessor and to the Maine Department of Inland Fisheries and Wildlife a copy of all completed surveys before commencing any construction on the Premises.

m. Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises. Lessee further shall not construct, alter, or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This Lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 30 days in which to cure such failure.

n. In the event of the following:

   a) Lessee constructs an electric transmission line on the Premises; and
   b) Lessee has determined, in its sole discretion, to rebuild the existing transmission line (the "Jackman Tie Line") located on that part of the existing 100-foot wide utility corridor described in a lease dated July 9, 1963 and recorded in the Somerset County Registry of Deeds, Book 679, Page 37 (the "Jackman Tie Line Lease") that is located westerly of the Premises and easterly of Route 201; and
   c) Lessee receives all permits and regulatory approvals necessary to rebuild the line in such new location including, but not limited to, approvals of the Maine Public Utilities Commission and the Maine Department of Environmental Protection; then

   Lessee agrees to relocate said Jackman Tie Line from the above described portion of the Jackman Tie Line Lease to a location on the Premises and such other corridor as acquired by the Lessee from others. Upon completion of any such relocation of the Jackman Tie Line or its functional replacement pursuant to this section and removal of Lessee's facilities from that portion of the Jackman Tie Line Lease lying westerly of the Premises, Lessor and Lessee agree to amend the Jackman Tie Line Lease to delete from the lease area that portion of the Jackman Tie Line Lease lying westerly of the Premises. All other terms and conditions of the Jackman Tie Line Lease shall remain in full force and effect. The term "rebuild" as used in this paragraph, shall not include routine repair or replacement of poles, crossarms, insulators, braces or conductor.

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7. Liability and Insurance.

a. Lessee shall without unreasonable delay inform Lessor of all risks, hazards, and dangerous conditions caused by Lessee which are outside of the normal scope of constructing and operating the Facilities of which Lessee becomes aware with regards to the Premises. Lessee assumes full control of the Premises, except as is reserved by Lessor herein, and is responsible for all risks, hazards, and conditions on the Premises caused by Lessee.

b. Except for the conduct of Lessor and Lessor's guests and agents, Lessor shall not be liable to Lessee for any injury or harm to any person, including Lessee, occurring in or on the Premises or for any injury or damage to the Premises, to any property of the Lessee, or to any property of any third person or entity. Lessee shall indemnify and defend and hold and save Lessor harmless, including, but not limited to costs and attorney fees, from: (a) any and all suits, claims, and demands of any kind or nature, by and on behalf of any person or entity, arising out of or based upon any incident, occurrence, injury, or damage which shall or may happen in or on the Premises that is caused by the Lessee or its Agents; and (b) any matter or thing arising out of the condition, maintenance, repair, alteration, use, occupation, or operation of the Premises, the installation of any property thereon or the removal of any property therefrom that is done by the Lessee or its Agents. Lessee shall further indemnify Lessor against all actions, suits, damages, and claims by whoever brought or made by reason of the nonobservance or nonperformance of Lessee or its Agents of: (a) any obligation under this Lease; or (b) any federal, state, local law or regulation pertaining to Lessee's use of the Premises.

c. The Lessee shall obtain and keep in force, for the duration of this Lease, a liability policy issued by a company fully licensed or designated as an eligible surplus line insurer to do business in this State by the Maine Department of Professional & Financial Regulation, Bureau of Insurance, which policy includes the activity to be covered by this Lease with adequate liability coverage over at least one million dollars for each occurrence and two million dollars in annual aggregate in general commercial liability coverage to protect the Lessee from suits for bodily injury and damage to property. Nothing in this provision, however, is intended to waive the immunity of the Lessor. Upon execution of this Lease, the Lessee shall furnish the Lessor with a certificate of insurance as verification of the existence of such liability insurance policy.

8. Lessee's Liability for Damages. Lessee shall be responsible to Lessor for any damages caused directly or indirectly by Lessee or its guests, servants, or agents, including, but not limited to, interference or meddling with any tools, machinery, equipment, gates, buildings, furniture, provisions, or other property of the Lessor, its agents, employees, or guests on the Premises.

9. Tax Proration. Lessee shall pay when due all taxes levied on the personal property and improvements constructed by Lessee and located on the Premises. Lessor shall have no ownership or other interest in any of the Facilities on the Property.

10. Lease Assignment, Sublease, and Colocation: Lessee shall not assign or sublease in whole or part without prior written consent of Lessor, which consent shall not be unreasonably withheld. Lessor may lease the Premises for other compatible uses and colocation of other utilities so long as such rights do not extend to access to the Facilities, said uses will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies, and such use will not interfere with the rights herein conveyed, including the right to build such additional Facilities as may be accommodated on the Premises using transmission line spacing standards approved by the Maine Public Utilities Commission. Notwithstanding the forgoing, Lessee may assign its interest in this Lease to NECEC Transmission LLC, a Delaware limited liability company ("NECEC") without Lessor consent, so long as Lessee gives written notice of such assignment to Lessor, together with a copy of the executed assignment, and so long as the assignment expressly provides that NECEC has assumed all of the Lessee's obligations under this Lease. Upon delivery of such notice and such executed assignment, Central Maine Power Company shall be released from any obligations under this Lease from and after the effective date of such assignment. NECEC is related to Lessee and under common ownership with Lessee.

11. Lessee's Removal of Structures: Lessee must obtain Lessor's advance written consent, which consent shall not be unreasonably withheld, delayed, or conditioned, to the method and timing of removal before any structures or improvements are removed from the Premises.

12. Surrender. Upon termination of this Lease for any reason, Lessee shall deliver the Premises to Lessor peaceably, without demand, and in reasonably good condition clear of all trash and debris, unusable equipment, unregistered vehicles, and abandoned equipment and structures, located on the Premises. If such trash and debris and other unusable equipment, unregistered vehicles, and abandoned equipment and structures are not removed within one hundred eighty days (180) days of the termination of this Lease, the Lessor shall thereafter have the right to remove it and Lessee shall reimburse Lessor for the costs of such removal and disposal. Any other personal property, fixture, or structure on the Premises belonging to Lessee shall be removed by Lessee, unless Lessor requests in writing, that the other personal property, fixture, or structure may remain and Lessee agrees in writing not to remove it. If the Lessee fails to remove such other personal property, fixture, or structure such items shall be deemed the property of the Lessor two hundred and ten days (210) days after termination of the Lease and the Lessor shall thereafter have the right to remove it and charge the Lessee with the costs of such removal and disposal. In the event that any of this other personal property, fixtures, or structures on the Premises are incapable of being removed within one hundred eighty days (180) days, Lessee may be allotted up to one year to remove the items, with prior written approval from Lessor, which approval shall not be unreasonably, delayed, or conditioned. Any holding over by Lessee without Lessor's prior written consent shall be considered a tenancy at sufferance.

13. Default.

a. The following constitutes a default under this Lease: (1) Lessee's failure to perform any of its monetary or nonmonetary obligations under this Lease; (2) the filing of any bankruptcy or insolvency petition by or against Lessee or if Lessee makes a general assignment for the benefit of creditors which is not resolved or withdrawn within 30

days of such petition being filed; (3) an execution, lien, or attachment issued against the Lease, the Premises, or Lessee's property on the Premises, unless Lessee provides Lessor with satisfactory assurances and evidence that such execution, lien, or attachment will be released within a reasonable time not to exceed thirty (30) days, unless a shorter period of time is provided for by any applicable law or proceeding for the removal thereof, in which case the more restrictive time limitation applies; (4) the assignment or sublease of this Lease to any third party other than as permitted pursuant to Section 10 above; or (5) the violation of any state, federal or local law, rule, regulation, or ordinance; or (6) Lessee's abandonment of the Premises.

b. Upon the occurrence of any such event of default and subject to any applicable cure period as defined in paragraph 6(m), above, Lessor may, in addition to (and not instead of) any other remedies available at law or in equity, terminate this Lease with notice or demand to Lessee and enter and take possession of the leased Premises. Lessee shall be liable to Lessor for loss and expense, including reasonable attorney fees, incurred by reason of such default or termination hereof Lessor will provide Lessee with written notice of an event or occurrence of default under paragraph 13(a)(1) and Lessee shall have a reasonable period of time, as determined by Lessor, to cure said default which period shall not exceed thirty (30) days; provided, however, that if Lessee satisfies to Lessor that Lessee has undertaken the appropriate actions to cure said default and such default has not been cured within the said time permitted, the Lessor may exercise its sole discretion to extend the cure period.

14. Statutory Authority Over Public Lands. Lessor shall have the right to request that this Lease be amended from time to time and throughout the term of this Lease if any Lease term is found not to comply with Maine state law regarding public reserved lands. Lessor shall send notice to Lessee of the proposed revision. Upon receipt of such notice, Lessee shall have the option to either terminate the Lease by notifying Lessor in writing within thirty (30) days of receipt of notice or negotiate an amendment to the Lease in order to bring such term in compliance with said state law. Except as provided in this Lease, neither Party shall have the right to terminate this Lease unless the resulting non-compliance constitutes a default under Section 13 hereof, in which case Section 13 shall govern.

15. Mechanics Lien. If any notice is filed at the county registry of deeds of a builder's, supplier's or mechanic's lien on the Premises, arising out of any work performed by or on behalf of Lessee, Lessee shall cause such lien to be discharged or released immediately and shall indemnify Lessor against any such claim or lien, including all costs and attorney fees that Lessor may incur in connection with the same.

16. Succession; No Partnership. This Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors in interest, and assigns of the parties hereto. Nothing in this agreement shall be construed to create an association, joint venture, trust or partnership covenant, obligation, or liability on or with regards to any of the parties to this agreement.

17. Waiver. Any consent, express or implied, by Lessor to any breach by Lessee of any covenant or condition of this Lease shall not constitute a waiver by the Lessor of any prior or succeeding breach by Lessee of the same or any other covenant or condition of this Lease.

Acceptance by Lessor of rent or other payment with knowledge of a breach or default by Lessee under any term on this Lease shall not constitute a waiver by Lessor of such breach or default.

18. Force Majeure. Except as expressly provided herein, there shall be no abatement, diminution, or reduction of the rent or other charges payable by Lessee hereunder, based upon any act of God, any act of the enemy, governmental action, or other casualty, cause, or happening beyond the control of the parties hereto.

19. Eminent Domain. In the event that the Premises or any portion thereof shall be lawfully condemned or taken by any public authority, Lessor may, in its discretion, elect either: (a) to terminate the Lease; or (b) to allow this Lease to continue in effect in accordance with its terms, provided, however, that a portion of the rent shall abate equal to the proportion of the Premises so condemned or taken. All condemnation proceeds shall be Lessor's sole property without any offset for Lessee's interests hereunder.

20. Holding Over. If Lessee holds over after the termination of this Lease, said hold over shall be deemed to be a trespass.

21. Lessor Protection. Lessor expressly retains and nothing contained herein shall be construed as a release or limitation by Lessor of any and all applicable liability protections under Maine law. Lessor specifically retains any and all protections provided under Maine law to owners of land, including but not limited to those provided under the Maine Tort Claims Act, 14 M.R.S. §§ 8101-8118.

22. Cumulative Remedies. The remedies provided Lessor by this Lease are not exclusive of other remedies available by current or later existing laws.

23. Entire Agreement; Supersedes 2014 Lease. This Lease sets forth all of the covenants, promises, agreements, conditions, and understandings between Lessor and Lessee governing the Premises. There are no covenants, promises, agreements, conditions, and understandings, either oral or written, between them other than those herein set forth. Except as herein provided, no subsequent alterations, amendments, changes, or additions to this Lease shall be binding upon the Lessor or Lessee unless and until reduced to writing and signed by both parties. This Lease supersedes the Transmission Line Lease between Lessor and Lessee dated December 15, 2014, as amended by Lease Amendment dated June 22, 2015 (as amended, the "2014 Lease"), and the parties acknowledge that the 2014 Lease is terminated as of the effective date of this Lease.

24. Notices. All notice, demands, and other communications required hereunder shall be in writing and shall be given by first class mail, postage prepaid, registered or certified mail, return receipt requested; if addressed to Lessor, to:

State of Maine, Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands,
22 State House Station, Augusta, ME 04333-0022, Attn: Director;

and if to Lessee, to;

Central Maine Power Company, Real Estate Services
83 Edison Drive, Augusta, Maine 04364, Attn. Supervisor, Real Estate

25. General Provisions:

a. Governing Law. This Lease shall be construed and interpreted in accordance with the laws of the State of Maine.

b. Savings Clause. The invalidity or unenforceability of any provision of this Lease shall not affect or impair the validity of any other provision. To the extent any provision of this Lease is inconsistent with applicable state statute, the statute is deemed to govern.

c. Paragraph Headings. The paragraph titles herein are for convenience only and do not define, limit, or construe the contents of such paragraph.

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IN WITNESS WHEREOF, the parties have hereunto set their hands on the dates set forth below. For purposes of this Lease, an electronic signature shall be deemed an original.

Lessor:

STATE OF MAINE
Department of Agriculture, Conservation, and Forestry
Bureau of Parks and Lands

By: _____
Print: ANDREW CUTKO
Its: DIRECTOR

Dated: June 23, 2020

_____
Witness

Lessee:

CENTRAL MAINE POWER COMPANY

By: _____
Print: Douglas A. Herling
Its: President and CEO

Dated: June 15, 2020

_____
Witness

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EXHIBIT A

Leased Premises
Department of Agriculture, Conservation and Forestry
Bureau of Parks and Lands and
Central Maine Power Company

A non-exclusive lease over a portion of the Lessor's land located in Johnson Mountain Township (T2 R6 BKP WKR), and West Forks Plantation, Somerset County, Maine, more particularly described as follows:

A strip of land 300 feet in width beginning at the southerly line of the Maine Public Reserved Lot located on the northerly line of West Forks Plantation at a ¾" iron rebar that is the northwest corner of an easement conveyed by Weyerhaeuser Company to Central Maine Power Company in a deed dated November 17, 2016 and recorded in the Somerset County Registry of Deeds in Book 5099, Page 247;

thence N °17-05'29' W across the land of the Lessor a distance of 4702.99 feet, more or less, to a ¾" iron rebar on the northerly line of the Maine Public Reserved Lot located in Johnson Mountain Twp., said iron rebar also being the southwesterly corner of an easement conveyed to Central Maine Power Company by Weyerhaeuser Company in a deed dated November 17, 2016 and recorded in said Registry in Book 5099, Page 237;

thence N 78°-58'-32" E along the north line of said Johnson Mountain Twp. Public Lot a distance of 301.69 feet, more or less, to a ¾" iron rebar at the southeast corner of said easement described in Book 5099, Page 237;

thence S °17-05'29" E across land of the Lessor a distance of 4702.81 feet, more or less, to a ¾" iron rebar at the southerly line of said West Forks Plantation Public Lot and the northeast corner of said easement described in Book 5099, Page 247;

thence S 78°-56'32" W along the southerly line of said West Forks Plantation Public Lot a distance of 301.67 feet, more or less, to the point of beginning, said lease area containing 32.39 acres, more or less.

Bearings are referenced to Grid North, Maine West Zone. For reference, see a survey by Sackett & Brake Survey, Inc. #2020076, dated March 23, 2020, to be recorded in said Registry.

All above referenced iron rebars are capped with a red plastic cap inscribed "S.W. Gould PLS 2318".

POOR ORIGINAL

EXHIBIT B

Leased Premises

(Survey Plan dated March 23, 2020)

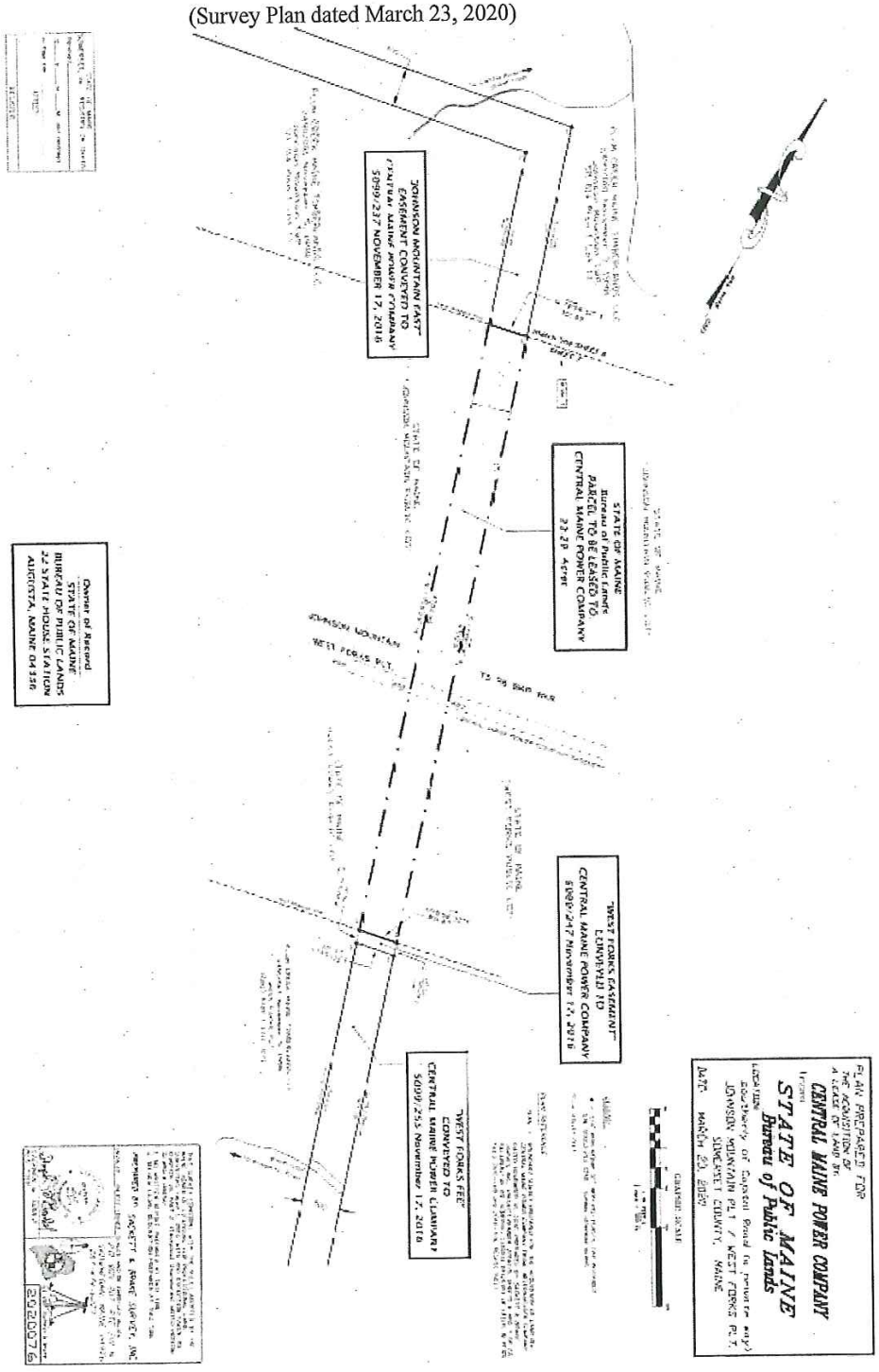

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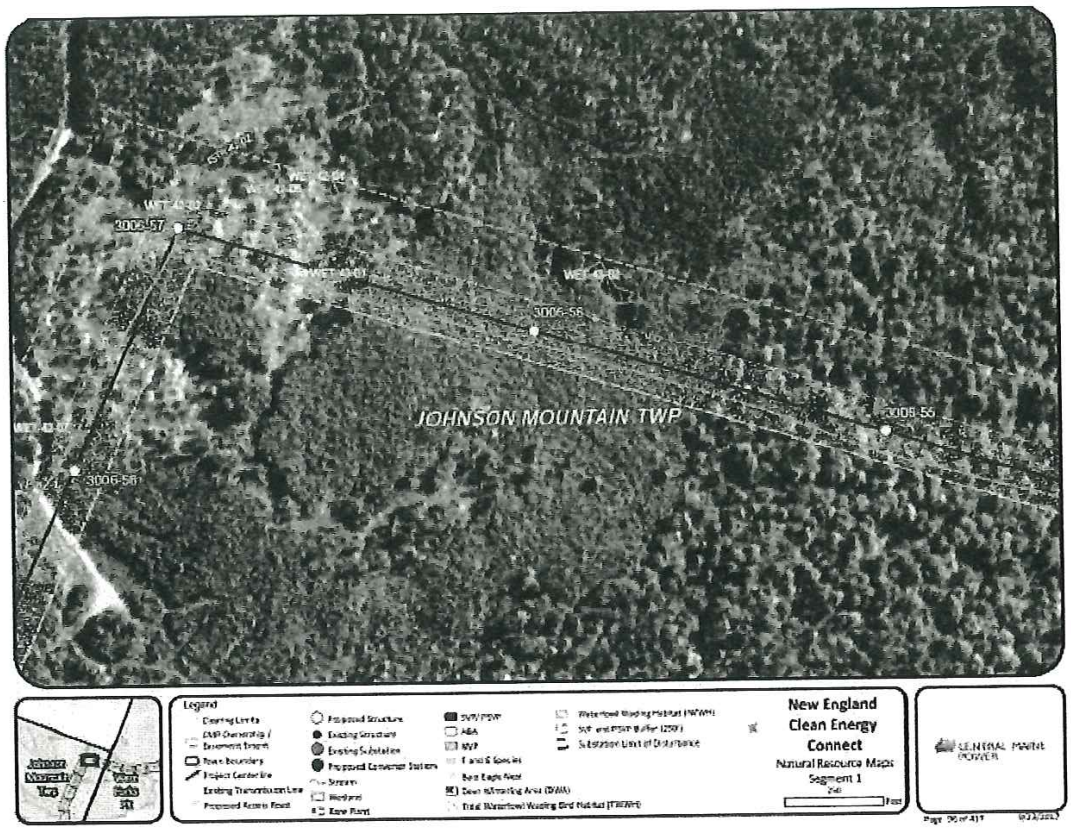
EXHIBIT C-1
Temporary Road Location



Doc 7159 Bk 5562 Pg 90

EXHIBIT C-2

Temporary Road Location

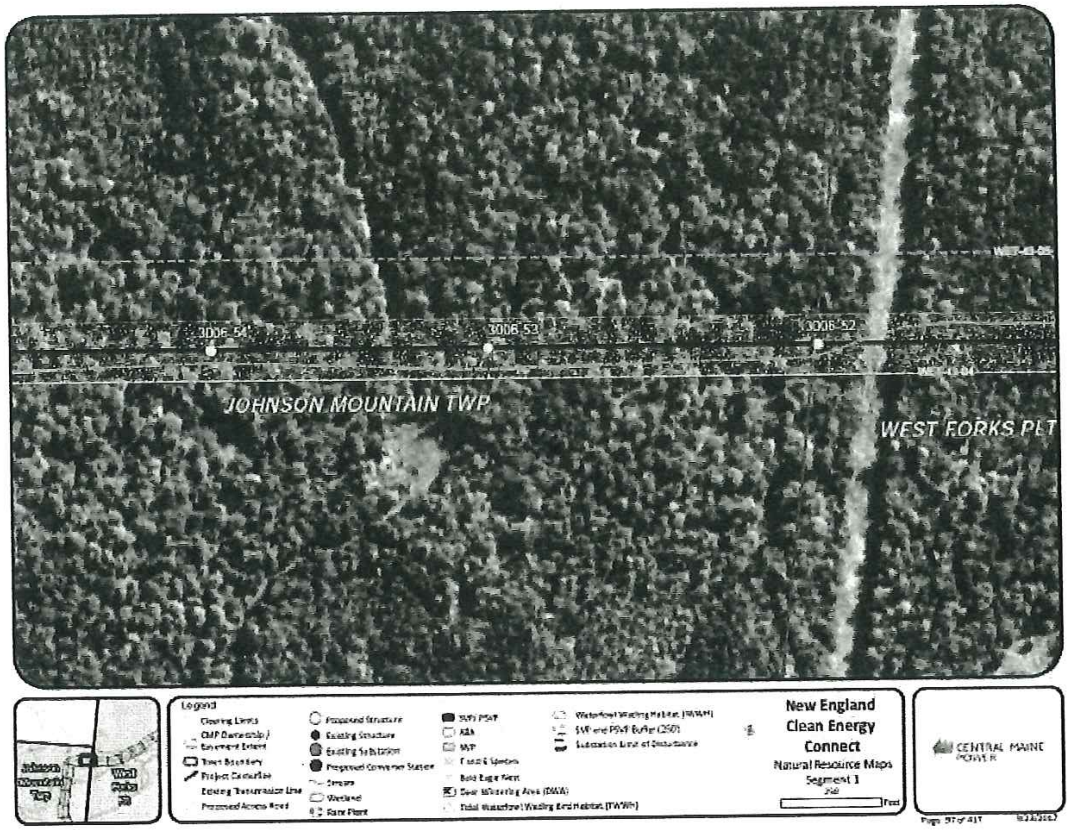


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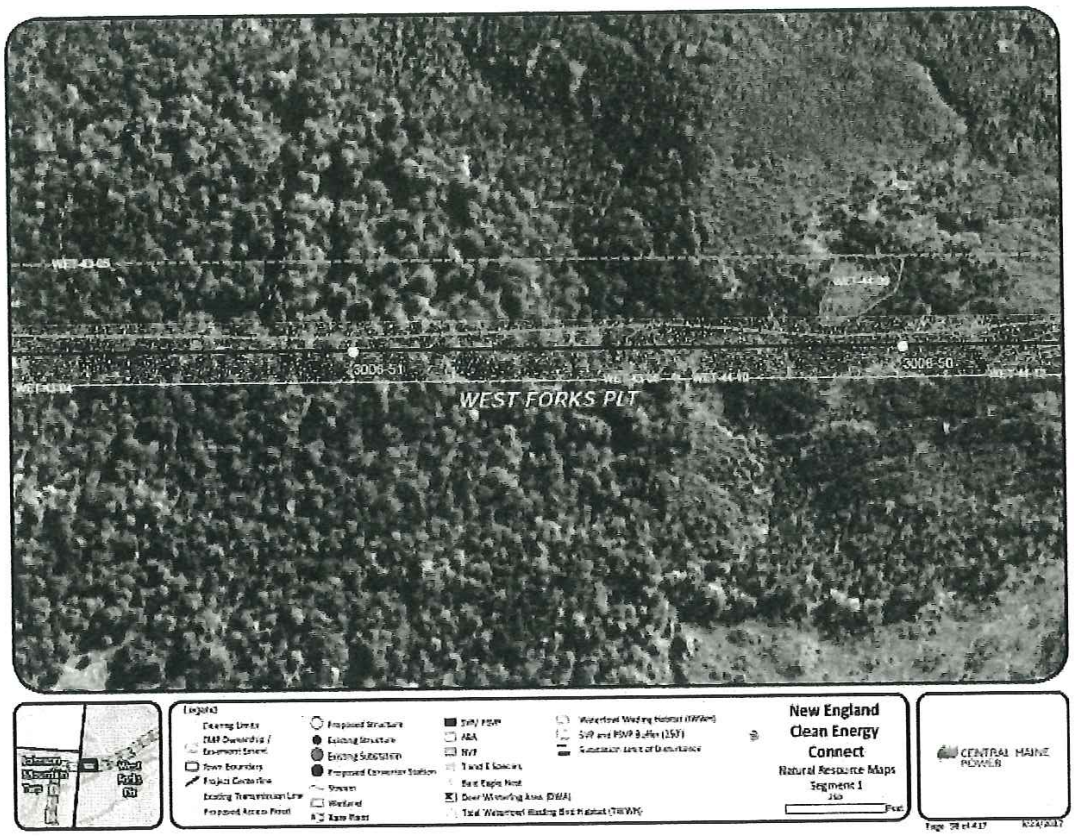
EXHIBIT C-3

Temporary Road Location



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ADDITIONAL ATTACHMENTS:

- Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects
- Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects
- Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects
- Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW Projects

Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that cross or abut mapped moderate or high value Inland Waterfowl and Wading Bird Habitats (IWWH) as defined in Chapter 335 of Maine's Natural Resources Protection Act. By definition IWWH includes the non-forested wetland complex and a 250 ft wide zone surrounding the wetland complex. Maps of IWWH polygons regulated under Chapter 335 are available through the Maine Department of Environmental Protection or by contacting our offices.

General Project Alignment Recommendations: Where practicable, right-of-way alignment should be designed to avoid vegetation clearing within mapped IWWH areas. Where full avoidance is not an option, alignments must minimize fragmentation of the habitat by crossing as close to the outer edge as possible, or minimizing the length of the proposed disturbance by crossing narrow portions of the IWWH. The placement of structures within an IWWH must be avoided to the maximum extent practicable.

Defining Boundaries and Setbacks
The limits of an IWWH and setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

Specific Inland Waterfowl and Wadingbird Habitat Performance Standards

A. *Arboricultural Management Practices*
(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) Where the practice is possible, the MDIFW encourages topping of large diameter (>12 inches diameter at breast height) capable trees to create snags to support waterfowl nesting cavities.

(3) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within an IWWH where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(4) If a right-of-way crosses an IWWH we encourage close pole spacing to minimize line sagging and maximize allowed growing height of vegetation within the IWWH.

(5) When capable vegetation within an IWWH must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the IWWH. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil must be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(6) Within an IWWH impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

(7) No clearing or vegetation maintenance work shall occur within the IWWH during the peak waterfowl and wading bird nesting season (April 15th to July 15th) unless approved in consultation with MDIFW.

(8) Provided they do not present a safety hazard and are naturally present, the permittee must leave undisturbed a minimum of 2-3 snags per 500 linear feet of corridor to provide nesting habitat for waterfowl. Snags must be a minimum of 12 inches diameter at breast height, larger diameter snags are preferred.

B. Heron Colony Surveys

Prior to initial transmission line clearing, the permittee must complete field investigations for the presence heron colonies within or immediately adjacent to IWWH. Surveys for great blue heron (State Special Concern) colonies must be conducted between April 20th and May 31st. In northern and downeast Maine where nesting tends to initiate later, surveys must not begin until the beginning of May. If heron colonies are noted, the permittee shall contact MDIFW to discuss avoidance measures and project timing considerations that would best minimize impacts to nesting herons.

C. *Herbicide Application*

(1) Herbicides may not be applied within 25-feet of any wetland (including forested wetlands) that is within an IWWH.

(2) Elsewhere in the IWWH herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically

amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.

(b) Awareness of the impacts of climatic conditions prior to application.

(c) Application is prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application. The application must be administered such that drift is minimized to the maximum extent practicable.

(3) Products with low potential for mobility and low persistence in the environment must be selected for use in riparian buffers. When operating within an IWWH the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,
(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfuron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) Agri-Dex,
(ii) Competitor,
(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(4) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(5) There may be no aerial or motorized application of herbicides.

(6) Pre-application planning meetings between the permittee and the pesticide applicator must be conducted.

(7) The permittee must closely supervise application and inspect application gear

(8) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

(9) Herbicide application must be specific to individual targeted species.

(10) The permittee must conduct post-treatment inspection.

(11) No herbicide may be stored, mixed or loaded within 100 ft of any wetland that is within an IWWH.

C. *Spill Management*

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity may occur within 100 ft of any wetland that is within an IWWH.

D. *Equipment Use*

(1) Initial clearing, slash removal, and non-emergency infrastructure maintenance within an IWWH must be undertaken during frozen ground conditions whenever practicable. In the event that it is not practicable, vegetation within the IWWH must be removed using hand cutting or appropriate techniques that minimize disturbance to the maximum extent practicable.

(2) Timber mats shall be used to prevent excessive rutting and designated travel lanes shall be used to minimize unnecessary vegetation disturbance.

(3) Matting used for any construction or maintenance purposes:

(a) shall not be made from wood from ash trees (*Fraxinus spp*);
(b) shall be free of bark;
(c) shall be cleaned of soil and vegetative material by pressure washing if imported from out of State;
(d) shall not have been used in, or made from lumber from, Federally Quarantined areas as setout in 7 CFR 301 unless accompanied by the appropriate USDA certificate of treatment required for interstate transport. Said certificates will be maintained in a central filing location available for review by appropriate personnel for a period of three years after project completion, as determined by permittee;
(e) must have shipping information sufficient to identify the shipper, shipping origin, and number of mats;
(f) shall be subject to potential inspection for compliance with these standards by the Maine Forest Service and U. S. Department of Agriculture.

E. *Bird Diverters*

Where transmission lines cross the non-forested wetland components of an IWWH, the permittee must install bird diverters or aviation marker balls according to manufacturer's guidelines and applicable transmission line codes unless otherwise determined to be impracticable in consultation with MDIFW. If aviation markers are used, colors must alternate between yellow/white (for overcast conditions) and red (for clear conditions). Alternative measures may be considered only in consultation with MDIFW.

F. *Slash Management*

No accumulation of slash shall be left within fifty (50) feet, horizontal distance, of the edge of the wetland habitat. In all other areas slash shall either be removed or disposed of in such a manner that it lies on the ground and no part thereof extends more than four (4) feet above the ground. Any debris that falls into the habitat shall be removed.

G. *Invasive Species*

In order to prevent the introduction and spread of invasive plant species within and between IWWH as a result of construction, the following must occur:

a) Locations within the electric utility transmission line corridor that contain invasive plant species must be identified.
b) The application must include an invasive species vegetation monitoring plan in its integrated vegetation management plan (IVMP). The vegetation monitoring plan must have a stated objective of preventing the introduction and spread of invasive species as a result of construction.
c) Hand removal or other non-chemical methods for controlling invasive plant growth are preferred; however if determined to be ineffective, herbicide application may be an acceptable alternative method.

H. *Inspector Oversight*

The permittee must have a third-party inspector provide oversight to the clearing of IWWH habitats during construction.

Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects

March 26, 2012

***Applicability*:** This document applies to linear right-of-way projects that host Significant Vernal Pools (SVPs) as defined in Chapter 335 of Maine's Natural Resources Protection Act. The definition of SVP habitat for the purposes of the standards below includes the pool depression and the 250 ft radius around the high water boundary of the pool that lies within the ownership or control of the ROW developer.

Data Submission: *All vernal pool data assessments (significant and non-significant) by the permittee must be provided to MDIFW before or during the permit application process. Delays in submission of vernal pool data may affect the speed and efficiency of project review and permitting.*

***General Project Alignment*:** Where practicable, right-of-way alignment should be designed to avoid impacts to SVP habitat. Where full avoidance is not an option, alignments should minimize impacts to SVP habitat by siting development as close as practicable to the outside edge of the SVP habitat, and by designing alignments that do not require vegetation management within the pool and depression components of a SVP habitat. Where avoidance is not practicable, and project impacts to SVPs are realized, close adherence to the minimization standards outlined in this document should be considered a mitigating factor by MDEP when calculating partial habitat compensation requirements.

SVP Habitat Performance Standards:

A. Defining Management Boundaries:
The SVP habitat boundaries and all setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

B. ***Arboricultural Management Practices:***
(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within SVP habitats where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(3) If a powerline right-of-way crosses a SVP depression, utility poles should be spaced to minimize line sagging and maximize potential growing height of otherwise capable vegetation in the SVP depression and habitat zone.

(4) When capable vegetation within SVP habitat must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the SVP habitat. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil should be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(5) Within a SVP habitat impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

C. *Herbicide Application:*

(1) Herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.
(b) Awareness of the impacts of climatic conditions prior to application.
(c) Application prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application and administered in such a manner that drift is minimized.

(2) Products with low potential for mobility and low persistence in the environment must be selected for use in SVP habitats. When operating within SVP habitats the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,
(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) Agri-Dex,
(ii) Competitor,

(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(3) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(4) There may be no aerial or motorized application of herbicides.

(5) Pre-application planning meetings between the ROW owner or agent and pesticide applicator must be conducted.

(6) The ROW owner or agent must closely supervise and inspect all SVP habitats during application.

(7) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

(8) Herbicide application must be specific to individual targeted species.

(9) No herbicide may be stored, mixed or loaded within any SVP habitat.

(10) Herbicides should not be applied within 100 feet of SVP depressions whether there is standing water present or not during time of application.

D. ***Spill Management:***

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity may occur within a SVP habitat.

E. ***Equipment Use & Vegetation Clearing:***

(1) Heavy machinery should be avoided within the SVP depression; removal of capable species must be accomplished using hand cutting or "reach-in" techniques to cut and remove trees.

(2) The use of heavy machinery for clearing and maintenance of vegetation within the SVP habitat should be avoided between March 15 and June 15. Maintenance clearing during this period within the SVP habitat should utilize hand tools (e.g. brush hooks, chainsaws and selective herbicide applications), unless otherwise approved in consultation with MDIFW. No vegetation maintenance operations may occur within 25 feet of a vernal pool depression during this time period.

(3) To minimize rutting and ground disturbance, vegetation clearing, construction and non-emergency infrastructure maintenance within a SVP habitat by heavy machinery should be undertaken during frozen or dry ground conditions. Where possible, machinery should be deployed only on pre-existing or pre-designated trails within the SVP habitat.

(4) Matting used for any construction or maintenance purposes:

(a) shall not be made from wood from ash trees (*Fraxinus spp*);
(b) shall be free of bark;
(c) shall be cleaned of soil and vegetative material by pressure washing if imported from out of State;
(d) shall not have been used in, or made from lumber from, Federally Quarantined areas as setout in 7 CFR 301 unless accompanied by the appropriate USDA certificate of treatment required for interstate transport. Said certificates will be maintained in a central filing location available for review by appropriate Agency personnel for a period of three years after project completion, as determined by utility owner; and,
(e) must have shipping information sufficient to identify the shipper and number and shipping origin of the mats.
(f) shall be subject to potential inspection for compliance with these standards by the Maine Forest Service and U. S. Department of Agriculture.

F. *Slash Management:*

(1) No accumulation of slash shall be left within 25 feet of the edge of a SVP depression. In all other areas slash must either be distributed in such a manner that it lies on the ground and no part thereof extends more than 18 inches above the ground.

(2) Large volumes of debris (more than 5 limbs or branches) that fall into the SVP depression must be removed; such removal must occur outside of the primary egg hatching period from March 15-July 15th.

G. *Inspector Oversight:*

The permittee must have a third-party inspector provide oversight to the clearing of SVP habitats during construction.

Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that cross or abut rivers, streams, and brooks and associated riparian buffers. Maintaining vegetated riparian buffers is critical to maintain habitat conditions for a diversity of aquatic species that require cool, clean water with regular contributions of leaf fall and woody debris. For the purposes of this document, riparian buffers are defined as 100-foot natural vegetated buffers measured from the upland edge of associated fringe and floodplain wetlands on either side of the waterbody.

General Project Alignment: Where practicable, right-of-way alignment should be designed to avoid vegetation clearing within the riparian buffer. Where full avoidance is not an option, alignments should minimize the number and length of necessary waterbody crossings. The placement of structures within a riparian buffer must be avoided to the maximum extent practicable.

Defining Boundaries and Setbacks
The riparian buffer limits and setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

Riparian Buffer Performance Standards

A. Arboricultural Management Practices

(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) Where capable vegetation removal would result in less than 20% areal coverage of woody vegetation within 25-feet of the stream, saplings that do not pose an immediate threat to the conductor safety zone should be left, or topped such that 50% areal

coverage of woody vegetation persists. As shrub growth develops, sapling sized capable vegetation can be removed.

(3) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within riparian buffers where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(4) If a right-of-way crosses a riparian buffer we encourage pole spacing to minimize line sagging and maximize allowed growing height of vegetation within the riparian buffer.

(5) When capable vegetation within a riparian buffer must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the riparian buffer. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil must be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(6) Within a riparian buffer impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

B. *Herbicide Application*

(1) Herbicides may not be applied within 25-feet of any river, stream, or brook. Herbicide should be limited to hand application only within a zone of 25 to 50 feet from the edge of a stream.

(2) Elsewhere in the riparian buffer herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.
(b) Awareness of the impacts of climatic conditions prior to application.
(c) Application prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application and administered in such a manner that drift is minimized to the extent practicable.

(3) Products with low potential for mobility and low persistence in the environment must be selected for use in riparian buffers. When operating within riparian buffers the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,

(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) Agri-Dex,
(ii) Competitor,
(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(4) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(5) There may be no aerial or motorized application of herbicides.

(6) Pre-application planning meetings between the electric utility owner or agent and pesticide applicator must be conducted.

(7) The electric utility owner or agent must closely supervise and inspect all riparian buffers during application.

(8) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

(9) Herbicide application must be specific to individual targeted species.

(10) The owner or agent must conduct post-treatment inspection.

(11) No herbicide may be stored, mixed or loaded within any riparian buffer.

C. *Spill Management*

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity should occur within 100 feet of any river, stream, or brook.

D. *Equipment Use*

(1) Initial clearing within a riparian buffer must be undertaken during frozen ground conditions whenever practicable, and if not practicable, the recommendations of a third-party inspector must be followed regarding appropriate techniques to minimize disturbance to the maximum extent practicable, such as the use of travel lanes to accommodate mechanical equipment use within the riparian buffer.

(2) Unless frozen, streams must be crossed using mats or bridges. Equipment may cross streams on rock, gravel or ledge bottom so long as such a crossing does not result in bank rutting or erosion.

(3) Culverts may be installed during the construction of the temporary access roads provided that the streams to be culverted are not: Class A or AA waters, outstanding river segments, do not support salmon or other coldwater fisheries, or contain threatened or endangered species. Culverts must be installed when the stream channel is dry, the stream may be dammed and pumped around the construction site, and the culverts must be embedded six inches into the soil and sized so that the diameter is equal to 1.2 times the bank full width of the stream. The stream channel must be restored to natural conditions when the culverts are removed.

(4) Matting used for any construction or maintenance purposes:

(a) shall not be made from wood from ash trees (*Fraxinus spp*);
(b) shall be free of bark;
(c) shall be cleaned of soil and vegetative material by pressure washing if imported from out of State;
(d) shall not have been used in, or made from lumber from, Federally Quarantined areas as setout in 7 CFR 301 unless accompanied by the appropriate USDA certificate of treatment required for interstate transport. Said certificates will be maintained in a central filing location available for review by appropriate Agency personnel for a period of three years after project completion, as determined by utility owner; and,
(e) must have shipping information sufficient to identify the shipper and number and shipping origin of the mats.
(f) shall be subject to potential inspection for compliance with these standards by the Maine Forest Service and U. S. Department of Agriculture.

E. *Slash Management*

(1) No accumulation of slash shall be left within 50 feet, horizontal distance, of the top of the stream bank. In all other areas slash must either be removed or disposed of in

such a manner that it lies on the ground and no part thereof extends more than 4 feet above the ground.

(2) Any debris that falls below the normal high-water line of a stream shall be removed.

Recommended Performance Standards for Deer Wintering Areas in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that cross Deer Wintering Areas (DWA) mapped by MDIFW. Deer Wintering Areas are a critical habitat for white-tailed deer living at the northern end of their range. A DWA is the habitat where deer go to avoid harsh winter winds and deep snow. During a winter of average severity, a deer living in southern Maine will require this shelter for 35 to 70 days. In far northern Maine dependency is usually 90 to 160 days. Quality winter shelter occurs where certain landforms and forest stands meet. Overhead utility right-of-ways can fragment DWA cover or travel lanes, can provide enhanced access for predators, and can provide an important source of browse.

General Project Alignment : Where practicable, right-of-way alignment should be designed to avoid vegetation clearing within mapped DWAs. Where full avoidance is not an option, alignments should minimize fragmentation of the habitat by crossing as close to the outer edge as possible, or minimizing the length of the proposed disturbance by crossing narrow portions of the DWA.

Specific Deer Wintering Area Performance Standards

A. Defining Boundaries and Setbacks

The limits of DWAs must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

B. ***Arboricultural Management Practices***

(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. However, within DWAs, a "feathered" clearing and maintenance approach will be used. Specifically, forested areas of the ROW will be cleared in a manner that allows for a gradual increase in tree height away from the centerline, as long as it does not impinge on the safety and reliability of the transmission line. Areas under the transmission line centerline may be cleared and maintained, but as the clearing approaches the edge of the ROW, an increasing amount of taller coniferous cover will be left to allow deer the ability to travel unimpeded from browse

areas to quality cover during restrictive winter conditions. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be retained and permitted to grow within DWAs where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(3) When capable vegetation within a DWA must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the DWA. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil must be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(4) Within a DWA impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

(5) As deer frequently travel along riparian zones within DWA's a vegetated buffer at least 100 feet wide on either side of streams, rivers, or wetlands associated with a DWA should be maintained. Only capable vegetation that pose a safety or reliability issue will be removed within this buffer during construction and maintenance activities.

(6) No herbicide will be used within DWAs and maintenance activities will be preformed by hand to promote hardwood stump sprouting that provides valuable browse for wintering deer.

(7) Harvesting is encouraged during winter conditions to protect regeneration, provide a one-time but beneficial source of food for deer (tops, downed lichen, etc.), and enhance deer mobility during the operation through snow compaction by logging equipment.

C. *Spill Management*

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity should not occur within a DWA.

TRANSMISSION LINE LEASE

BETWEEN

DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BUREAU OF PARKS AND LANDS
and CENTRAL MAINE POWER COMPANY

This Lease Agreement is made by and between the State of Maine, by the Bureau of Parks and Lands, Department of Agriculture, Conservation and Forestry (hereinafter called the "Lessor"), acting pursuant to the provisions of Title 12 M.R.S.A. §1852(4), and Central Maine Power Company, a Maine corporation with its principal place of business at 83 Edison Drive, Augusta, Maine (hereinafter called "Lessee"). For the considerations hereinafter set forth, the Lessor hereby leases to Lessee, and Lessee hereby takes from the Lessor, the non-exclusive use of that portion of the West Forks Plantation and Johnson Mountain Township (T2 R6 BKP WKR) Maine Public Reserved Lands in Somerset County, Maine described in Exhibit "A" and shown on Exhibit "B" attached hereto and incorporated herein, being a three hundred (300) foot wide by approximately one mile long transmission line corridor located on a portion of the aforementioned Maine Public Reserved Lands. The described transmission line corridor, together with the improvements now or hereafter to be placed thereon, is hereinafter referred to as the "Property" or "Premises," and is subject to the following terms and conditions:

1. Term:

a. This lease shall be in effect from the date of execution of this instrument for a term of twenty-five (25) years and, at no less than 5 year intervals, the term of this lease may be extended by mutual agreement for additional years as will grant Lessee a remaining lease term totaling no more than twenty-five (25) years, so long as Lessee is in compliance with the conditions of this lease. Lessee shall not request a lease term extension any more often than once every five years. Notice of any lease extension shall be given to Lessor at least six (6) months prior to the expiration of any initial term or renewal period.

b. Lessor reserves the right to terminate this Lease at any time during the term hereof to the extent permitted under the provisions contained in paragraph 13 Default.

c. Lessee has the right to terminate this Lease upon at least ninety (90) days prior written notice to Lessor, or such lesser notice period as agreed to by Lessor in writing.

d. Any notice required by this paragraph, whether by Lessee or Lessor, shall be sent postage pre-paid, registered or certified mail, return receipt requested, to the party at the address set forth in paragraph 24.

2. Rent. Lessee shall pay to the Lessor rental as follows:

An annual payment of $1,400.00. The first payment shall be due on the date of execution of this lease (the "Initial Payment") and subsequent annual payments shall be made on or before December first of each following year. Lessor or Lessee may, within the first twelve months of the lease and at either Lessor's or Lessee's sole discretion, commission an appraisal of the Premises. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. Lessee agrees to pay any additional value above the Initial Payment indicated by the appraisal and the cost of the appraisal. The annual payment shall be adjusted each year in an amount not to exceed the average increase in the Consumer Price Index as published by the Bureau of Labor Statistics, United States Department of Labor over the preceding one year period.

In addition, Lessee shall pay to Lessor the negotiated price of the timber present on the Premises based on mill scale and stumpage value at time the corridor is harvested for the construction of the utility corridor.

3. Use. The Property shall be used by the Lessee as follows: to erect, construct, reconstruct, replace, remove, maintain, operate, repair, upgrade, and use poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity ("Facilities"), all as the Lessee, its successors and assigns, may from time to time require upon, along, and across said Property; to enter upon the Property at any time with personnel and conveyances and all necessary tools and machinery to maintain the Premises and facilities; the non-exclusive right of ingress to and egress from the Premises over and across the land of the Lessor; to transmit electricity and communication, as conditioned below, over said wires, cables, or apparatus installed on Lessee's facilities. Lessee shall own all communication facilities and such facilities shall be for Lessee's use in its business as a public utility. In the event Lessee desires to provide capacity to others on Lessee's communication facilities, Lessee shall first obtain Lessor's written approval, which shall not be unreasonably withheld. Lessor may adjust the rent at such time as Lessee provides communication capacity to others. The rent adjustment is to be determined by an appraisal paid for by Lessee. Both Lessor and Lessee shall agree on the Appraiser to be assigned the appraisal assignment. Lessee shall not sub-lease or contract the communication facilities for any other commercial use. The Lessor further grants to said Lessee the right to establish any and all safety and reliability regulations applicable to said transmission line corridor which said Lessee deems necessary and proper for the safe and reliable construction and maintenance of said structures, wires, and apparatus and for the transmission of electricity.

4. Quiet Enjoyment. So long as Lessee pays the rent, performs all of its non-monetary obligations, and otherwise complies with the provisions of this Lease, the Lessee's possession of the Premises for its intended use will not be disturbed by the Lessor, its successors and assigns except as otherwise provided under the terms of this Lease. Notwithstanding any provision to the contrary herein, Lessor reserves the right to enter onto the Premises at any time and from time to time to inspect the Premises.

5. Access:

a. It is agreed by the parties to this Lease that Lessor is under no obligation to construct or maintain access to the Premises, notwithstanding any provisions of any federal, state and local law to the contrary. However, the Lessee shall be allowed to cross Lessor's abutting land by using Lessor's Forest Management Roads for access to the Premises for construction, maintenance and repairs, subject to reasonable restrictions and regulations imposed by Lessor, and the rights of others using said roads. Upon reasonable advance notice to Lessee, Lessor reserves the right to close, lock or otherwise restrict access along or through the Forest Management Roads at any time it appears reasonably necessary to protect the safety of persons or property. Such situations include, but are not limited to, spring mud season or periods of high fire danger. Lessee shall immediately repair any damage to the road caused by Lessee. Lessor is under no obligation to provide maintenance to the road. If Lessee wishes to undertake performing repairs or upgrades to the Forest Management Roads, Lessee must acquire prior written approval from Lessor. Lessee shall acquire prior written approval for the construction or use of any other access location across Lessor's land abutting the Premises which approval shall not be unreasonably withheld, delayed, or conditioned.

b. The Lessor expressly reserves the right for itself or its guests, servants, or agents to pass and repass over the described Premises at any and all times with machinery and equipment necessary for the operation or conduct of Lessor's uses as such uses may from time to time exist, provided that: said uses will comply with the above referenced safety regulations and any applicable state law, and will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies; that the Lessor shall provide Lessee with at least three business days prior written notice if Lessor will be on the Premises with construction or logging equipment; and that such use will not unreasonably interfere with the rights of Lessee herein conveyed.

6. Lessee Covenants. The Lessee covenants as follows:

a. No buildings, either permanent or temporary, may be constructed or placed upon the described Premises, except temporary structures during construction of the Facilities, such as field trailers.

b. Crossing mats for stream or wetland crossings shall not be made of ash or hemlock, so as to avoid introduction of invasive pests associated with these species.

c. No hazardous or toxic waste substance or material, residual pesticides or fertilizers, other than organic compost, shall be used or kept upon the Premises or any portion thereof, nor shall any livestock or poultry be kept temporarily or permanently thereon. Pesticides, herbicides, and chemical defoliants registered for use in Maine may be applied to the Premises only after acquiring prior written approval from Lessor and only by trained applicators working under the supervision of applicators

licensed by the State of Maine in formulations and dosages approved by the Environmental Protection Agency and Lessor. One month prior to all pesticide applications, Lessee shall provide information to Lessor, including, but not limited to pesticides, herbicides, and chemical defoliants to be used, dates and methods of application, application locations and reasons for use.

d. There shall be no vegetation removal that would result in less than 50% aerial coverage of woody vegetation and stream shading within 25 feet of a stream.

e. There shall be no vegetation maintenance or disturbance within a 50-foot radius around the high water boundary of a significant vernal pool from March 15 – July 15; provided, however, that Lessee may take all appropriate actions with regards to vegetation management to ensure that Lessee is in compliance with all federal and state laws, rules and regulations imposed upon Lessee as the owner and operator of the Facilities.

f. Lessee shall not make any strip or waste of the Leased Premises or of any other lands of Lessor. Vegetation clearing within the Leased Premises for Lessee's Facilities shall be limited to standards approved by the Maine Public Utilities Commission and shall encourage a ground cover of woody species with a maximum mature height approaching but not exceeding15 feet. Lessee shall make every effort to minimize clearings and cutting of vegetation.

g. Lessee acknowledges that lease of the Premises by the Bureau of Parks and Lands, Department of Agriculture, Conservation and Forestry is unique, and that in authorizing the Lease under 12 M.R.S. § 1852(4)(A), Lessor requires that Lessee shall make every reasonable effort within the leased Premises to be in conformance with the Maine Department of Inland Fisheries and Wildlife "Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects", "Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects", and "Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects", all dated March 26, 2012, which copies are attached to this lease, or the publication's most current version.

h. Lessee shall not kindle any outside fires on the Premises or any other land of the Lessor, except in accordance with applicable federal, state and local regulations, and hereby agrees to assist with any means at Lessee's disposal in putting out fires occurring on the Premises or adjacent areas, and to report promptly such fires to Lessor or its representative and to the appropriate authorities.

i. Lessee agrees to maintain the Premises in a neat and sanitary manner and to provide for proper disposal of all garbage, trash, septic (for purposes of this Lease, "septic" shall mean, but is not limited to, sewage, wash water, black water, gray water and slop water), and other waste in compliance with all applicable federal, state and local laws and in a manner so as not to be objectionable or detract from the aesthetic values of the general area. Lessee shall not discharge any untreated or partially treated sewage or other waste materials directly or indirectly into any body of water including but not limited to, any wetland, stream, river, lake, pond, or

groundwater. In addition, Lessee covenants that it bears the responsibility for any noncompliance with all federal, state and local laws and regulations governing septic and other waste disposal resulting from Lessee's activities and Lessee shall indemnify and hold harmless Lessor from and against any and all actions, suits, damages and claims by any party by reason of noncompliance by Lessee with such laws and regulations. Such indemnification shall include all Lessor's costs, including, but not limited to reasonable attorney fees.

j. No non-forest waste including, but not limited to, broken equipment, spilt fuels, fluids and lubricants, fluid and lubricant containers, equipment parts, tires, debris, garbage, or trash shall be deposited, discharged, dumped or buried upon the Premises. Forest woody waste (e.g., wood chips and stumps) may be disposed of on the premises, but may not be disposed of in piles. Stumps shall be buried in "stump dump" holes, except that small numbers of stumps (four or less) may be left aboveground. All non-forest waste shall be disposed of legally and not on property of Lessor.

k. Lessee shall not build permanent roads on the Premises without obtaining prior specific written permission from the Lessor; provided, however, that Lessee may construct a minimal number of temporary roads and trails to facilitate the construction of the transmission line (tree clearing, pole setting, wiring). At the time construction is completed, all temporary roads and trails shall be dismantled and put to bed or converted to permanent access trails. All access trails shall be built to Best Management Practices (BMP) standards as shown in the "Maine Motorized Trail Construction and Maintenance Manual" written by the Bureau of Parks and Lands Off-Road Vehicle Division, dated May 2011 and all roads shall be built pursuant to those Best Management Practices (BMPs) standards pertaining to forest management and road construction practices set forth in the publication entitled, "Best Management Practices for Forestry: Protecting Maine's Water Quality," prepared by the Maine Department of Agriculture, Conservation and Forestry, Maine Forest Service, in such publication's most current version at the time of the grant of this lease, and as the same may be further amended, supplemented or replaced after the date of the execution of this lease.

   Prior to start of construction, Lessee shall provide an Access and Maintenance Plan to Lessor for review and approval. This plan shall provide details and maps on proposed roads, permanent and temporary, access points, temporary trails, inspection, and maintenance access, and descriptions of any proposed bridges, temporary or permanent.

l. Natural Plant Community, wetland and Significant Vernal Pool field surveys of the Premises must be conducted by Lessee or Lessee's designee prior to any construction on the Premises. Lessee shall send to Lessor and to the Maine Department of Inland Fisheries and Wildlife a copy of all completed surveys before commencing any construction on the Premises.

m. Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises. Lessee further shall

not construct, alter or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 30 days in which to cure such failure.

n. In the event of the following:

a) Lessee constructs an electric transmission line on the Premises; and
b) Lessee has determined, in its sole discretion, to rebuild the existing transmission line (the "Jackman Tie Line") located on that part of the existing 100-foot wide utility corridor described in a lease dated July 9, 1963 and recorded in the Somerset County Registry of Deeds, Book 679, Page 37 (the "Jackman Tie Line Lease") that is located westerly of the Premises and easterly of Route 201; and
c) Lessee receives all permits and regulatory approvals necessary to rebuild the line in such new location including, but not limited to, approvals of the Maine Public Utilities Commission and the Maine Department of Environmental Protection; then

Lessee agrees to relocate said Jackman Tie Line from the above described portion of the Jackman Tie Line Lease to a location on the Premises and such other corridor as acquired by the Lessee from others. Upon completion of any such relocation of the Jackman Tie Line or its functional replacement pursuant to this section and removal of Lessee's facilities from that portion of the Jackman Tie Line Lease lying westerly of the Premises, Lessor and Lessee agree to amend the Jackman Tie Line Lease to delete from the lease area that portion of the Jackman Tie Line Lease lying westerly of the Premises. All other terms and conditions of the Jackman Tie Line Lease shall remain in full force and effect. The term "rebuild" as used in this paragraph, shall not include routine repair or replacement of poles, crossarms, insulators, braces or conductor.

7. Liability and Insurance.

a. Lessee shall without unreasonable delay inform Lessor of all risks, hazards and dangerous conditions caused by Lessee which are outside of the normal scope of constructing and operating the Facilities of which Lessee becomes aware of with regards to the Premises. Lessee assumes full control of the Premises, except as is reserved by Lessor herein, and is responsible for all risks, hazards and conditions on the Premises caused by Lessee.

b. Except for the conduct of Lessor and Lessor's guests and agents, Lessor shall not be liable to Lessee for any injury or harm to any person, including Lessee, occurring in or on the Premises or for any injury or damage to the Premises, to any property of the Lessee, or to any property of any third person or entity. Lessee shall indemnify and defend and hold and save Lessor harmless, including, but not limited

to costs and attorney fees, from: (a) any and all suits, claims and demands of any kind or nature, by and on behalf of any person or entity, arising out of or based upon any incident, occurrence, injury, or damage which shall or may happen in or on the Premises that is caused by the Lessee or its Agents; and (b) any matter or thing arising out of the condition, maintenance, repair, alteration, use, occupation or operation of the Premises, the installation of any property thereon or the removal of any property therefrom that is done by the Lessee or its Agents. Lessee shall further indemnify Lessor against all actions, suits, damages, and claims by whoever brought or made by reason of the nonobservance or nonperformance of Lessee or its Agents of: (a) any obligation under this Lease; or (b) any federal, state, local law or regulation pertaining to Lessee's use of the Premises.

c. The Lessee shall obtain and keep in force, for the duration of this lease, a liability policy issued by a company fully licensed or designated as an eligible surplus line insurer to do business in this State by the Maine Department of Professional & Financial Regulation, Bureau of Insurance, which policy includes the activity to be covered by this Lease with adequate liability coverage over at least one million dollars for each occurrence and two million dollars in annual aggregate in general commercial liability coverage to protect the Lessee and the Lessor from suits for bodily injury and damage to property. Nothing in this provision, however, is intended to waive the immunity of the Lessor. Upon execution of this Lease, the Lessee shall furnish the Lessor with a certificate of insurance as verification of the existence of such liability insurance policy.

8. Lessee's Liability for Damages. Lessee shall be responsible to Lessor for any damages caused directly or indirectly by Lessee or its guests, servants or agents, including, but not limited to, interference or meddling with any tools, machinery, equipment, gates, buildings, furniture, provisions or other property of the Lessor on the Premises, its agents, employees or guests.

9. Tax Proration. Lessee shall pay when due all taxes levied on the personal property and improvements constructed by Lessee and located on the Premises. Lessor shall be responsible for any real property taxes levied on the Premises based on unimproved land. Lessor shall have no ownership or other interest in any of the Facilities on the Property and Lessee may remove any or all of the Facilities at any time.

10. Lease Assignment, Sublease and Colocation: Lessee shall not assign or sublease in whole or part without prior written consent of Lessor, which consent shall not be unreasonably withheld. Lessor may lease the Premises for other compatible uses and colocation of other utilities so long as such rights do not extend to access to the Facilities, said uses will not prohibit the Lessee from complying with the conditions or requirements imposed by permitting agencies, and such use will not interfere with the rights herein conveyed, including the right to build such additional Facilities as may be accommodated on the Premises using transmission line spacing standards approved by the Maine Public Utilities Commission.

11. Lessee's Removal of Structures: Lessee must obtain Lessor's advance written consent, which consent shall not be unreasonably withheld, delayed, or conditioned, to the method of removal before any structures or improvements are removed from the Premises.

12. Surrender. Upon termination of this Lease for any reason, Lessee shall deliver the Premises to Lessor peaceably, without demand, and in reasonably good condition clear of all trash and debris, unusable equipment, unregistered vehicles and abandoned equipment and structures, located on the Premises by Lessee or its Agents. If such trash and debris and other unusable equipment, unregistered vehicles, and abandoned equipment and structures are not removed within one hundred eighty days (180) days of the termination of this Lease, the Lessor shall thereafter have the right to remove it and Lessee shall reimburse Lessor for the costs of such removal and disposal. Any other personal property, fixture, or structure on the Premises belonging to Lessee shall be removed by Lessee, unless Lessor requests in writing, that the other personal property, fixture, or structure may remain and Lessee agrees in writing not to remove it. If the Lessee fails to remove such other personal property, fixture, or structure such items shall be deemed the property of the Lessor two hundred and ten days (210) days after termination of the Lease and the Lessor shall thereafter have the right to remove it and charge the Lessee with the costs of such removal and disposal. In the event that any of this other personal property, fixtures, or structures on the Premises are incapable of being removed within one hundred eighty days (180) days, Lessee may be allotted up to one year to remove the items, with prior written approval from Lessor, which approval shall not be unreasonably, delayed, or conditioned. Any holding over by Lessee without Lessor's prior written consent shall be considered a tenancy at sufferance.

13. Default.

a. The following constitutes a default under this Lease: (1) Lessee's failure to perform any of its monetary or nonmonetary obligations under this Lease; (2) the filing of any bankruptcy or insolvency petition by or against Lessee or if Lessee makes a general assignment for the benefit of creditors which is not resolved or withdrawn within 30 days of such petition being filed; (3) an execution, lien, or attachment issued against the Lease, the Premises, or Lessee's property on the Premises, unless Lessee provides Lessor with satisfactory assurances and evidence that such execution, lien, or attachment will be released within a reasonable time not to exceed ninety (90) days, unless a shorter period of time is provided for by any applicable law or proceeding for the removal thereof, in which case the more restrictive time limitation applies; (4) the assignment or sublease of this lease to any third party without Lessor's prior written consent; or (5) the violation of any state, federal or local law, rule, regulation, or ordinance; or (6) Lessee's abandonment of the leased premises.

b. Upon the occurrence of any such event of default and subject to any applicable cure period as defined in paragraph 6(m), above, Lessor may, in addition to (and not instead of) any other remedies available at law or in equity, terminate this lease with notice or demand to Lessee and enter and take possession of the leased premises. Lessee shall be liable to Lessor for loss and expense, including reasonable attorney fees, incurred by reason of such default or termination hereof Lessor will provide Lessee with written notice of an event or occurrence of default under paragraph 13(a)(1) and Lessee shall have a reasonable period of time, as determined by Lessor, to cure said default which period shall not exceed thirty (30) days; provided, however, that if Lessee satisfies to Lessor that Lessee has

undertaken the appropriate actions to cure said default and such default has not been cured within the said time permitted, the Lessor may exercise its sole discretion to extend the cure period.

14. Statutory Authority Over Public Lands. Lessor shall have the right to request that this Lease be amended from time to time and throughout the term of this lease in the event that any Lease term is found not to comply with Maine state law regarding the lease of property under 12 M.R.S. § 1852(4). Lessor shall send notice to Lessee of the proposed revision. Upon receipt of such notice, Lessee shall have the option to either terminate the Lease by notifying Lessor in writing within thirty (30) days of receipt of notice or negotiate an amendment to the Lease in order to bring such term in compliance with said state law. Except as provided in this Lease, neither Party shall have the right to terminate this lease unless the resulting non-compliance constitutes a default under Section 13 hereof, in which case Section 13 shall govern.

15. Mechanics Lien. If any notice is filed at the county registry of deeds of a builder's, supplier's or mechanic's lien on the Premises, arising out of any work performed by or on behalf of Lessee, Lessee shall cause such lien to be discharged or released immediately and shall indemnify Lessor against any such claim or lien, including all costs and attorney fees that Lessor may incur in connection with the same.

16. Succession; No Partnership. This Lease shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors in interest and assigns of the parties hereto. Nothing in this agreement shall be construed to create an association, joint venture, trust or partnership covenant, obligation, or liability on or with regards to any of the parties to this agreement.

17. Waiver. Any consent, express or implied, by Lessor to any breach by Lessee of any covenant or condition of this Lease shall not constitute a waiver by the Lessor of any prior or succeeding breach by Lessee of the same or any other covenant or condition of this Lease. Acceptance by Lessor of rent or other payment with knowledge of a breach or default by Lessee under any term on this Lease shall not constitute a waiver by Lessor of such breach or default.

18. Force Majeure. Except as expressly provided herein, there shall be no abatement, diminution, or reduction of the rent or other charges payable by Lessee hereunder, based upon any act of God, any act of the enemy, governmental action, or other casualty, cause or happening beyond the control of the parties hereto.

19. Eminent Domain. In the event that the Premises or any portion thereof shall be lawfully condemned or taken by any public authority, Lessor may, in its discretion, elect either: (a) to terminate the Lease; or (b) to allow this Lease to continue in effect in accordance with its terms, provided, however, that a portion of the rent shall abate equal to the proportion of the Premises so condemned or taken. All condemnation proceeds shall be Lessor's sole property without any offset for Lessee's interests hereunder.

20. Holding Over. If Lessee holds over after the termination of this Lease, said hold over shall be deemed to be a trespass.

21. Lessor Protection. Lessor expressly retains and nothing contained herein shall be construed as a release or limitation by Lessor of any and all applicable liability protections under Maine law. Lessor specifically retains any and all protections provided under Maine law to owners of land, including but not limited to those provided under the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118.

22. Cumulative Remedies. The remedies provided Lessor by this Lease are not exclusive of other remedies available by current or later existing laws.

23. Entire Agreement. This Lease sets forth all of the covenants, promises, agreements, conditions and understandings between Lessor and Lessee governing the Premises. There are no covenants, promises, agreements, conditions, and understandings, either oral or written, between them other than those herein set forth. Except as herein provided, no subsequent alterations, amendments, changes, or additions to this Lease shall be binding upon the Lessor or Lessee unless and until reduced to writing and signed by both parties.

24. Notices. All notice, demands, and other **communications** required hereunder shall be in writing and shall be given by first class mail, postage prepaid, registered or certified mail, return receipt requested; if addressed to Lessor, to:

State of Maine, Department of Agriculture, Conservation and Forestry, Division of Parks and Lands,
22 State House Station, Augusta, ME 04333-0022, Attn: Director;

and if to Lessee, to;

Central Maine Power Company, Real Estate Services
83 Edison Drive, Augusta, Maine 04364, Attn. Supervisor, Real Estate

25. General Provisions:

a. Governing Law. This Lease shall be construed and interpreted in accordance with the laws of the State of Maine.

b. Savings Clause. The invalidity or unenforceability of any provision of this Lease shall not affect or impair the validity of any other provision. To the extent any provision herein is inconsistent with applicable state statute, the statute is deemed to govern.

c. Paragraph Headings. The paragraph titles herein are for convenience only and do not define, limit, or construe the contents of such paragraph.

IN WITNESS WHEREOF, the parties have hereunto set their hands the day and year first above written. For purposes of this Lease, a facsimile signature shall be deemed an original.

Lessor:

STATE OF MAINE
Department of Agriculture, Conservation, and Forestry
Bureau of Parks and Lands

By: Thomas Morrison
Thomas Morrison Acting Director

Dated: Dec 15, 2014

David Rodrigues
Witness

Lessee:

CENTRAL MAINE POWER COMPANY

BY: Mary R. Smith
Mary R. Smith, Authorized Representative

Dated: 12-8-14

Roberta B. Holahan
Witness

ROBERTA B. HOLAHAN
Notary Public, State of New York
No. 01HO6040322
Qualified in Monroe County
Commission Expires April 17, 2018

EXHIBIT A

Leased Premises
Department of Agriculture, Conservation and Forestry
Bureau of Parks and Lands
and
Central Maine Power Company

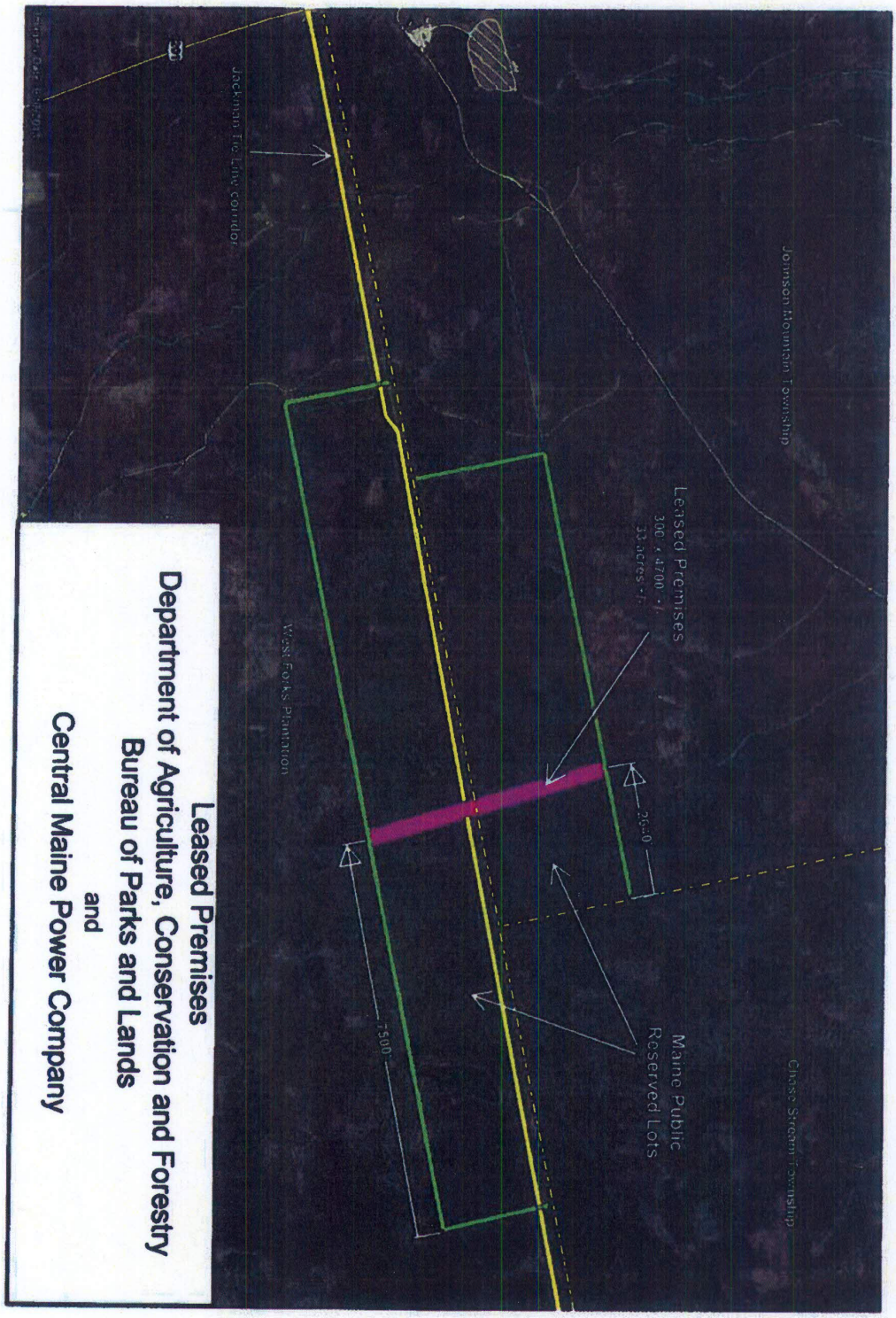
A non-exclusive lease over a portion of the Lessor's land located in Johnson Mountain Township (T2 R6 BKP WKR), and West Forks Plantation, Somerset County, Maine, more particularly described as follows:

A strip of land 300 feet in width beginning at the southerly line of the Maine Public Reserved Lot located on the northerly line of West Forks Plantation and extending northerly a distance of 4700 feet, more or less, to the northerly line of the Maine Public Reserved Lot located on the common line between West Forks Plantation and Johnson Mountain Township (T2 R6 BKP WKR). The centerline of said strip beginning at a point on the southerly line of the Lessor's land at a point that is 7,500 feet westerly of the southeasterly corner of said Lot in West Forks Plantation; thence on a bearing of 342.2 degrees a distance of 4,700 feet, more or less, to a point on the northerly line of said Lot in Johnson Mountain Township, said point being 2640 feet, more or less, westerly of the northeast corner of said Lot and the east line of Johnson Mountain Township; said leased area containing 33 acres, more or less (the "Leased Premises").

The description of the Leased Premises is based on a current conceptual design of the Lessee's proposed transmission line corridor and may be subject to modification by Lessee to minimize impacts on environmentally sensitive areas. Lessor and Lessee agree that upon completion of environmental assessments, final engineering, and if applicable, any survey prepared by Lessee, Lessee will prepare a final description of the Leased Premises to be incorporated into this Lease. Lessor and Lessee further agree that the final alignment of the transmission line corridor will be substantially as described herein and any significant deviation from the above described line will be agreed to in writing by Lessor and Lessee.

Seller's Initials _____

Exhibit B



Leased Premises
Department of Agriculture, Conservation and Forestry
Bureau of Parks and Lands
and
Central Maine Power Company

Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that host Significant Vernal Pools (SVPs) as defined in Chapter 335 of Maine's Natural Resources Protection Act. The definition of SVP habitat for the purposes of the standards below includes the pool depression and the 250 ft radius around the high water boundary of the pool that lies within the ownership or control of the ROW developer.

Data Submission: *All vernal pool data assessments (significant and non-significant) by the permittee must be provided to MDIFW before or during the permit application process. Delays in submission of vernal pool data may affect the speed and efficiency of project review and permitting.*

General Project Alignment: Where practicable, right-of-way alignment should be designed to avoid impacts to SVP habitat. Where full avoidance is not an option, alignments should minimize impacts to SVP habitat by siting development as close as practicable to the outside edge of the SVP habitat, and by designing alignments that do not require vegetation management within the pool and depression components of a SVP habitat. Where avoidance is not practicable, and project impacts to SVPs are realized, close adherence to the minimization standards outlined in this document should be considered a mitigating factor by MDEP when calculating partial habitat compensation requirements.

SVP Habitat Performance Standards:

A. Defining Management Boundaries:

The SVP habitat boundaries and all setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

B. ***Arboricultural Management Practices:***

(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within SVP habitats where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(3) If a powerline right-of-way crosses a SVP depression, utility poles should be spaced to minimize line sagging and maximize potential growing height of otherwise capable vegetation in the SVP depression and habitat zone.

(4) When capable vegetation within SVP habitat must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the SVP habitat. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil should be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(5) Within a SVP habitat impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

C. ***Herbicide Application:***

(1) Herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.
(b) Awareness of the impacts of climatic conditions prior to application.
(c) Application prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application and administered in such a manner that drift is minimized.

(2) Products with low potential for mobility and low persistence in the environment must be selected for use in SVP habitats. When operating within SVP habitats the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,
(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) Agri-Dex,
(ii) Competitor,

(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(3) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(4) There may be no aerial or motorized application of herbicides.

(5) Pre-application planning meetings between the ROW owner or agent and pesticide applicator must be conducted.

(6) The ROW owner or agent must closely supervise and inspect all SVP habitats during application.

(7) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

(8) Herbicide application must be specific to individual targeted species.

(9) No herbicide may be stored, mixed or loaded within any SVP habitat.

(10) Herbicides should not be applied within 100 feet of SVP depressions whether there is standing water present or not during time of application.

D. ***Spill Management:***

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity may occur within a SVP habitat.

E. ***Equipment Use & Vegetation Clearing:***

(1) Heavy machinery should be avoided within the SVP depression; removal of capable species must be accomplished using hand cutting or "reach-in" techniques to cut and remove trees.

(2) The use of heavy machinery for clearing and maintenance of vegetation within the SVP habitat should be avoided between March 15 and June 15. Maintenance clearing during this period within the SVP habitat should utilize hand tools (e.g. brush hooks, chainsaws and selective herbicide applications), unless otherwise approved in consultation with MDIFW. No vegetation maintenance operations may occur within 25 feet of a vernal pool depression during this time period.

(3) To minimize rutting and ground disturbance, vegetation clearing, construction and non-emergency infrastructure maintenance within a SVP habitat by heavy machinery should be undertaken during frozen or dry ground conditions. Where possible, machinery should be deployed only on pre-existing or pre-designated trails within the SVP habitat.

(4) Matting used for any construction or maintenance purposes:

(a) shall not be made from wood from ash trees (*Fraxinus spp*);
(b) shall be free of bark;
(c) shall be cleaned of soil and vegetative material by pressure washing if imported from out of State;
(d) shall not have been used in, or made from lumber from, Federally Quarantined areas as setout in 7 CFR 301 unless accompanied by the appropriate USDA certificate of treatment required for interstate transport. Said certificates will be maintained in a central filing location available for review by appropriate Agency personnel for a period of three years after project completion, as determined by utility owner; and,
(e) must have shipping information sufficient to identify the shipper and number and shipping origin of the mats.
(f) shall be subject to potential inspection for compliance with these standards by the Maine Forest Service and U. S. Department of Agriculture.

F. *Slash Management:*

(1) No accumulation of slash shall be left within 25 feet of the edge of a SVP depression. In all other areas slash must either be distributed in such a manner that it lies on the ground and no part thereof extends more than 18 inches above the ground.

(2) Large volumes of debris (more than 5 limbs or branches) that fall into the SVP depression must be removed; such removal must occur outside of the primary egg hatching period from March 15-July 15th.

G. *Inspector Oversight:*

The permittee must have a third-party inspector provide oversight to the clearing of SVP habitats during construction.

Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that cross or abut mapped moderate or high value Inland Waterfowl and Wading Bird Habitats (IWWH) as defined in Chapter 335 of Maine's Natural Resources Protection Act. By definition IWWH includes the non-forested wetland complex and a 250 ft wide zone surrounding the wetland complex. Maps of IWWH polygons regulated under Chapter 335 are available through the Maine Department of Environmental Protection or by contacting our offices.

General Project Alignment Recommendations: Where practicable, right-of-way alignment should be designed to avoid vegetation clearing within mapped IWWH areas. Where full avoidance is not an option, alignments must minimize fragmentation of the habitat by crossing as close to the outer edge as possible, or minimizing the length of the proposed disturbance by crossing narrow portions of the IWWH. The placement of structures within an IWWH must be avoided to the maximum extent practicable.

Defining Boundaries and Setbacks
The limits of an IWWH and setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

Specific Inland Waterfowl and Wadingbird Habitat Performance Standards

A. *Arboricultural Management Practices*
(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) Where the practice is possible, the MDIFW encourages topping of large diameter (>12 inches diameter at breast height) capable trees to create snags to support waterfowl nesting cavities.

(3) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within an IWWH where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(4) If a right-of-way crosses an IWWH we encourage close pole spacing to minimize line sagging and maximize allowed growing height of vegetation within the IWWH.

(5) When capable vegetation within an IWWH must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the IWWH. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil must be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(6) Within an IWWH impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

(7) No clearing or vegetation maintenance work shall occur within the IWWH during the peak waterfowl and wading bird nesting season (April 15th to July 15th) unless approved in consultation with MDIFW.

(8) Provided they do not present a safety hazard and are naturally present, the permittee must leave undisturbed a minimum of 2-3 snags per 500 linear feet of corridor to provide nesting habitat for waterfowl. Snags must be a minimum of 12 inches diameter at breast height, larger diameter snags are preferred.

B. Heron Colony Surveys

Prior to initial transmission line clearing, the permittee must complete field investigations for the presence heron colonies within or immediately adjacent to IWWH. Surveys for great blue heron (State Special Concern) colonies must be conducted between April 20th and May 31st. In northern and downeast Maine where nesting tends to initiate later, surveys must not begin until the beginning of May. If heron colonies are noted, the permittee shall contact MDIFW to discuss avoidance measures and project timing considerations that would best minimize impacts to nesting herons.

C. *Herbicide Application*

(1) Herbicides may not be applied within 25-feet of any wetland (including forested wetlands) that is within an IWWH.

(2) Elsewhere in the IWWH herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically

amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.

(b) Awareness of the impacts of climatic conditions prior to application.

(c) Application is prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application. The application must be administered such that drift is minimized to the maximum extent practicable.

(3) Products with low potential for mobility and low persistence in the environment must be selected for use in riparian buffers. When operating within an IWWH the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,
(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfuron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:

(i) Agri-Dex,
(ii) Competitor,
(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(4) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(5) There may be no aerial or motorized application of herbicides.

(6) Pre-application planning meetings between the permittee and the pesticide applicator must be conducted.

(7) The permittee must closely supervise application and inspect application gear

(8) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

E. *Bird Diverters*

Where transmission lines cross the non-forested wetland components of an IWWH, the permittee must install bird diverters or aviation marker balls according to manufacturer's guidelines and applicable transmission line codes unless otherwise determined to be impracticable in consultation with MDIFW. If aviation markers are used, colors must alternate between yellow/white (for overcast conditions) and red (for clear conditions). Alternative measures may be considered only in consultation with MDIFW.

F. *Slash Management*

No accumulation of slash shall be left within fifty (50) feet, horizontal distance, of the edge of the wetland habitat. In all other areas slash shall either be removed or disposed of in such a manner that it lies on the ground and no part thereof extends more than four (4) feet above the ground. Any debris that falls into the habitat shall be removed.

G. *Invasive Species*

In order to prevent the introduction and spread of invasive plant species within and between IWWH as a result of construction, the following must occur:

a) Locations within the electric utility transmission line corridor that contain invasive plant species must be identified.
b) The application must include an invasive species vegetation monitoring plan in its integrated vegetation management plan (IVMP). The vegetation monitoring plan must have a stated objective of preventing the introduction and spread of invasive species as a result of construction.
c) Hand removal or other non-chemical methods for controlling invasive plant growth are preferred; however if determined to be ineffective, herbicide application may be an acceptable alternative method.

H. *Inspector Oversight*

The permittee must have a third-party inspector provide oversight to the clearing of IWWH habitats during construction.

Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects

March 26, 2012

Applicability: This document applies to linear right-of-way projects that cross or abut rivers, streams, and brooks and associated riparian buffers. Maintaining vegetated riparian buffers is critical to maintain habitat conditions for a diversity of aquatic species that require cool, clean water with regular contributions of leaf fall and woody debris. For the purposes of this document, riparian buffers are defined as 100-foot natural vegetated buffers measured from the upland edge of associated fringe and floodplain wetlands on either side of the waterbody.

General Project Alignment: Where practicable, right-of-way alignment should be designed to avoid vegetation clearing within the riparian buffer. Where full avoidance is not an option, alignments should minimize the number and length of necessary waterbody crossings. The placement of structures within a riparian buffer must be avoided to the maximum extent practicable.

Defining Boundaries and Setbacks
The riparian buffer limits and setbacks defined in subsections of this document must be clearly marked in the field prior to the start of construction or subsequent maintenance work.

Riparian Buffer Performance Standards

A. Arboricultural Management Practices

(1) Capable vegetation may be removed and controlled within the transmission line corridor portions of the development. Capable vegetation is defined as species that are capable of growing to a height that would reach the conductor safety zone. Most tree species in Maine are defined as capable vegetation.

(2) Where capable vegetation removal would result in less than 20% areal coverage of woody vegetation within 25-feet of the stream, saplings that do not pose an immediate threat to the conductor safety zone should be left, or topped such that 50% areal

coverage of woody vegetation persists. As shrub growth develops, sapling sized capable vegetation can be removed.

(3) When terrain conditions permit (e.g., ravines and narrow valleys) capable vegetation must be permitted to grow within riparian buffers where maximum growing height can be expected to remain below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, pole-to-pole.

(4) If a right-of-way crosses a riparian buffer we encourage pole spacing to minimize line sagging and maximize allowed growing height of vegetation within the riparian buffer.

(5) When capable vegetation within a riparian buffer must be removed for the purpose of construction, natural re-generation of non-capable woody vegetation must be allowed within the riparian buffer. To facilitate the regeneration of natural vegetation, the contractor must separate the topsoil from the mineral soil when excavating during project construction. The excavated topsoil must be returned to its original place and position in the landscape and appropriate erosion control methods utilized.

(6) Within a riparian buffer impacts to scrub-shrub and herbaceous vegetation, and other non-capable species must be minimized to the maximum extent practicable.

B. *Herbicide Application*

(1) Herbicides may not be applied within 25-feet of any river, stream, or brook. Herbicide should be limited to hand application only within a zone of 25 to 50 feet from the edge of a stream.

(2) Elsewhere in the riparian buffer herbicide usage must comply with all label requirements and standards established by the Maine Board of Pesticides Control (MBPC), as periodically amended. Herbicide restrictions and approvals are governed by MBPC. Some key standards include the following:

(a) Use of only trained applicators working under licensed supervisors.
(b) Awareness of the impacts of climatic conditions prior to application.
(c) Application prohibited when wind speed exceeds 15 MPH as measured on-site at the time of application and administered in such a manner that drift is minimized to the extent practicable.

(3) Products with low potential for mobility and low persistence in the environment must be selected for use in riparian buffers. When operating within riparian buffers the following is required:

(a) Only the following herbicides may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) 2,4-D salt formulation, NOT the ester formulation,
(ii) Glyphosate,

(iii) Imazapyr,
(iv) Fosamine Ammonium,
(v) Aminopyralid Triisopropanolammonium, and
(vi) Metsulfron methyl

(b) Only the following surfactants may be used unless otherwise approved in consultation with MDIFW prior to application:
(i) Agri-Dex,
(ii) Competitor,
(iii) Dyne-Amic,
(iv) Clean Cut,
(v) Cide-Kick,
(vi) Nu-Film IR,
(vii) Induce,
(viii) Chemsurf90, and
(viv) 41-A

(4) Herbicides must be applied in accordance with USEPA label requirements to minimize washoff.

(5) There may be no aerial or motorized application of herbicides.

(6) Pre-application planning meetings between the electric utility owner or agent and pesticide applicator must be conducted.

(7) The electric utility owner or agent must closely supervise and inspect all riparian buffers during application.

(8) Low-pressure, manual backpack sprayers, with appropriate nozzles to minimize drift, must be used.

(9) Herbicide application must be specific to individual targeted species.

(10) The owner or agent must conduct post-treatment inspection.

(11) No herbicide may be stored, mixed or loaded within any riparian buffer.

C. *Spill Management*

(1) Any spill or release of petroleum products or other hazardous material within a utility transmission line corridor must be managed in accordance with the Spill Contingency Plan as approved by the Maine Department of Environmental Protection.

(2) No fuel storage, vehicle/equipment parking and maintenance, and refueling activity should occur within 100 feet of any river, stream, or brook.

D. *Equipment Use*

(1) Initial clearing within a riparian buffer must be undertaken during frozen ground conditions whenever practicable, and if not practicable, the recommendations of a third-party inspector must be followed regarding appropriate techniques to minimize disturbance to the maximum extent practicable, such as the use of travel lanes to accommodate mechanical equipment use within the riparian buffer.

(2) Unless frozen, streams must be crossed using mats or bridges. Equipment may cross streams on rock, gravel or ledge bottom so long as such a crossing does not result in bank rutting or erosion.

(3) Culverts may be installed during the construction of the temporary access roads provided that the streams to be culverted are not: Class A or AA waters, outstanding river segments, do not support salmon or other coldwater fisheries, or contain threatened or endangered species. Culverts must be installed when the stream channel is dry, the stream may be dammed and pumped around the construction site, and the culverts must be embedded six inches into the soil and sized so that the diameter is equal to 1.2 times the bank full width of the stream. The stream channel must be restored to natural conditions when the culverts are removed.

(4) Matting used for any construction or maintenance purposes:

(a) shall not be made from wood from ash trees (*Fraxinus spp*);
(b) shall be free of bark;
(c) shall be cleaned of soil and vegetative material by pressure washing if imported from out of State;
(d) shall not have been used in, or made from lumber from, Federally Quarantined areas as setout in 7 CFR 301 unless accompanied by the appropriate USDA certificate of treatment required for interstate transport. Said certificates will be maintained in a central filing location available for review by appropriate Agency personnel for a period of three years after project completion, as determined by utility owner; and,
(e) must have shipping information sufficient to identify the shipper and number and shipping origin of the mats.
(f) shall be subject to potential inspection for compliance with these standards by the Maine Forest Service and U. S. Department of Agriculture.

E. *Slash Management*

(1) No accumulation of slash shall be left within 50 feet, horizontal distance, of the top of the stream bank. In all other areas slash must either be removed or disposed of in

such a manner that it lies on the ground and no part thereof extends more than 4 feet above the ground.

(2) Any debris that falls below the normal high-water line of a stream shall be removed.

LEASE AMENDMENT

This Amendment to the Lease is made as of this 22 day of June, 2015 (Effective Date) between the Department of Agriculture, Conservation and Forestry Bureau of Parks and Lands, ("Lessor") and Central Maine Power Company, a Maine corporation with an office at 83 Edison Drive, Augusta, Maine 04336 ("Lessee").

WITNESSETH

WHEREAS, Lessor and Lessee (collectively, the Parties) entered into a certain Lease (Lease) effective December 8, 2014 to lease a portion of the Lessor's land located in the West Forks Plantation and Johnson Mountain Township (T2 R6 BKP WKR) Maine Public Reserved Lands in Somerset County, Maine ("Premises") to be developed and used as a transmission line corridor and;

WHEREAS, at lease execution, Lessee initially agreed to pay to the Lessor an annual base year lease payment (Year One) of $1,400.00; which shall be adjusted each subsequent lease year in an amount not to exceed the average increase in the Consumer Price Index, as published by the Bureau of Labor Statistics, United States Department of Labor.

NOW THEREFORE, the Parties agree to amend the Lease as follows.

1) The initial Year One annual (base year) lease payment shall be increased from $1,400.00 to $3,680.00.

Except as specifically amended herein, all terms and conditions of the original Lease shall remain in full force and effect including the annual lease payment shall continue to be adjusted each year in an amount not to exceed the average increase in the Consumer Price Index, as published by the Bureau of Labor Statistics, United States Department of Labor over the preceding one year period.

IN WITNESS WHEREOF, The parties hereto have caused this Amendment to Lease to be executed by its duly authorized agent as of the date first written above.

LESSEE:

Central Maine Power Company

By: Alice Richards
Alice Richards
Its: Supervisor, Real Estate Services

LESSOR:
State of Maine
Department of Agriculture,
Conservation and Forestry
Bureau of Parks and Lands

By: Walter E. Whitcomb
Walter E. Whitcomb
Its: Commissioner

MEMORANDUM

TO: Public Lands Lease Files
FROM: Andy Cutko, Parks and Lands Bureau Director; AAC
David Rodrigues, Director of Real Property Management DAR
DATE: September 24, 2020
RE: Johnson Mountain Township & West Forks Plantation Public Lands Units CMP Utility Corridor Lease

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This memorandum provides background detail and context and memorializes actions, considerations, and legal interpretations by the Bureau of Parks and Lands (the Bureau) related to the New England Clean Energy Connect (NECEC) utility corridor lease between the Bureau and Central Maine Power Company (CMP) for 32.4 acres of the Johnson Mountain Township and West Forks Plantation Public Lots, which are units of Public Reserved lands (see attached map). The lease was originally signed in December 2014 (2014 Lease) and was amended and restated in June 2020 (2020 Amended and Restated Lease). In preparing this memorandum, the Bureau consulted with former Bureau Director Willard Harris and former Director of Operations Tom Morrison for additional detail and context regarding the Bureau's memorialized actions, considerations, and legal interpretations with respect to the 2014 Lease and review process.

1. Background

- **The Johnson Mountain Township and West Forks Plantation Public Lots**

Public Reserved lands, which include public lots, are managed pursuant to a multiple use mandate and a management plan developed with public input. The Johnson Mountain and West Forks Plantation Public Lots (also referred to as the Lots) are original Public Lots. However, because they are relatively small and have limited recreational value, there was no management plan in place for these Lots in 2014. The management plan for the Upper Kennebec Region of Public Reserved lands, which includes the Johnson Mountain Township and West Forks Plantation Public Lots, was adopted on June 25, 2019. That plan describes the dominant uses of both Lots as timber management. Of the 1,241 acres on the two Lots, 1,156 acres are managed forest, and the remainder is mostly open bog or roads, plus 36 acres in the existing Jackson Tie Line utility corridor across the West Forks Plantation Public Lot.

Unlike Tumbledown Mountain, the Mahoosucs, Bigelow Preserve, Deboullie, Nahmakanta and other Public Reserved lands, the Johnson Mountain Township and West Forks Plantation Public Lots are not crown jewels of the Public Reserved lands system. The Johnson Mountain Township and West Forks Plantation Public Lots are not among the state's 18 designated Ecological Reserves, which represent some of the state's most important habitats for wildlife and biodiversity. The Johnson Mountain Township and West Forks Plantation Public Lots are also not improved with recreational infrastructure (maintained campsites, parking lots, kiosks, vault toilets and trail systems) that characterize Public Reserved lands such as Dodge Point, Pineland, the Cutler Coast, Donnell Pond, and many other Public Reserved lands. The Johnson Mountain Township and West Forks Plantation Public Lots have no constructed or maintained facilities.

- **2014 Lease and 2020 Amended and Restated Lease**

In July 2014 CMP approached the Bureau to request a lease for an additional utility corridor across the Johnson Mountain Township and West Forks Plantation Public Lots. Bureau staff in 2014 visited the Lots where the additional corridor was proposed. Field surveys confirmed that the Lots were primarily used for timber harvesting and limited remote recreation; there were old skid trails and signs of timber harvests. There were no recreation facilities observed, except a few hunting blinds on the existing Jackman Tie Line corridor.

From July through December of 2014, CMP staff Kenneth Freye and Bureau Director of Operations Tom Morrison, Chief of Planning and Acquisitions Kathy Eickenberg, and Senior Planner David Rodrigues worked to negotiate a lease for a 300-foot wide utility corridor that extended 5,071 feet across the Lots. CMP informed the Bureau that the additional corridor was for a utility line for future renewable energy transmission. The Bureau requested that CMP co-locate the new corridor onto the existing corridor (the East-West Jackson Tie Line), which is also located on the Lots. CMP responded that co-location would not be feasible and that a North-South route on the Lots would be required. However, CMP agreed to a condition in the 2014 Lease that requires CMP to relocate and co-locate the Jackson Tie Line onto the new 300-foot corridor if the Jackson Tie Line is ever reconstructed (see section 6(n) of the 2014 Lease).

The Bureau also requested reviews of the lease proposal from the Maine Natural Areas Program and the Maine Department of Inland Fisheries and Wildlife (the DIFW) regarding rare plants, exemplary natural communities, and wildlife concerns. The Bureau incorporated their recommendations into the lease. Bureau staff noted that the corridor was initially proposed to cross over Tomhegan Stream, a tributary that flows into Cold Stream. Bureau staff requested that the corridor location be changed so that it would not cross over Tomhegan Stream, and CMP subsequently changed the proposed corridor to the current lease location. The 2014 Lease incorporates the DIFW's Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects, Recommended Performance Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects, and Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects.

At the time the lease proposal was under Bureau review in 2014, the following circumstances existed. All of these circumstances remain in place in 2020:

- The Johnson Mountain Township and West Forks Plantation Public Lots have historically been used primarily for timber management. Harvesting occurred on the Lots in 1986-1987 and again in 2006-2007. Abutting property on all sides of the Lots were historically managed extensively as commercial timberlands, and this was the case when the 2014 Lease was signed. This adjacent management largely remains the case in 2020, with the state's Cold Stream property added to the southwest corner of the Lots in 2016. Timber harvesting is still the primary and dominant use of the Lots under the Bureau's June 25, 2019 management plan.

- An existing utility corridor on the Lots, called the Jackson Tie Line, runs east and west across the entire northern property line of the West Forks Plantation Public Lot, abutting the southern boundary of the Johnson Mountain Township Public Lot. The lease for this Jackson Tie Line corridor was issued in 1963 to CMP by the State Forest Commissioner. The Jackson Tie Line corridor is 16,035-feet (3.0 miles) long, 100-feet wide, occupies 37 acres, and is 2.9% of the Lots. (See Attachment A – Map of Johnson Mountain and West Forks Public Lots). The Jackson Tie Line corridor remains in place on the Lots in 2020.

- As of 2014, the Bureau had not constructed any recreational infrastructure (e.g., campsites, hiking trails, kiosks, parking lots) on the Lots, and the limited recreational use in the proposed NECEC corridor consisted of deer hunting primarily on the existing Jackson Tie Line corridor. Some fishing and bear hunting also occurred within the Lots. While many other Public Reserved lands have constructed campsites, parking lots, kiosks, vault toilets, and trail systems, the Johnson Mountain Township and West Forks Plantation Public Lots have no constructed or maintained facilities and no motorized or non-motorized trails. These same conditions remain in 2020.

In December 2014 the Bureau signed the Lease with CMP. The 2014 Lease authorizes CMP to clear vegetation and cross an additional 32.4 acres of the Johnson Mountain Township and West Forks Plantation Public Lots, separate from the 37 acres attributable to the Jackson Tie Line. The 2014 Lease is non-exclusive. The 2014 Lease had a term of 25 years and an annual lease payment of $1,400 per year. An appraisal was completed on January 9, 2015, by Dwyer Associates, and, based on that appraisal, the annual lease payment for the 2014 Lease was adjusted to $3,680 per year. Under the 2014 Lease, the annual payment has been adjusted each year by an amount not to exceed the average increase in the Consumer Price Index as published by the Bureau of Labor Statistics, United States Department of Labor, over the preceding one-year period.

The 2014 Lease was amended and restated in June 2020 to reflect a higher lease value ($65,000 per year) based on a comparative review of recent leases and acquisitions for the NECEC project in the region. In addition to the DIFW Performance Standards that were included in the 2014 Lease, the DIFW Performance Standards for Deer Wintering Areas in Overhead Utility ROW Projects was added to the 2020 Amended and Restated Lease as requested by DIFW staff. The 2020 Amended and Restated Lease requires CMP to commission an appraisal within one year, and if the appraised value exceeds the lease value, the lease payment will be adjusted based on the new appraised value.

CMP had not acquired a Certificate of Public Convenience and Necessity from the Public Utilities Commission at the time the 2014 Lease was signed in December 2014, as contemplated by 35-A M.R.S. § 3132(13). CMP acquired this Certificate on May 3, 2019, which was well in advance of the 2020 Amended and Restated Lease signed in June 2020. In any event, the Bureau's position is that CMP's failure to obtain the Certificate at the time the 2014 Lease was signed does not invalidate the 2014 Lease. CMP has performed no on-the ground disturbance or construction on any of the leased premises, and, pursuant to section 6(m) of both the 2014 Lease and the 2020 Amended and Restated Lease:

m. *Lessee shall be in compliance with all Federal, State and local statutes, ordinances, rules, and regulations, now or hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises. Lessee further shall not construct, alter or operate the described Premises in any way until all necessary permits and licenses have been obtained for such construction, alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This Lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 30 days in which to cure such failure.*

Thus, CMP will not undertake any such activities until it receives all necessary approvals. If CMP does not obtain all required permits, the Bureau may terminate the lease.

2. Applicable Authority

The Bureau considered and interpreted the following legal provisions during its negotiations with respect to both the 2014 Lease and the 2020 Amended and Restated Lease:

- **12 M.R.S. § 1852 and Public Reserved Land Leases**
  Public Reserved lands are not held strictly for conservation, forest management, or recreation purposes. The Bureau's internal review process for the 2014 Lease also took into consideration 12 M.R.S. § 1852(1)-(9), which outlines conditions pursuant to which the Bureau may lease Public Reserved lands for specific types of leases. Specifically, 12 M.R.S. § 1852(4) allows the Bureau to lease Public Reserved lands for utilities and rights-of-way:

  4. Lease of Public Reserved land for utilities and rights-of-way. The bureau may lease the right, for a term not exceeding 25 years, to:
  A. Set and maintain or use poles, electric power transmission and telecommunication transmission facilities, roads, bridges and landing strips;
  B. Lay and maintain or use pipelines and railroad tracks; and
  C. Establish and maintain or use other rights-of-way.

  Notably, this subsection addressing the lease of Public Reserved land for utilities and rights of way *does not* require consent from the Commissioner of Agriculture, Conservation & Forestry (ACF), the Governor, or the Legislature to convey a utility corridor lease. Only one of the nine subsections in 12 M.R.S. § 1852 (subsection 1852(7) - Lease of Public Reserved lands to the Federal Government) requires the approval of the Legislature. The Bureau has always sought legislative approval for leases to the Federal Government, as required by 12 M.R.S. § 1852(7). As an example, in 2013 the Bureau sought and obtained legislative

approval (reference Resolves 2013, Chapter 56) for a lease to the Customs and Border Protection for a Tower on Coburn Mountain.

Other subsections of 12 M.R.S. § 1852 (e.g., subsections 1852(3) and 1852(8), which relate to the lease of Public Reserved land to other state agencies and to municipalities) also require consent of the Governor and Commissioner. Because some subsections in 12 M.R.S. § 1852 require express approvals of specified government officials and others do not, the Bureau interprets subsection 1852(4) as a legislative recognition that utility leases such as the 2014 Lease and the 2020 Amended and Restated Lease do not amount to reductions or substantial alterations to designated lands that require legislative approval.

- **Article IX, Section 23 of the Maine Constitution, 12 M.R.S. § 598-A, and Legislative Approval**

In 1993 Maine's Constitution was amended to require 2/3 legislative approval to convey or substantially alter the uses of public lands held for conservation or recreation purposes. Article IX, section 23 of the Maine Constitution 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 members elected to each House…." Title 12 M.R.S. § 598-A, part of Maine's designated lands statutes, implements Article IX, section 23 by providing that designated lands "may not be reduced or substantially altered except by a 2/3 vote of the Legislature." As the Bureau interpreted these constitutional and statutory provisions with respect to both the 2014 Lease and the 2020 Amended and Restated Lease, no designated lands have been reduced or substantially altered as a result of the lease with CMP for the new corridor on the Lots.

As used in Title 12, Chapter 202-D (Designated Lands), which includes 12 M.R.S. § 598-A, "[s]ubstantially altered" means "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…." 12 M.R.S. § 598(5). Accordingly, the designated lands statutes define substantially altered in reference to the purposes for which the State holds each type of designated lands. As the Bureau interprets this provision, another proposed transmission line (in addition to the Jackson Tie Line, which is 2.9% of those public land units) through the Johnson Mountain Township and West Forks Plantation Public Lots should be measured against the management objectives of these Lots. No management plan existed for the Lots in 2014, and the Lots were used primarily for timber management purposes in 2014 and were historically used primarily for that purpose prior to 2014. The June 25, 2019 management plan outlines the intended uses of the Lots as forest management, wildlife habitat, and dispersed recreation, with timber harvesting being the primary and dominant use. The creation of an additional utility corridor would result in a temporary change from one habitat type (forest) to another (shrub or early-successional forest) for an amount of 2.6% of the Lots. The total percentage of land on the Lots occupied by both utility corridors would be 5.5%. While forest and shrub habitats provide different conditions for wildlife, neither are inconsistent with the Bureau's existing management plan for the Lots and the purposes for which the Bureau holds the Lots. Accordingly, relative to 12 M.R.S. § 598-A, the Johnson Mountain Township and West

Forks Plantation Public Lots have not been substantially altered as a result of the 2014 Lease or the 2020 Amended and Restated Lease.

As used in 12 M.R.S. § 598-A, "[r]educed" means "a reduction in acreage of an individual parcel of lot of designated land under 598-A." 12 M.R.S. § 598(4). Based on the Bureau's interpretation, this definition of "[r]educed" does not include or mean a change in vegetation or a reduction in the value of the property, and no acreage has been reduced in the Lots as a result of the 2014 Lease or the 2020 Amended and Restated Lease, both of which are temporary and non-exclusive; the Bureau still owns the same amount of acreage of the Lots.

- **Leases v. Easements**

The Bureau's interpretations and approach as to leases is and has historically been different than its interpretations and approach as to easements. These differences also factored into the Bureau's positions in 2014 and 2020 that the CMP utility lease for the new additional corridor on the Lots did not result in any reductions or substantial alterations of Public Reserved lands such that further legislative approval would be required.

  - **Leases**

Under the Bureau's interpretations of its authority, leases issued by the Bureau are *temporary* instruments and typically range from five-year to 25-year terms. Utility corridor leases are not exclusive, and the public has continued full use of the premises. As noted above, leases are addressed in statute through 12 M.R.S. § 1852. Neither Article IX, section 23 of the Maine Constitution nor 12 M.R.S. § 598-A are referenced in 12 M.R.S. § 1852 governing leases. By contrast, in 12 M.R.S. § 1851 (Sale of Public Reserved Lands) the phrase "subject to the provisions of section 598-A" appears multiple times.

The Bureau's FY 2015 annual report stated that the Bureau administered 62 leases (excluding camp lots), including 18 utility leases. The 18 utility leases consist mostly of small residential utility lines, guy wire leases, and a few high voltage leases. Some of these leases are located on State Park land and were granted under 12 M.R.S. § 1814. The majority of the other leases were already present on parcels when they were acquired by the Bureau. As discussed below, the Bureau issued a lease for a transmission line to Bangor Hydro in 2007. The only other utility corridor lease granted to date by the Bureau is the NECEC lease that is the subject of this memo. To date, as far as the Bureau is aware, the Bureau has never acquired legislative approval to issue a utility corridor lease on Public Reserved lands. This is consistent with the Bureau's longstanding positions and interpretations that no such approval is generally required under applicable authority and that no such approval was required with respect to the 2014 Lease and the 2020 Amended and Restated Lease.

  - **Easements**

Under the Bureau's interpretations of its authority, easements, unlike leases, are typically *permanent* and may convey exclusive rights, which limit the public's ability to access and use that land. Easements are conveyed pursuant to 12 M.R.S. § 1851, which expressly cross-

references 12 M.R.S. § 598-A multiple times. Because of these differences, the Bureau has always sought 2/3 legislative approval to convey an easement and has interpreted these authorities as not requiring similar approval for leases like the 2014 Lease and the 2020 Amended and Restated Lease.

The Bureau always acquires legislative approval to grant an easement, since an easement, unlike a lease, is a permanent right and is generally viewed by the Bureau as a reduction under 12 M.R.S. § 598-A and Article IX, section 23 of the Maine Constitution. As an example, the Bureau acquired legislative approval to grant an easement to Bangor Hydro for a utility corridor in Bradley and No. 21 Township in 2007 for electric transmission purposes (Resolve Chapter 91, 123rd Legislature). The Bureau had issued a lease to Bangor Hydro in 1990 for a utility corridor for electric transmission purposes in Bradley and No. 21 Township, and the utility corridors were not built at that time. Bangor Hydro subsequently changed its proposal, including the corridor size, and a second lease to Bangor Hydro was issued for these corridors in 2007, prior to conveying the easement. Consistent with its longstanding positions and interpretations on legislative approvals for easements but not leases, the Bureau did not acquire legislative approval for the 2007 lease but did acquire legislative approval for the subsequent easement. The Legislature at that time (2007) provided no indication that legislative approval should have been acquired to issue the lease to Bangor Hydro, or for future utility corridor leases.

- **12 M.R.S. § 1853 and Legislative Reporting**

12 M.R.S. § 1853(1) requires the Bureau to submit a written report each year to the joint standing committee with jurisdiction over Public Reserved lands. The committee "shall review the report and submit a written recommendation regarding the bureau's proposed budget to the joint standing committee of the Legislature having jurisdiction over appropriations and financial affairs on or before March 15th of each year."

The 2014 Lease was described in the Bureau's *FY 2015 Annual Report to the Joint Standing Committee on Agriculture, Conservation and Forestry* (March 1, 2016). That report, under the sub-heading Energy Development and Transmission Corridors, states: "During 2015 the Bureau saw increased requests for new powerline corridor leases across its lands, reflecting continued interest in wind generation for supplying more "green" energy to the demand centers in southern New England. One lease completed in FY 2015 involves a 300-foot corridor 4,700 feet in length crossing two small public lots in the Forks area." The Bureau's FY 2015 Annual Report was presented to the ACF Committee in March 2015. Representative Russel J. Black was a member of the ACF Committee at that time and remained a member of the ACF Committee when the 2014 Lease was discussed with the Committee in February 2020. Senator Tom Saviello was also on the ACF Committee that received the Bureau's FY 2015 Annual Report. In discussing its 2014 activities with the 2015 ACF Committee, the Bureau was not made aware by the ACF Committee of any objections to the 2014 Lease. Additionally, the Bureau's FY 2015 Annual Report states that the Bureau was working on negotiating another lease for a high voltage line across Public Reserved Land in Western Maine. In response to the Bureau's FY 2015 Annual Report, the ACF Committee did not object to the ongoing negotiations for that prospective high voltage line in

Western Maine. The Bureau understood and interpreted this to mean that no legislative approval of either lease referenced in the FY 2015 Annual Report, or any similar future leases, was required.

3. Bureau Review, Findings, and Determinations

In reviewing the project in 2014, the Bureau made the following findings and determinations, although not reduced to writing, with respect to the 2014 Lease based on field observations and its consideration and interpretations of applicable statutes. In 2020, the Bureau confirmed and made again these same findings and determinations, although not reduced to writing, with respect to the 2020 Amended and Restated Lease:

- The CMP lease is temporary, not permanent; it is for a stated term of years. The lease may also be terminated under the lease terms if the Lessee does not obtain all the required permits or defaults on the required conditions.

- The primary and dominant use and purpose of the Johnson Mountain Township and West Forks Plantation Public Lots is and has historically been timber management, with wildlife and recreation as secondary uses.

- The lease does not grant an exclusive right to CMP. The public may continue to use the leased property for walking, hiking, hunting, fishing, trapping, bird watching, and other recreational uses. In fact, deer hunting opportunities may be increased since there will be an additional utility corridor for hunting.

- The lease does not "frustrate the essential purposes for which that land is held by the State." The primary use of the leased property is currently timber harvesting, and the 2014 Lease required and the 2020 Amended and Restated Lease requires that the Bureau be paid the value of the trees cut for the corridor. The appraisal included the future value of the timber in the rent amount to be paid annually.

- The presence of an existing utility corridor (the Jackson Tie Line) on the Lots indicates that these units of Public Reserved lands constitute a reasonable place for an additional utility corridor and is consistent with existing uses (in contrast to a unit of Public Reserved lands with no existing fragmentation or in contrast to a unit of Public Reserved lands that is primarily managed for wildlife habitat and public recreation).

- The creation of an additional utility corridor results in the temporary change from one wildlife habitat type (forest) to another (shrub or early-successional forest) for a relatively small portion of the Lots. Creation and maintenance of both habitat types are consistent with the Bureau's existing June 25, 2019 management plan, and the change in habitat type does not frustrate the purposes for which the Lots are and have been held. The total percentage of both existing and new utility corridors is 5.5% of the Lots.

4. Conclusions

Based on the above considerations and its interpretation of its authority, the Bureau's position was and is that legislative approval was not required for either the 2014 Lease or the 2020 Amended and Restated Lease. The Bureau's longstanding position is supported by the above considerations and the following conclusions:

- The Bureau's governing statute for utility corridor leases, 12 M.R.S. § 1852(4) (Lease of Public Land for Utility Rights-of-Way), does not require legislative approval for such leases. Unlike other subsections, 12 M.R.S. § 1852(4) does not require any express approvals, including Governor or Commissioner approval. Under the Bureau's longstanding interpretation of this and other applicable authority, utility leases such as the 2014 Lease and the 2020 Amended and Restated Lease require no express approvals and no legislative approval.

- 12 M.R.S. § 1852 (Transfer or Lease of Public Reserved Lands) does not state "subject to the provisions of section 598-A". In contrast, 12 M.R.S. § 1851 (Sale of Public Reserved Lands) expressly states "subject to the provisions of section 598-A" three times. The Bureau interprets these provisions as further support for its longstanding position that no legislative approval was required for the 2014 Lease or the 2020 Amended and Restated Lease.

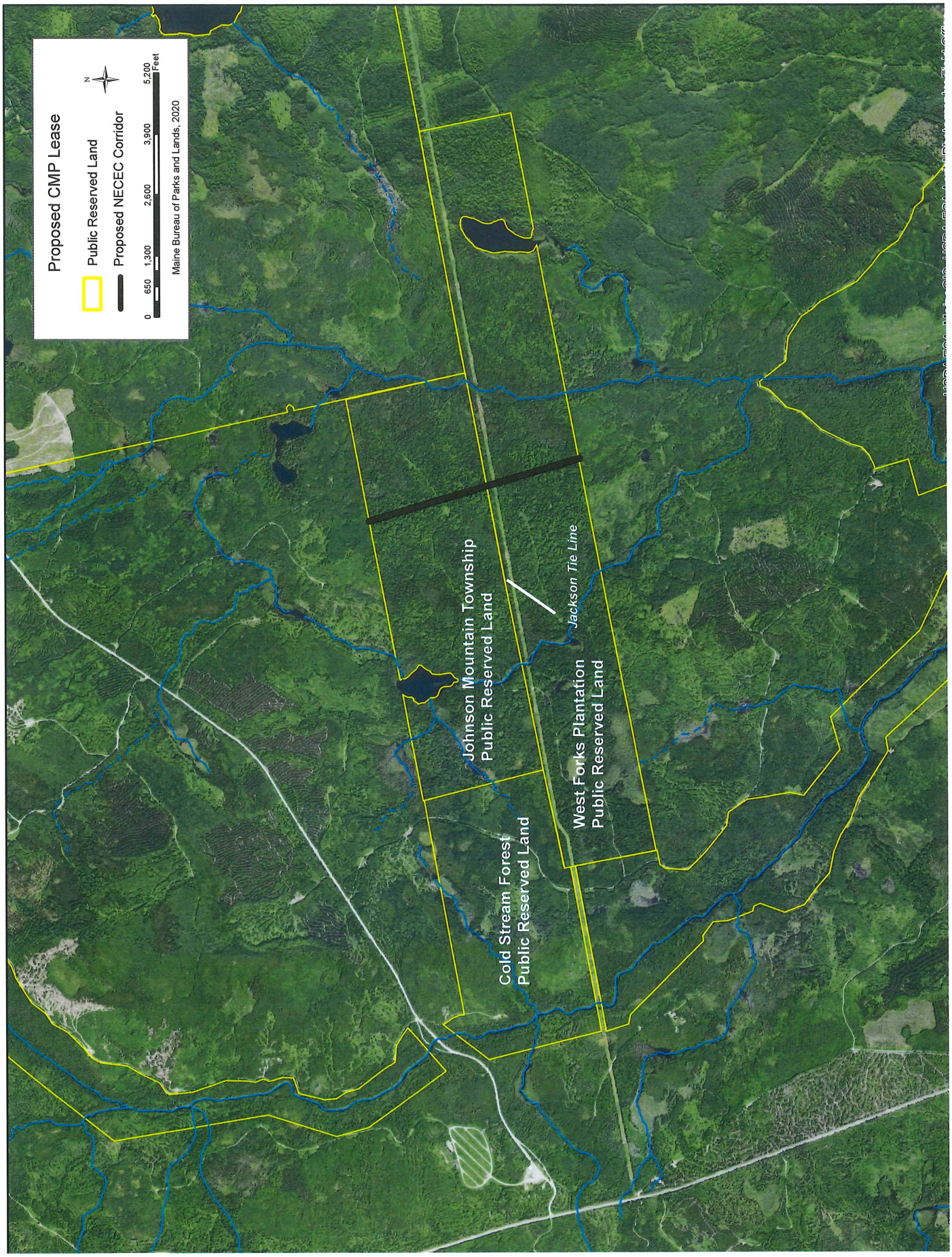
- The Bureau's historical practice is consistent with its longstanding interpretation of applicable authority as not requiring legislative approval for utility leases such as the 2014 Lease and the 2020 Amended and Restated Lease. There is no precedent in past Bureau practice for seeking such legislative approval, since the Bureau has never sought legislative approval for a utility corridor lease on Public Reserved lands.

- The ACF Committee of the Maine Legislature was made aware of the 2014 Lease in 2015 through the Bureau's FY 2015 Annual Report. The ACF Committee was also made aware of the 2007 Bangor Hydro utility corridor lease, which was also not subject to legislative approval, in 2007. Neither the ACF Committee nor the Maine Legislature objected to either utility lease at the time they were notified about them. The Bureau understood and interpreted these events to mean that no further legislative approval of such utility leases was required.

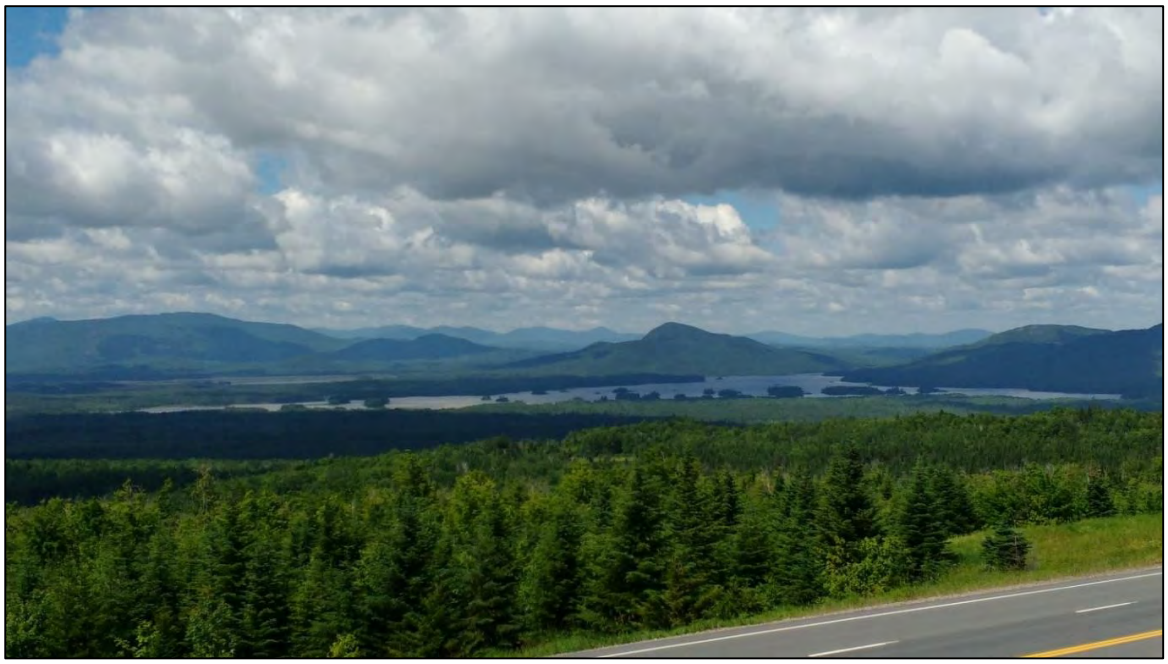
- At the time the 2014 Lease was proposed, there was already an existing utility corridor (the Jackson Tie Line) running across the Johnson Mountain Township and West Forks Plantation Public Lots. The proposed additional corridor contemplated by the 2014 Lease and the 2020 Amended and Restated Lease consists of 2.6% of the Lots' total area; 97.4% of the Lots would not be affected by any such new utility corridor.

- The Bureau's longstanding position is that 12 M.R.S. § 598-A is not relevant to utility leases. But, as the Bureau interprets its authority, even if 12 M.R.S. § 598-A were relevant to utility leases, the Bureau's lease of a utility corridor as contemplated by the 2014 Lease and the 2020 Amended and Restated Lease would not constitute any

reduction or substantial alteration that would "frustrate the essential purposes for which that land is held by the state." The CMP lease is a non-exclusive temporary use for the term of the lease, and the public retains all recreational use of that Public Reserved land. There were no recreation facilities constructed by the Bureau on the Lots prior to the 2014 Lease or existing today, and the public still has full use of the Lots for recreation. There is not a substantial alteration in recreational use and there is no reduction of the Lots. The Lots are managed primarily for timber management, which is the dominant use and purpose of the Lots. Under the terms of the CMP lease, the Bureau would be paid for all timber that was present on the corridor when it would be cleared and all future growth value for the 25-year lease term. Under the Bureau's longstanding interpretation of its authority, the influence of the lease on timber management does not constitute a significant alteration or reduction.


Proposed CMP Lease
Public Reserved Land
Proposed NECEC Corridor
0 650 1,300 2,600 3,900 5,200 Feet
Maine Bureau of Parks and Lands, 2020
Johnson Mountain Township
Public Reserved Land
Jackson Tie Line
West Forks Plantation
Public Reserved Land
Cold Stream Forest
Public Reserved Land

Upper Kennebec Region Management Plan



View from US 201DOT rest stop toward Attean Pond (center) and No. 5 Bog (center left) with Attean Mountain in the middle background.

Maine Department of Agriculture, Conservation and Forestry
Bureau of Parks and Lands

June 2019

the past two years, and nearly half had visited the Public Reserved Lands. Regarding opinions on the most needed non-motorized trail resources contained in the SCORP survey, the Maine general population, recreationists, and non-resident recreationists who visited Maine were in agreement that easy and moderate day-hike trails in natural settings and educational/natural history trails were the most needed. All three of these types of trails were considered by a majority of Maine residents to be "most needed."

Overall, these data indicate the types of activities offered on the public lands in the Moosehead Region remain popular with Mainers and the Public Reserved Lands and State Parks are among the most commonly used venues to enjoy those activities. Given these facts, the Bureau can expect continue high interest and demand for outdoor recreation access and amenities on the properties addressed by the Plan.

Summary of Planning Implications

1. The Upper Kennebec Region Public Reserved Lands lie in an area highly valued for its natural resources. The culture and economy of the area are historically linked to the forest resources and outdoor recreation.

2. The recreation opportunities on the Public Reserved Lands are part of a much larger landscape-level system connecting the numerous lakes and ponds with surrounding mountain ranges and historic travel routes – including the nationally significant Appalachian Trail and Old Canada Road Scenic Byway; the Northern Forest Canoe Trail; an interstate system of snowmobile trails, and a regional network of ATV trails.

3. New public and private initiatives to further develop the recreation-based economy, and to conserve the special natural areas in the Region are strong. The tens of thousands of acres of conservation easement lands in the region, primarily on Weyerhaeuser's commercial forestland surrounding Moosehead Lake and the major portion of Attean Township, are central to both objectives.

4. The overriding attraction of the area for recreationists is the region's many lakes, ponds and streams – particularly those associated with the Moose River Bow Trip -- and the mix of undeveloped backcountry and commercial forest land open to traditional recreation uses. Careful stewardship is needed to protect these values while making the public lands available to enjoy.

5. There are many opportunities for development of public-private partnerships to further both conservation, and development and stewardship of recreational opportunities on the Bureau managed Public Reserved Lands - including partnerships or cooperative agreements with local towns; the Jackman-Moose River and Forks Area Chambers of Commerce; Maine Appalachian Trail Club (MATC); Brookfield Renewable, LLC; local snowmobile and ATV clubs; and others. These collaborative relationships are essential to good stewardship of the public lands.

IV. Resources and Management Issues for Lands in the Upper Kennebec Region

General Management Focus

The Bureau's overall management focus for the Upper Kennebec Region is built upon the following management principles and objectives:

1) practice sound multiple use planning;
2) utilize exemplary, state of the art resource management practices that protect resources from over-use, avoid conflicting use, control exotic species, and continually add value to the resource base and visitor's "back woods" experiences;
3) offer new recreation and educational opportunities where appropriate and compatible with the emphasis on more remote, dispersed, less developed activities, with or without vehicle access;
4) honor traditional uses wherever appropriate, and avoid restrictions on free and reasonable public access;
5) remain adaptable to changing environmental and cultural conditions through far-sighted planning, and cooperation and connectivity with adjoining landowners, and
6) conduct timber harvesting where appropriate in a manner that maintains or improves forest health and diversity, protects special natural features and visitor safety, enhances wildlife habitat, preserves the visual integrity of the landscape and produces a sustainable stream of high quality (over the long term) timber products; all within the Bureau's legislative and regulatory mandates and budgetary and staffing constraints.

Over 91 percent of the Public Reserved Lands addressed by this Plan (excepting the Holeb Unit's No. 5 Bog Ecological Reserve and Attean Pond north and south shore lands) are forested. Of those forested lands over 90 percent are regulated acres — those areas which the Bureau manages to yield a sustained flow of forest products and to improve the quality of the forest resource. The table below summarizes the forested and regulated acres for the larger management Units in the Upper Kennebec Region and for the smaller lots combined into groups.

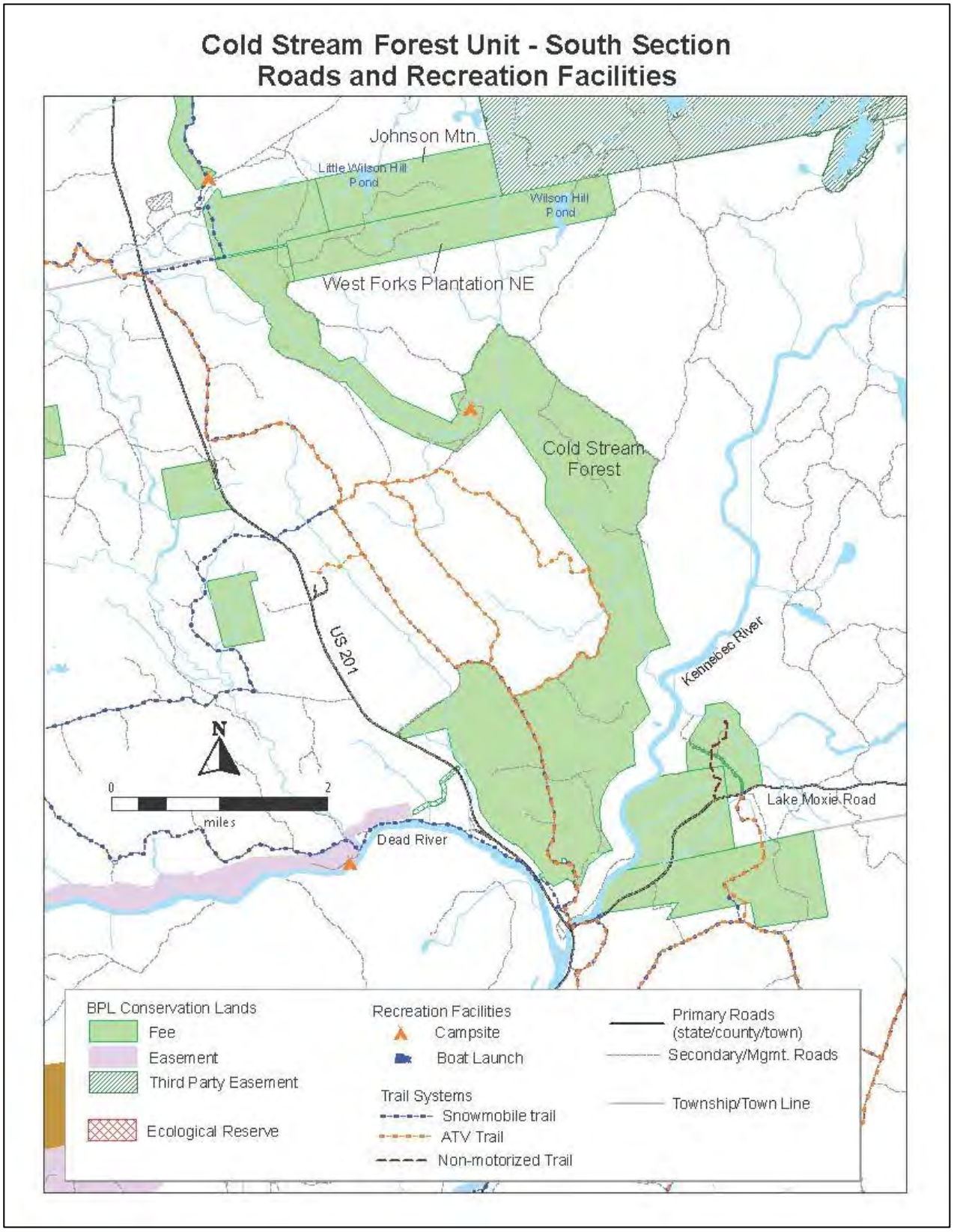
Summary of Forested and Regulated Acres in the Upper Kennebec Region

Management Unit(s)	Total Acres	Forest Acres	Regulated Acres				Unreg. Acres
			Total	HW	MW	SW	
Holeb[1]	17,851	16,265	14,396	4,666	5,668	4,062	1,869
Cold Stream Forest	8,159	7,548	5,920	unk	unk	unk	1,630
Bald Mountain	1,793	1,477	1,343	496	418	429	134
Northern Smaller Lots[2]	5,638	5,051	4,826	1,878	1,924	1,024	225
Southern Smaller Lots[3]	5,362	5,143	4,605	2,456	1,488	661	538
Totals	***38,803***	***35,484***	***31,090***	***9,496***	***9,498***	***6,176***	***4,396***
Percent		***91.5***	***87.6***	***37.7****	***37.7****	***24.5****	***12.4***

1. Excludes the Number 5 Bog ecological reserve (all acres are unregulated) and all lands on Attean Pond.
2. Includes Sandy Bay, Dennistown, Moose River and Bradstreet lots and the East Attean portion of Holeb Unit.
3. Includes Coburn Mtn., Johnson Mtn., Moxie Gore, West Forks, The Forks, Caratunk, Pleasant Ridge and Highland Plt. lots

* percent of regulated acres, excluding Cold Stream Forest, for which regulated acres by type have not been determined.

Key: HW = hardwood, MW = mixedwood, SW = softwood



MAP FIGURE 7b.

Johnson Mountain and West Forks Northeast Lots

These adjacent original reservation lots are located on either side of the town line, covering 514 and 730 acres, respectively. The lots abut the newly acquired Cold Stream Forest parcels on the west side and are likewise accessible from Capital Road and Wilson Hill Road. The primary management road extends from Wilson Hill Road across the west side of both lots.

The two ponds almost wholly within the lots, 21-acre Wilson Hill Pond (West Forks NE Lot) and 13-acre Little Wilson Hill Pond (Johnson Mtn. Lot) are brook trout fisheries and State Heritage Fish waters. The ponds are tributary to Cold Stream, with their outlets streams flowing into Tomhegan Stream south of the lots. Tomhegan Stream flows across both lots upstream of those junctures, and into Cold Stream within the Cold Stream Forest Unit. Tomhegan Stream also supports a brook trout fishery and telemetry studies indicate that some Kennebec River brook trout ascend Cold Stream and continue into Tomhegan Stream for thermal refuge and spawning.

A few boats (five were observe on a site visit) are stored at Little Wilson Pond where an informal access trail comes to the south shore. There are four bear bait sites on the lot.

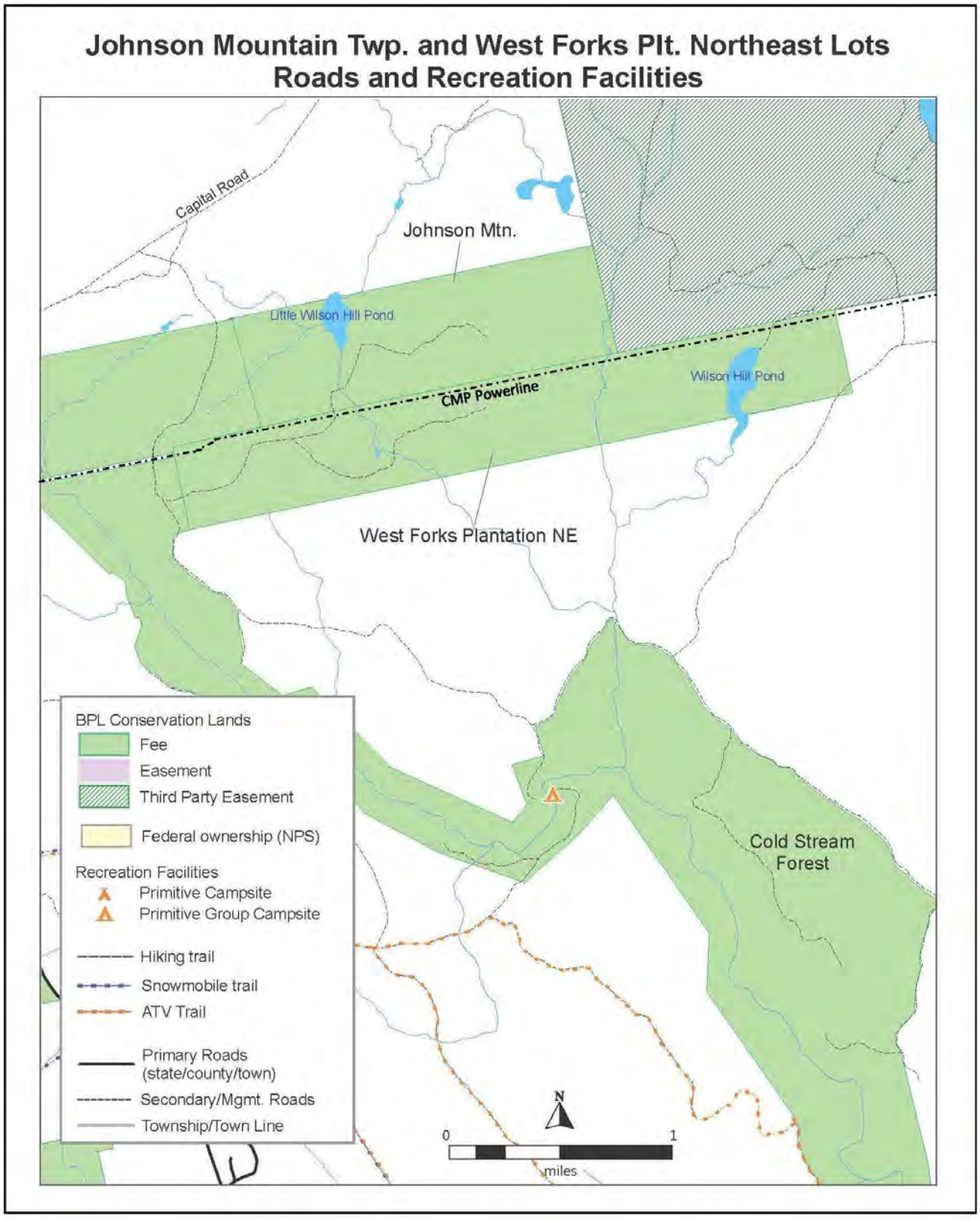
The terrain is quite varied, with low hills, bogs, streams, and the two ponds, and a varied mix of timber types. There is a small amount of wetland on the lot, primarily associated with the ponds. There are no special status or unique wildlife known to be present.

A 100-foot wide CMP transmission line right-of-way (established in 1963) follows the town line across the West Forks Plt. Lot. A new 300-foot wide by mile-long transmission line lease crossing both lots from north to south was executed with CMP in December 2014; the line has not yet been built.

Timber Resources and Harvest History. Of the 1,241 acres on the two lots, 1,156 acres are regulated forest, the remainder being mostly open bog or roads, plus 36 acres in the utility corridor across the West Forks lot. The regulated forest is 24% softwood types, 40% mixedwood, and 36% hardwood, with an average stocking of about 26 cords per acre.

Inventory volume is 47% spruce, 17% sugar maple, with beech, fir, and red maple sharing another 20% about equally. White pine makes up 3% of the total, usually as scattered large individuals or as a significant minority component of spruce-rich softwood stands. Quality of spruce and pine is excellent, sugar maple and yellow birch fair to good, and most other species variable in quality, though healthy full-crowned beech are scarce. Abutters' clearcuts caused some windthrow on the lots in past years, but this has since stabilized.

The Bureau has conducted two timber harvests on these combined tracts. The first, in 1986-87, produced 9,900 cords, with removal of fir and low quality hardwoods the main objective, along with improvement harvests. The second entry came twenty years after the first, in 2006-07, with about 4,200 cords harvested as about half the forest was not in need of treatment at that time.



MAP FIGURE 14.

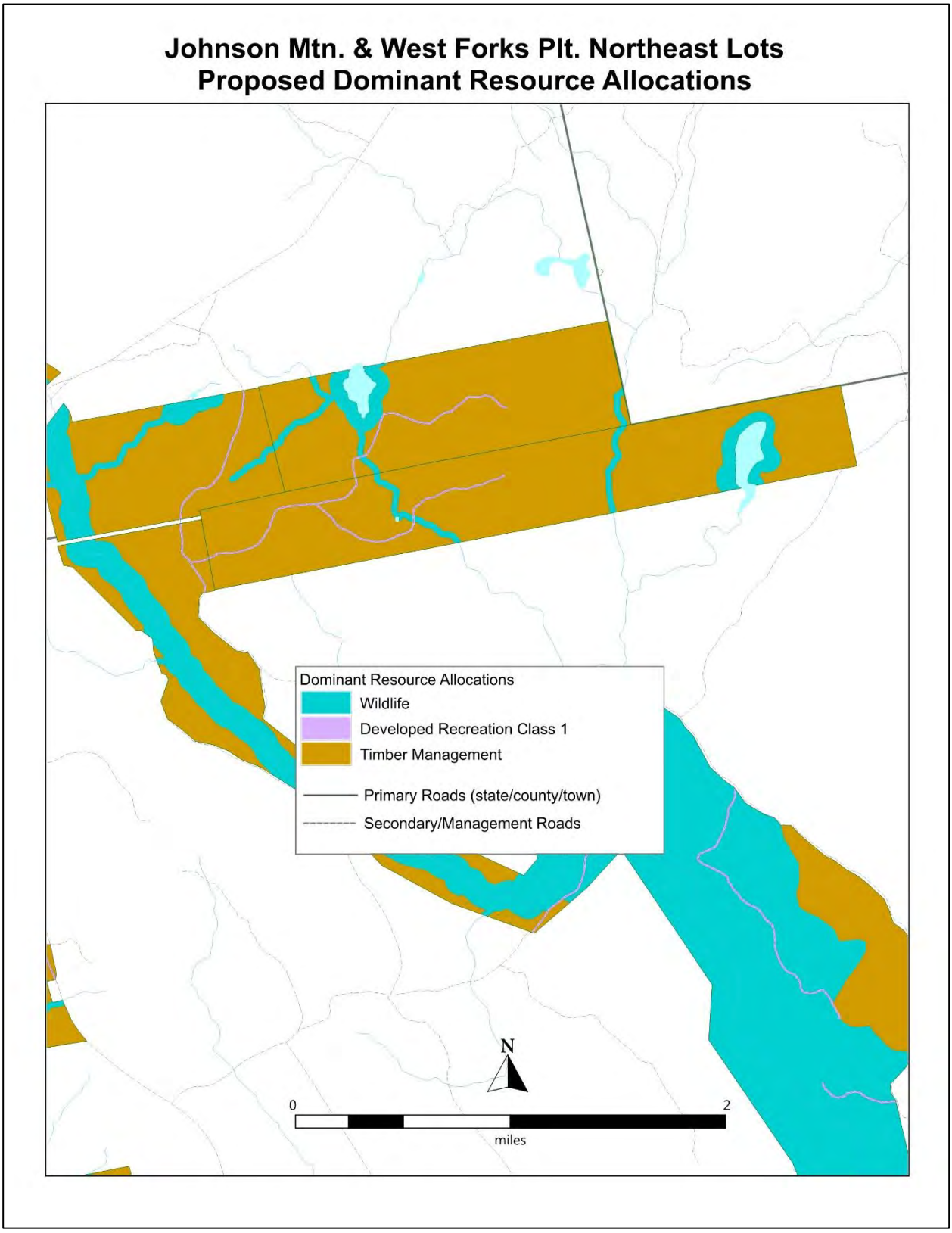
Johnson Mountain and West Forks Plantation Northeast Lots
Timber Management is the dominant allocation for most of the Johnson Mountain and West Forks Northeast Lots, excepting the riparian buffer associated with the streams and ponds on the lots, which are allocated to *Wildlife Management,* and the management roads providing vehicle access into the lots, which are allocated to *Developed Recreation Class 1*. Remote Recreation is a secondary use on the entire lots; Wildlife Management is a secondary use on the timber management acres.

West Forks Plantation Northwest, Central and Southwest Lots
Timber Management is the dominant allocation for most of the three West Forks Lots, excepting the riparian buffers associated with the streams on the Central and Southwest lots, which are allocated to *Wildlife Management,* and the Rt. 201 corridor within the Central lot, which is allocated to *Developed Recreation Class 1*. Remote Recreation is a secondary use on the entire lots outside the highway corridor; Wildlife Management is a secondary use on the timber management acres. *Visual Consideration Class 1* will apply as a secondary allocation on the Central lot along Rt. 201.

Moxie Gore and The Forks Plantation North Lots
Timber Management is the dominant allocation for most of the Moxie Gore and The Forks North Lots. The 300 foot riparian buffers associated with the Kennebec River and the 75 foot buffers along the streams crossing the Moxie Gore Lot are allocated to *Wildlife Management,* as is additional steep ground alongside the Kennebec River buffer zone. A 250-foot *Remote Recreation* buffer is designated on each side of the Moxie Falls Trail. The parking area and trailhead is allocated to *Developed Recreation Class 1* as is the Lake Moxie Road corridor. Remote Recreation is a secondary use on the entire lot outside the trail corridor and parking area; Wildlife Management is a secondary use on the timber management acres. *Visual Consideration Class 1* will apply as a secondary allocation along Lake Moxie Road.

The Forks Plantation South and Caratunk North Lots
Timber Management is the dominant allocation for most of The Forks Plt. and Caratunk North Lots. A 100-foot no-cut *Special Protection* buffer is designated on each side of the AT, along with a 400-foot *Remote Recreation* buffer outside that core area. The riparian buffers associated with the stream crossing The Forks Lot, outside the trail buffer, and the stream at the south margin of the Caratunk Lot are allocated to *Wildlife Management*. The Pleasant Pond Road corridor is allocated to *Developed Recreation Class 1*. Remote Recreation and Wildlife Management are secondary uses on the timber management acres. *Visual Consideration Class 1* will apply as a secondary allocation along Pleasant Pond Road.

Bald Mountain/Moxie Bald Lot
Timber Management is the dominant allocation for most of the Bald Mountain Lot. A 100-foot no-cut *Special Protection* buffer is designated on each side of the AT, along with a 400-foot *Remote Recreation* buffer outside that core area. The exemplary natural community on the high ground of Moxie Bald Mountain is allocated to *Special Protection*. The riparian buffers associated with the Bald Mountain Pond shoreline and the streams crossing the east side of the lot, outside the trail buffer, are allocated to *Wildlife Management*. Remote Recreation and Wildlife Management are secondary uses on the timber management acres. *Visual*



MAP FIGURE 25.

Johnson Mountain and West Forks Plantation Northeast Lots

- Management on this fine timber tract should continue to improve overall quality, maintaining the high spruce and sugar maple components and favoring pine where it occurs.
- Public access to the management road system will not be increased to maintain the existing walk-in native brook trout fishing opportunity at the ponds.

West Forks Plantation Northwest, Central and Southwest Lots

- Much of the fir on these lots is mature and should be targeted during the next harvest entries, and the aspen and paper birch are also mature.
- The Bureau should work to secure future access to the West Forks SW Lot from Rt. 201 with the new owner of the parcel to the east of the lot.

Moxie Gore and The Forks Plantation North Lots

- Timber management on these lots should continue to increase overall quality of the more valuable species, while favoring softwoods.
- Lands will continue to coordinate with Parks on the management of the Moxie Falls trailhead and trail.
- The snowmobile and ATV trail crossing the North Lot will continue as an important link to the regional trail networks, connecting The Forks with areas to the north, south, and east.
- Although it is expected that the rare plants identified by MNAP on the north lot will be protected by their cliff and cedar swamp locations, where harvesting does not occur, MNAP will be consulted on any management activity with the potential to impact these resources.

The Forks Plantation South and Caratunk North Lots

- Timber management on these lots should continue to increase overall quality of the more valuable species, while favoring softwoods.
- The small acreage means that most harvests would best be done in at the same time on the two lots.
- A 100-foot no-harvest buffer will be applied to each side of the AT, along with a 400-feet remote recreation buffer beyond that where timber harvesting is conducted to maintain an undisturbed appearance.

Bald Mountain Lot

- Timber management on this lot should continue to favor vigorous well-formed trees of all species present while respecting the visual concerns and the AT.

Caratunk South and East Lots

- Timber management on these lots should continue to increase overall quality of the more valuable species, while favoring softwoods.
- Mowing or other methods will continue to be attempted on the old field to maintain this valuable habitat, if access challenges permit.

Considerations for locating a CMP Right of Way across BPL Lands in West Forks Plt and Johnson Mt. Plt

1. Authority to grant ROW across existing public lots (Johnson Mountain Twp Lot and West Forks Plt. Lot): BPL can grant a right of way through its Public Reserved Lands through two statutory authorities:

   a. 12 MRSA Section 1852, subsection 4, allows the bureau to lease public reserved lands for utilities rights-of-way for a term not exceeding 25 years; with the consent of the Governor and the Commissioner.

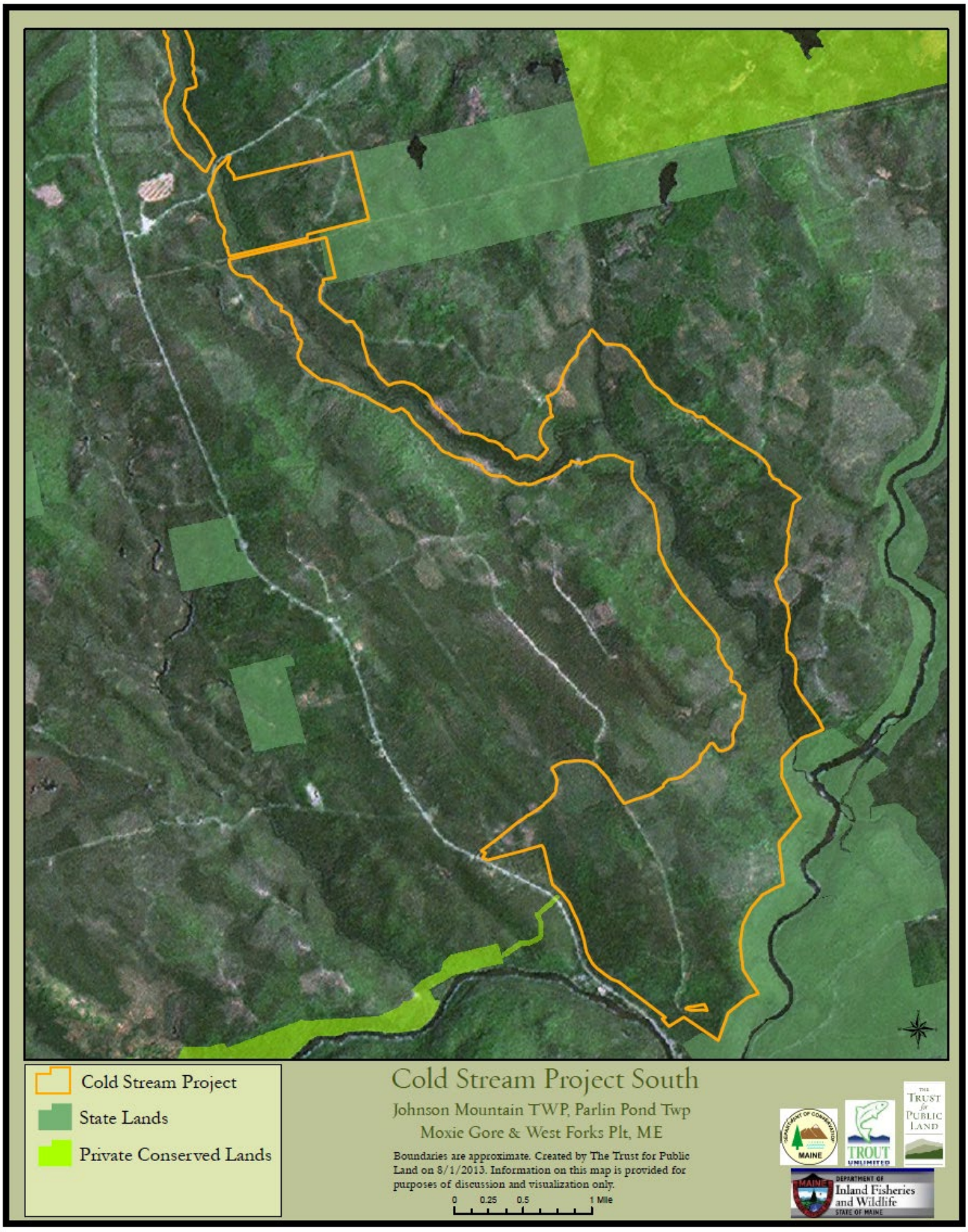
   b. 12 MRSA Section 1851 allows the bureau to execute deeds to convey lands, subject to the approval of the Legislature (by a two-thirds vote pursuant to 12 MRSA Section 598-A).

Note on Routing: There is already a lease to CMP for a power line corridor across the northern border of the West Forks Plt. Lot. That corridor extends all the way to Route 201, with an existing crossing of Cold Stream. It appears to be about 100 feet wide at most. The Bureau looked at this as a potential alternative route, and concluded that the net new acreage of ROW across current state ownership would appear to be about the same. Because of impacts related to crossing of Cold Stream, as discussed below, this option was not viewed as preferable to the proposed alignment.

2. Pending Cold Stream Forest Acquisition: The proposed corridor route would cross a portion of a property that is intended for BPL acquisition, with implications for both the routing and options for the conveyance of a right of way or deed. The Cold Stream Forest Project is a Forest Legacy Project which will entail BPL acquisition of lands along Cold Stream and its headwater ponds in order to protect important brook trout and deer habitat. See the attached map. This planned acquisition would occur in 2015. Forest Legacy funds in the amount of $6 million have been approved for this project, and an additional $1.5 million is requested from the Land for Maine's Future program, currently in the process of determining the use of voter approved bond for a round of proposals submitted earlier this spring. The Cold Stream Forest Project is LMF's highest ranked project.

Conveyance considerations related to the Cold Stream Forest Acquisition: The proposed route would cross about 0.2 mile of the Cold Stream Forest lands expected to come under state ownership. Once the property is acquired with Forest Legacy and LMF funds, there would be significantly more complication in making a conveyance of the property, or a power line corridor lease. To avoid this, the Bureau proposes to work with Plum Creek, and the Trust for Public Land (which holds a purchase option on the property), to exclude the proposed corridor from the acquisition property.

Routing Considerations: Regarding the routing, additional analysis would be needed, but It does appear that where the proposed corridor crosses Cold Stream near the Capital Road might minimize new clearing needed, reducing potential impacts of loss of shade and warm runoff, as well as visual impacts on the stream corridor. The Bureau would ask that the crossing involve as little width and clearing as possible, for these reasons. The Bureau, TPL and Plum Creek, the present landowner, would need to understand what is needed for this crossing in order to adjust the project accordingly. There was already a small buffer of land excluded from the project around the Capital Road – the question is, how much more is needed?


Cold Stream Project
State Lands
Private Conserved Lands
Cold Stream Project South
Johnson Mountain TWP, Parlin Pond Twp
Moxie Gore & West Forks Plt, ME
Boundaries are approximate. Created by The Trust for Public Land on 8/1/2013. Information on this map is provided for purposes of discussion and visualization only.
0 0.25 0.5 1 Mile
MAINE
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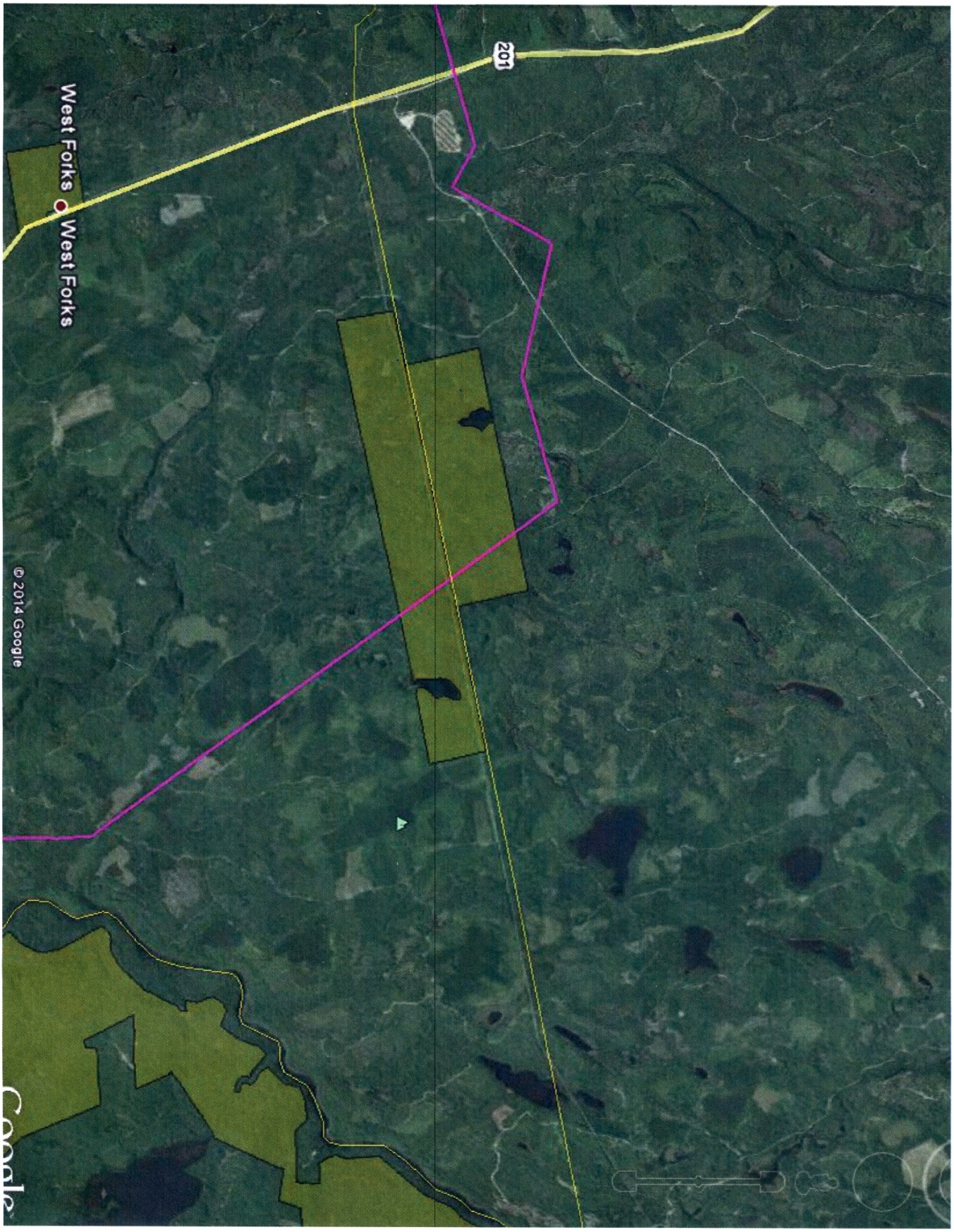
THE TRUST for PUBLIC LAND
DEPARTMENT OF Inland Fisheries and Wildlife STATE OF MAINE


201
West Forks
West Forks
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Koyanagi, Gayle

From: Rodrigues, David
Sent: Monday, November 3, 2014 5:06 PM
To: Morrison, Tom; Eickenberg, Katherine; Smith, Peter D.
Subject: FW: Draft Lease Johnson Mtn. - West Forks Utility corridor
Attachments: Draft Lease CMP-BPL 10-23-14 KHF.docx

Tom, Kathy and Pete,

We have gone through a few drafts of this lease and are now close to having a final draft. Lauren is also now reviewing it for the second time. The appraiser is on board and CMP will be contracting and paying for the appraisal. The appraiser, Andy Cutko and I walked the corridor last Thursday and found no natural communities of concern. The location of the crossing of Tomhegan Stream is of concern. The majority of the trees in this location are mostly large trees, so when the corridor is cut for the utility corridor, the stream will be entirely unshaded for the 300 foot width of the corridor. Tomhegan Stream empties into Cold Stream and is an important Trout Stream. CMP is looking into moving the corridor so that it does not cross Tomhegan Stream on the Public Lands, but it would still have to cross the stream farther South and closer to Cold Stream. I will research this crossing more with IFW.

Please review and let me know if we have missed anything and if we are ready to move forward.

David

From: Freye, Kenneth H [mailto:Kenneth.Freye@cmpco.com]
Sent: Thursday, October 23, 2014 10:34 AM
To: Rodrigues, David
Subject: Draft Lease CMP-BPL 10-23-14 KHF.docx

David,
Attached is the BPL - CMP lease with CMP's mark-ups. For simplicity, I accepted all of your changes, deleted the comments and then added the CMP changes in red-line. Many of the changes are spacing/typos. Regarding the substantive changes:

Section 3 Use:
CMP is not planning to provide communication capacity to third party users at this time. The revised language provides for doing this in the future under the BPL's terms.

Section 6c (herbicide application)
The language has been changed to conform with the IF&W standards and current practice.

Section 6g (IF&W standards)
Other than on the MPRP Project, MDEP has not adopted the various IF&W standards as part of CMP transmission line permits. CMP is agreeable to using these standards on this lease but needs to clarify that the IF&W standards apply only to the leased premises.

Section 6n (Jackman Tie Line)
CMP is willing to consider relocating the Jack man Tie Line but cannot commit to doing so at this time due to cost and unknowns in the regulatory and permitting areas.

Section 14 Statutory Authority Over Public Lands:
The original language was very broad and gave CMP only a the option to terminate or accept the amended lease as presented by BPL. The revised language limits this section to changes in Maine law pertaining to the lease of public land. CMP would, of course, have to comply with any other changes in Maine law but would do so under the auspices of the appropriate agency or regulatory authority. The need to negotiate an amendment is necessary because there are often many possible solutions and CMP should not be forced into arbitrarily accepting the one chosen by BPL.

Please call if you have questions on any of the above.
Ken

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Koyanagi, Gayle

From: Cutko, Andy
Sent: Thursday, November 12, 2020 9:31 AM
To: Rodrigues, David
Subject: FW: CMP West Forks-Johnson Mountain Proposed Utility Line
Attachments: powerline.pdf

Here is the e-mail we discussed a few days ago.

From: Rodrigues, David <David.Rodrigues@maine.gov>
Sent: Friday, November 14, 2014 2:06 PM
To: Morrison, Tom <Tom.Morrison@maine.gov>
Cc: Eickenberg, Katherine <Katherine.Eickenberg@maine.gov>
Subject: RE: CMP West Forks-Johnson Mountain Proposed Utility Line

Tom,

Here is the proposed corridor map if you need it.

David

From: Rodrigues, David
Sent: Friday, November 14, 2014 2:00 PM
To: Morrison, Tom
Cc: Eickenberg, Katherine
Subject: CMP West Forks-Johnson Mountain Proposed Utility Line

Tom,

We are near finalizing a Lease Agreement with CMP for the installation of a new Utility Transmission Corridor across the Bureau's Public Reserved Lands in West Forks Plantation and Johnson Mountain Township. We have two issues we are working on resolving. One issue is the crossing of Tomhegan Stream with the new corridor. The current crossing location may have significant impacts to the stream due to the removal of mature trees at this location with little to no understory or regeneration to provide stream shading. CMP has proposed moving the corridor to avoid crossing in this location and we are reviewing their proposal and seeking fisheries guidance from MIFW. A second resolution could be to require replanting of 4 to 5-foot tall native shrub vegetation within 75 feet of the stream in this location, which could provide stream shading in the near future. We are also discussing this possible lease condition with IFW.

The second issue is that CMP and BPL have not been able to agree on the partial rerouting of the existing utility line on the West Forks parcel onto the new corridor which is proposed to cross it. BPL has requested that CMP commit to moving the existing corridor onto the new corridor at the crossing location of the two corridors at the time the new corridor is cleared and constructed. CMP is currently opposed to committing to doing this. This existing corridor does not provide any annual lease rental income to the Bureau. The current lease for the existing corridor had a one-time rent of $2,500 in 1963 with no provisions for a rental increase and a termination date of "until said Plantation becomes incorporated". If the Plantation does not incorporate the lease would go on endlessly or until CMP abandons it.

The positive results for BPL from co-location are:

- Reducing the amount of transmission line corridor on the public lands by approximately 9,900 feet long and 100 feet wide.

- Having an additional 23 acres of public lands for timber production.
- Reduce the fragmentation of the forest on the public lands

CMP is resisting committing to this reroute primarily due to cost:

1. The estimated cost for the reroute given to me by CMP is approximately $1,406,250.00.

At this time we must decide on whether we will:

1. Settle for allowing the new corridor to move forward with the lease and no commitment from CMP that they will reroute the existing corridor.
2. Decline to move forward with a new corridor lease if they do not commit to the reroute.
3. As an incentive, propose to reduce the rent on the new corridor if they agree to reroute the existing corridor.
4. Compromise with a lease condition that states that they shall not rebuild the existing transmission line in its current location and that any replacement transmission line shall be constructed in the new corridor. I have discussed this with Ken Frye and he thinks CMP may agree to this.

Please advise on how you would like the Bureau to move forward on this?

Thank you,
David

Koyanagi, Gayle

From: Freye, Kenneth H <Kenneth.Freye@cmpco.com>
Sent: Monday, December 1, 2014 2:26 PM
To: Rodrigues, David
Subject: RE: West Forks, Johnson Mtn. Draft Lease CMP-BPL 2014-11-24

David,
CMP is OK with the changes. I will add the updated exhibits and send two signed copies to you. It may take a couple of days to get the signatures. I hope all goes well with the surgery and your wife has a speedy recovery.
Ken

From: Rodrigues, David [mailto:David.Rodrigues@maine.gov]
Sent: Monday, December 01, 2014 11:25 AM
To: Freye, Kenneth H
Subject: FW: West Forks,Johnson Mtn. Draft Lease CMP-BPL 2014-11-24

Hi Ken,

Removing condition "c" is satisfactory, thanks.

Attached is mostly a clean version of the lease with all your edits accepted, excluding section "c". IFW responded with their recommendations (see below), we have added in their recommendation C to the lease in redline in section 6,l. We did not see that their recommendation A was applicable since all the mapped streams on the leased area are now avoided with the new route. In response to their recommendation B, we felt that what was currently in the lease, was adequate at this time. In the Future, after further review and surveys of the corridor route at the time of permitting, MIFW can recommend additional setbacks if the surveys show a need. If minor adjustments are needed in the corridor to avoid vernal pools for example, the Bureau can easily make amendments to the lease to adjust the route. I also added in section 6,g "or the most current versions of the IFW recommended standards"

If you feel that you want to make any edits to the lease based on IFW's recommendations, please let me know. If the two additions are acceptable, please accept them and print out two original leases. Please have CMP sign both and send the two originals to me along with the new exhibit A and B. I'll have the Acting Director (Tom Morrison) sign and return to you the fully executed lease.

I'm in today, but my wife is having some major surgery tomorrow, so I don't know how much time I will be in the office the rest of this week. I'll have to shuttle her around to Portland and Brunswick for follow-up visits on Wednesday and Thursday so will most likely not be available. Call me on my cell phone at 446-1747 if you have any questions. She is expected to be able to be on her own by next Monday, if all goes well, I should be back in the office full time by then.

Thanks,
David

David,

CMP is agreeable to deleting condition 'c.' which should resolve the matter. Let me know if this is acceptable. I will get the exhibit and description to you first thing next week.
Ken

Ken Freye

Dirigo Partners, Ltd.
INTEGRATED REALTY SOLUTIONS

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From: Stratton, Robert D
Sent: Tuesday, November 25, 2014 5:11 PM
To: Rodrigues, David
Cc: Eickenberg, Katherine; Morrison, Tom; Connolly, James; Perry, John; VanRiper, Robert; Boucher, Dave; Erskine, Andrea
Subject: RE: West Forks,Johnson Mtn. Draft Lease CMP-BPL 2014-11-24

Good afternoon David,

MDIFW appreciates the opportunity to review the draft "Transmission Line Lease" between DACF BPL and Central Maine Power Company, and to comment on two potential corridor crossings of BPL land, per your request (see attached map). It should be noted that MDIFW is providing the following recommendations without the benefit of a detailed project site plan of the proposed corridor, and specifies that these recommendations do not replace MDIFW's recommendations as part of a formal environmental review nor do they preclude MDIFW from conducting a formal review. Because we are reviewing only a very small segment of a presumably much larger transmission line project, we can only provide general recommendations at this point.

1. Draft Lease Recommendations:

A. In Section 6.d. it states, "*There shall be no vegetation removal that would result in less than 50% aerial coverage of woody vegetation and stream shading within 25 feet of a stream.*" As referenced in MDIFW's Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects (March 26, 2012), and as part of current MDIFW recommendations on large scale projects such as gen lead lines associated with wind energy projects, "*…riparian buffers are defined as 100-foot natural vegetated buffers measured from the upland edge of associated fringe and floodplain wetlands on either side of the waterbody*". Further, for the large scale projects referenced, MDIFW recommends 250-foot buffers for any stream in which Atlantic salmon or Northern spring salamanders are located or suspected. While Atlantic salmon are not within the BPL project area, the presence of Northern spring salamanders is possible. This species requires clean, free flowing riverine habitat with vegetated buffers and minimal shoreline disturbance.

B. In Section 6.g., MDIFW was pleased to note reference to our Recommended Performance Standards for Inland Waterfowl and Wadingbird Habitats in Overhead Utility ROW Projects, Recommended Performance

Standards for Maine's Significant Vernal Pools in Overhead Utility ROW Projects, and Recommended Performance Standards for Riparian Buffers in Overhead Utility ROW Projects (all dated March 26, 2012), but would recommend stronger guidance than "*Lessee shall make every reasonable effort within the leased Premises to be in conformance*". Also please note that these standards are currently being internally reviewed and are subject to revision.

C. In Section 6.l., MDIFW requests the following change, "Natural Plant Community, wetland and Significant Vernal Pool field surveys… . Lessee shall send to Lessor and to the Maine Department of Inland Fisheries and Wildlife, a copy of all completed surveys before commencing any construction on the Premises."

2. Corridor Recommendation:

MDIFW was asked to review two potential corridor locations as they potentially impact BPL property. As noted above, MDIFW has not been made aware of the entire proposed transmission line corridor and is only addressing the immediate question related to stream crossings in BPL's Johnson Mountain and West Forks Plantation Northeast parcels. The two options presented consist of: (1) the "original" proposed corridor that would cross both Tomhegan Stream and the tributary from Wilson Hill Pond while on BPL property, and (2) a more westerly proposed corridor that would cross Tomhegan Stream south of BPL property and eliminate the crossing of the second stream. MDIFW notes that all streams in the vicinity are high quality, coldwater brook trout waters. As noted on the attached resource map, several waters are designated as A and B Heritage Waters. Generally, given the quality habitat involved, MDIFW believes that fewer stream crossings are preferred, which suggests the second option of the two. However, as this option is further south, CMP needs to ensure that an adequate riparian buffer to Cold Stream is maintained.

MDIFW also notes the presence of the proposed State of Maine Cold Stream Acquisition Project in this area that is intended to protect valuable coldwater fisheries habitat and deer wintering areas (see attached map). As part of a future full environmental permit application review, MDIFW will look to see that potential impacts to these valuable resources are avoided or minimized to the extent practicable.

3. General Recommendations:

MDIFW anticipates that our recommendations as part of a future environmental permit application review will likely include issues such as the following:

A. All temporary and permanent stream crossings should incorporate StreamSmart practices:

1. Span the stream channel to 1.2 times the bankfull width.
2. Set the crossing at the proper elevation.
3. Ensure the slope within the crossing matches the stream slope.
4. Include substrate in the crossing either by using open bottomed structures or embedding a closed structure.
5. Culverts should be embedded 25% of the rise.

B. In general for large scale projects, and specific to this proposed project area of this size, MDIFW recommends preconstruction investigations for potential impacts to the following species and habitats, including, but not limited to:

1. Inland Waterfowl and Wadingbird Habitats (IWWH moderate and high value)
2. A & B List Ponds

3. Canada lynx
4. Deer Wintering Areas (no mapped DWAs are noted, but there are mapped LURC p-fw's)
5. Rusty blackbirds
6. Bats
7. Northern Spring Salamander
8. Roaring Brook Mayfly
9. Raptors (general concern)
10. Great Blue Heron colonies
11. Significant Vernal Pools

C. The following information is provided from MDIFW recommendations for other project reviews to provide greater information to the applicant. The applicant should collaborate with MDIFW to develop complete, agreed-upon preconstruction survey protocols prior to collecting data in the field.

1. Bats: Seven out of eight species of bats in Maine are currently listed as Species of Special Concern by MDIFW: eastern small-footed bat (*Myotis leibii*), little brown bat (*Myotis lucifugus*), northern long-eared bat (*Myotis septentrionalis*), red bat (*Lasiurus borealis*), hoary bat (*Lasiurus cinereus*), silver-haired bat (*Lasionycteris noctivagans*), and tri-colored bat (*Perimyotis subflavus*). However, the three species of *Myotis* are currently the subject of the rulemaking process for protection under Maine's Endangered Species Act. While a comprehensive statewide inventory for bats has not been completed, it is likely that all or most of these species occur within the project area during migration and/or the breeding season. At this time, we have not developed guidelines to avoid or minimize impacts to habitat for these species, particularly from forestry clearing operations associated with the construction of the project; therefore, we will defer to guidance and recommendations provided from the U.S. Fish and Wildlife Service (USFWS), as the northern long-eared bat is being proposed for listing as an Endangered Species under the Federal Endangered Species Act.

2. Great Blue Heron Surveys: MDIFW recommends an aerial survey area within 4-miles of proposed development locations to look for new and existing colonies and level of use, include ridgeline sightings in raptor survey work. Surveys should be conducted between April 20 and May 31 (later in northern Maine and in Downeast Maine).

3. Bicknell's Thrush Surveys: At sites believed to support Bicknell's Thrush (~2,700 ft. elevation and above), a series of surveys should be conducted to assess the abundance and distribution of the population at that site. Surveys initially entail a series of point counts with broadcast to determine presence. If present (either by survey or anecdotal observation), surveys are followed by spot mapping to identify core areas for protection. Surveys for Bicknell's Thrush should involve close coordination with MDIFW staff to ensure consistent timing and level of effort with past studies.

4. Roaring Brook Mayfly Surveys: If the project area is high elevation (>1,000 feet) and within the species' currently known distribution, potentially suitable habitat should be identified during stream delineations and surveyed during the appropriate timing window (September).

5. Spring Salamander Surveys: If the area is high elevation (>1,000 feet) and within the species' known distribution, potentially suitable habitat should be identified during stream delineations and surveyed during the appropriate timing window (mid-May to mid-September).

6. Vernal Pool Surveys: Vernal pool surveys should be conducted within 250 feet of any proposed project impact and during the recommended egg mass periods. A MEDEP Maine State Vernal Pool Assessment Form should be filled out for each pool and submitted to MDIFW for pool status determination well before the project application is submitted to MDEP.

7. Northern Bog Lemming Surveys: As part of wetland delineations (>2,700 el, or those wetlands that show characteristics) MDIFW recommends that the applicant note any potential habitat supporting Northern Bog Lemming, and that they perform a meandering-type survey to document lemming presence through run-ways, latrines, and green scat. We do not recommend snap-trapping, or box trapping the wetland. If it has evidence of lemmings is present, MDIFW will consider the area as occupied and buffer accordingly. MDIFW recommendations will be to avoid these wetlands, or to prove that bog lemmings are not present.

8. Rare Animal Forms: MDIFW requests that the applicant/consultants document any Rare, Threatened, or Endangered Species they may encounter during course of other surveys.

As indicated previously, these recommendations are based on limited information and therefore do not constitute a comprehensive review of the entire proposed transmission line. Further, they do not replace MDIFW's recommendations as part of a formal environmental review, which we anticipate will occur in the future. Thank you very much. Please let us know if you have any questions or concerns. Thank you, Bob.

Bob Stratton
Supervisor, Fisheries and Wildlife Program Support
Maine Department of Inland Fisheries and Wildlife
41 State House Station
Augusta, Maine 04333-0041

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From: Cutko, Andrew
To: Rodrigues, David
Subject: RE: Johnson Mt. BPL Parcel
Date: Monday, November 10, 2014 8:04:16 AM

Thanks for the update, David. I'll defer to the fisheries biologists and engineers as to which option is best to minimize impacts.

- Andy

From: Rodrigues, David
Sent: Thursday, November 06, 2014 8:49 AM
To: Cutko, Andrew
Subject: RE: Johnson Mt. BPL Parcel

Thanks Andy,

I have been in contact with Bobby Vanriper at IFW and we are working on possible alternatives for that crossing. I spoke with CMP about moving East with the corridor and crossing the new line at the same location as the existing line. This would result in just an expansion of the existing opening and eliminate the second crossing. The problem there is that it is a tight area due to the adjacent wetlands and the MRCE at that corner. CMP also stated that if they relocated the existing utility line onto the new line at that location, it would result in a 90° angle and according to them, the poles may have to be located in the stream.

CMP suggested moving the Corridor West and crossing Tomhegan Stream South and off the Public Lands (see attached map). This would also eliminate the crossing of the smaller stream coming from Wilson Hill Pond. The downside to this is there is still an additional 300' crossing of Tomhegan Stream and it is closer to where it enters Cold Stream. Not sure if this is a better alternative? Bobby is working on this.

Any thoughts on this?

Thanks,
David

From: Cutko, Andrew
Sent: Wednesday, November 05, 2014 4:20 PM
To: Rodrigues, David
Subject: Johnson Mt. BPL Parcel

Hi David –

Here's a quick follow up regarding our trip to the Johnson Mt. parcel last week.

Using the map provided by CMP, we traversed the majority of the area within the proposed utility corridor. The forest here consists of a mix of mature lowland spruce-fir and northern hardwoods,

with patches of alder along branches of Tomhegan Stream and a small open wetland under the current east-west powerline. Forest stocking is generally good (basal area > 100 square feet/acre), and the harvest history varies. Portions of the forest were selectively harvested about 5 years ago, but areas immediately adjacent to (and east of) Tomhegan Stream were not cut. The southeast end of proposed corridor traverses through mature to late-successional northern hardwoods characterized by 20"+ sugar maples. Adjacent private lands have been harvested recently.

In terms of sensitive areas, the only real concern we noted is the crossing of the mainstem of Tomhegan Stream and a smaller branch to the west. Portions of Tomhegan Stream upstream of the BPL parcel are mapped as brook trout habitat by MDIFW. If the proposed utility line moves forward, I would encourage you to contact MDIFW's regional fisheries biologist regarding mitigation for these stream crossings (e.g., siting of the crossing, minimizing disturbance during construction, retaining shade, etc.). We did not visit the northern ¼ of the proposed line, but based on air photos there did not appear to be any particularly sensitive habitats there.

Let me know if you have questions regarding any of this.

- Andy

Andy Cutko
Ecologist
Maine Department of Agriculture, Conservation, and Forestry
State House Station 93
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(207) 287-8042

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OFFICE OF THE ATTORNEY GENERAL

6 State House Station
Augusta, Maine 04333-0006

phone: 626-8878
fax: 626-8812
email: lauren.parker@maine.gov

Memorandum

does not relate to attached lease

Sample purposes applies

To: Tom Desjardin, Director, Bureau of Parks and Lands

From: Lauren E. Parker, Assistant Attorney General LEP

Date: July 25, 2018

Subject: Cold Stream Forest

Introduction

You have asked whether the Bureau of Parks and Lands (the BPL), within the Department of Agriculture, Conservation, and Forestry (the DACF), must obtain 2/3 legislative approval, pursuant to either 12 M.R.S.A. § 598-A (Supp. 2017) or 5 M.R.S.A. § 6209(6) (2013), to lease to Central Maine Power Company (CMP) for a transmission line public reserved lands that were acquired with proceeds from the Land for Maine's Future (LMF) Fund (LMF funds). As explained below, 12 M.R.S.A. § 598-A, not 5 M.R.S.A. § 6209(6), applies to the use of public reserved lands that were acquired with LMF funds. Thus, the Bureau may enter into a valid transmission line lease with CMP if such a lease will not "substantially alter" the public reserved lands at issue.

Background

In an application dated September 27, 2017, Central Maine Power (CMP) applied to the Department of Environmental Protection (the DEP) for a permit, pursuant 38 M.R.S.A. § 483-A(1) (Pamph. 2017) (the Site Law), for a high voltage direct current transmission line that would run from Quebec, through Western Maine, to a conversion station in Lewiston. When a development subject to the Site Law is proposed for the unorganized and deorganized areas, the Land Use Planning Commission certifies to the DEP whether the proposed development is an allowed use within the zoning sub-district(s) where it is proposed. 12 M.R.S.A. § 685-B(1)(B-1) (Supp. 2017); 38 M.R.S.A. § 489-A-1 (Pamph. 2017); *see* 12 M.R.S.A. § 682(1) (Supp. 2017) (defining "unorganized and deorganized areas"). CMP's proposed route would cross through several sub-districts zoned by the LUPC as Recreation Protection (P-RR sub-district). In a P-RR sub-district, utility facilities may be allowed by special exception "provided that the applicant shows by substantial evidence that," among other criteria, "there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant." 01-672 C.M.R. ch. 10, § 10.23(I)(3)(d)(8) (2017). The Bureau has identified a possible alternate route for part of CMP's proposed transmission line, which, I understand, would traverse several miles along the

southeastern boundary of the Cold Stream Forest unit of public reserved lands and not be located in a P-RR sub-district.

The Bureau acquired the Cold Stream Forest unit of public reserved lands (Cold Stream Forest) in 2016 with LMF funds and money from the federal Forest Legacy Program.[1] *See* 5 M.R.S.A. § 6203 (2013) (establishing the LMF Fund); P.L. 2011, ch. 696 (authorizing a bond issuance for the LMF Fund). Cold Stream Forest is part of the Upper Kennebec Region of public reserved lands. Me. Dep't of Agric., Conservation & Forestry, Draft Upper Kennebec Region Management Plan 2 (May 31, 2018). The Bureau acquired Cold Stream Forest "with the primary goal of protecting wild native brook trout habitat, and deer winter habitat." *Id.* at 44. The Bureau will manage Cold Stream Forest pursuant to two habitat management agreements with the Department of Inland Fisheries and Wildlife (the DIFW), the Bureau's multiple use mandate, and a management plan "for multiple uses including outdoor recreation, wildlife habitat, scenic and natural area protection, water quality protection, and production of forest products." *Id.* at 47, 53, 56-57; Trust for Public Land and Me. Dep't of Agric., Conservation & Forestry, Cold Stream Forest: Proposal to the Land for Maine's Future Board 4 (Mar. 28, 2014); *see* P.L. 2011, ch. 696, § 5(2) ("Land . . . purchased by the State that contains wildlife or fish habitat must be managed by the Department of Conservation using protocol provided by the Department of Inland Fisheries and Wildlife."); 12 M.R.S.A. § 1847 (Supp. 2017) (establishing a multiple use mandate for public reserved lands and requiring a management plan). Because Cold Stream Forest is public reserved land, and was acquired with LMF funds, the Bureau has asked whether 12 M.R.S.A. § 598-A or 5 M.R.S.A. § 6209(6) requires that the Bureau obtain 2/3 legislative approval to lease part of Cold Stream Forest to CMP for a transmission line.

ANALYSIS

Title 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) each require 2/3 legislative approval of certain changes in use and conveyances of specified types of public lands. The plain language of 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) suggests that each statute applies to a proposed change in use or conveyance of public reserved lands acquired with LMF funds. To determine which statute applies, or whether both statutes apply, it is necessary to review the Bureau's statutes pertaining to public reserved lands, the LMF statutes, and Maine's designated lands statute.

Statutory Framework

1. The Bureau of Parks and Lands – Public Reserved Lands

The DACF, through the Bureau, is one of the State's land-owning agencies. 12 M.R.S.A. §§ 1802, 1803 (Supp. 2017). The Bureau's lands are classified into different categories—state parks and historic sites, public reserved lands, nonreserved public lands, submerged lands and intertidal lands, the Allagash Wilderness Waterway, and public boating facilities. 12 M.R.S.A. §§ 1803(1), 1804(1), (2) (Supp. 2017). Each category of land is subject to its own management directive. 12 M.R.S.A. § 1804(2). Public reserved lands, which include those lands acquired by

[1] This memorandum is limited to addressing state law. It does not opine as to whether a transmission line lease would be allowed pursuant to the federal Forest Legacy Program.

the State and expressly designated as such by the Bureau, are managed pursuant to a multiple use mandate and a management plan.[2] 12 M.R.S.A. § 1847; *see* 12 M.R.S.A. §§ 1801(8), 1845(1) (defining, respectively, "public reserved lands" and "multiple use"). Public reserved lands are not held strictly for conservation and recreation purposes. Indeed, 12 M.R.S.A. § 1852(4)-(6) (Supp. 2017) authorizes the Bureau to lease public reserved lands for varying purposes, including for electric power transmission, telecommunications, railroad tracks, warehouses, dam sites, and dump sites.

2. Land for Maine's Future

The LMF program is a public land acquisition program funded by bond sales, the proceeds of which are disbursed by the LMF Board. 12 M.R.S.A. §§ 6203, 6206(1)(C), (D) (2013). The LMF program was created in 1987 to facilitate the acquisition and maintenance of "natural areas for recreation, hunting and fishing, conservation, wildlife habitat, vital ecologic functions and scenic beauty."[3] 5 M.R.S.A. § 6200 (2013); P.L. 1987, ch. 506. When deciding whether to award funds to an acquisition proposal, the LMF Board considers, among other things, the land's resources and recreational values, including public access. 5 M.R.S.A § 6207(2), (3) (2013); P.L. 2011, ch. 696, § 5.

To protect the public's investment, land acquired with LMF funds "may not be sold or used for purposes other than those stated in this chapter, unless approved by a 2/3 majority of the Legislature." 5 M.R.S.A. § 6209(6). Electricity generation and transmission are not among the purposes for which the LMF Board funds land acquisitions. *See* 5 M.R.S.A. §§ 6200 & 6207(2), (3). Thus, if 5 M.R.S. § 6209(6) applies to public reserved lands acquired with LMF funds, the Bureau would need 2/3 legislative approval to lease part of Cold Stream Forest to CMP for a transmission line.

3. Designated Lands Statute

In 1993, Maine's Constitution was amended to require 2/3 legislative approval to convey or substantially alter the uses of public lands held for conservation or recreation purposes. Article IX, section 23 of the Maine Constitution states:

> 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

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[2] The Bureau is in the process of developing its plan for the Upper Kennebec Region, which includes Cold Stream Forest. Prior to adopting a plan, the Bureau must manage Cold Stream Forest in accordance with the Bureau's multiple use mandate. 12 M.R.S.A. § 1847(2); *see also* 12 M.R.S.A. § 1847(3) ("The director may take actions on the public reserved lands consistent with the management plans for those lands and upon any terms and conditions and for any consideration the Director considers reasonable.").

[3] Title 5 M.R.S.A. § 6209(2) provides that "[t]itle to all lands acquired pursuant to this chapter must be vested solely in the State." Recent bond authorizations, however, have allowed title to land acquired with LMF funds to be vested in entities that qualify as cooperating entities pursuant to 5 M.R.S.A. § 6201(2) (2013). *E.g.*, P.L. 2011, ch. 696, § 5(1)(B); P.L. 2009, ch. 414, § E-5(2).

> members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

Maine's designated lands statute, 12 M.R.S.A. §§ 598 to 598-B (2005 & Supp. 2017), implements Article IX, section 23 of the Maine Constitution. The designated lands statute provides that designated lands "may not be reduced or substantially altered except by a 2/3 vote of the Legislature." 12 M.R.S.A. § 598-A. Both public reserved lands and lands acquired by the State with LMF funds are designated lands. 12 M.R.S.A. § 598-A(2-A)(D), (6). For purposes of the designated lands statute, "substantially altered" means

> 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 public reserved . . . lands are the protection, management and improvement of those properties for the multiple use objectives established in section 1847. The essential purposes of lands acquired through the Land for Maine's Future Board *that are not held by the Department of Inland Fisheries and Wildlife or by the Department of Agriculture, Conservation and Forestry* are the protection, management and improvement of those lands for recreation, conservation, farming, open space, plant and animal habitat, scenic values, public access and related purposes.

12 M.R.S.A. § 598(5) (Supp. 2017) (emphasis added).[4]

The designated lands statute defines "substantially altered" in reference to the purposes for which the State holds each type of designated lands. When defining the purposes of LMF-funded lands, the designated lands statute incorporates the purposes of the LMF program, but only for those properties that are held by agencies other than the DIFW or the DACF. If the DIFW or the DACF holds the LMF-funded land, the purposes for which the DIFW or the DACF holds that land are the basis for determining whether a use substantially alters it. A proposed transmission line through Cold Stream Forest is therefore measured against the Bureau's multiple use mandate for public reserved lands and its management objectives for Cold Stream Forest, and not against the purposes of the LMF program. Thus, under the designated lands statute, the Bureau may lease part of Cold Stream Forest to CMP for a transmission line without 2/3 legislative approval if the Bureau finds that a transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest. 12 M.R.S.A. §§ 598(5), 598-A.

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[4] The designated lands statute defines "reduced" to mean: "[A] reduction in acreage of an individual parcel or lot of designated land under 598-A. 'Reduced' does not mean a reduction in the value of the property . . . [nor] does [it] mean the conveyance of an access right by easement in accordance with section 1814-A." 12 M.R.S.A. § 598-A(4). A transmission line lease will not reduce the acreage of Cold Stream Forest owned by the State and, therefore, is not a reduction requiring 2/3 legislative approval.

12 M.R.S.A. § 598-A, not 5 M.R.S.A. § 6209(6), Applies to Public Reserved Lands Acquired with LMF Funds

Because Cold Stream Forest is public reserved land and because Cold Stream Forest was acquired with LMF funds, both 12 M.R.S.A. § 598-A and 5 M.R.S.A. § 6209(6) purport to apply to a transmission line through Cold Stream Forest. But each statute produces a different result: Whereas 5 M.R.S.A. § 6209(6) requires that the Bureau obtain 2/3 legislative approval to run a transmission line through Cold Stream Forest, 12 M.R.S.A. § 598-A would require 2/3 legislative approval of the same use only if the Bureau determines that the transmission line will not alter the physical characteristics of Cold Stream Forest in a way that frustrates the purposes for which the Bureau holds Cold Stream Forest. Title 5 M.R.S.A. § 6209(6) and 12 M.R.S.A. § 598-A produce different results because their respective standards measure the proposed transmission line against different purposes, one of which—the conservation and recreation purposes of the LMF program—is more restrictive than the other—the multiple use mandate of public reserved lands. Where 5 M.R.S.A. § 6209(6) requires 2/3 legislative approval of a transmission line through Cold Stream Forest, and 12 M.R.S.A. § 598-A may not require 2/3 legislative approval of a transmission line through Cold Stream Forest, 5 M.R.S.A. § 6209(6) and 12 M.R.S.A. § 598-A are in conflict. *See Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 19, 183 A.3d 749.

"When a more recent amendment to a Maine statute directly conflicts with an older provision, we must, as always determine the intent of the Legislature, and the question becomes whether the older provision has been repealed by implication." *Maine Senate*, 2018 ME 52, ¶ 20, 183 A.3d 749 (quotation marks omitted). This method of statutory construction applies

> when a later enactment encompasses the entire subject matter of an earlier act, or when a later statute is inconsistent with or repugnant to an earlier statute. When a later statute does not cover the earlier act in its entirety, but is inconsistent with only some of its provisions, a repeal by implication occurs to the extent of the conflict.

Id. (quotation marks omitted).

At the time the designated lands statute was enacted in 1993, 5 M.R.S.A. § 6209(6) already protected against a sale or change in use of public lands acquired by the State with LMF funds. The more recent designated lands statute protects against the same concerns using different language—"reduced" and "substantially altered"—and covers more types of public lands than does 5 M.R.S.A. § 6209(6).[5] Although the Legislature could have excluded lands already subject to 5 M.R.S.A. § 6209(6) when enacting the designated lands statute, it chose to include those lands acquired by the State with LMF funds. Additionally, it expressed its intent as to how a proposed change in use of public reserved lands that are acquired with LMF funds and held by the DACF should be evaluated: substantial alteration of those lands is measured against the purposes for which the DACF holds those lands. 12 M.R.S.A. § 598(5). Although the Legislature could have

[5] The designated lands statute applies only to "real estate held by the State." 12 M.R.S.A. §§ 598(1), (3), 598-A. Title 5 M.R.S.A. § 6209(6) may apply to LMF-funded properties that are not owned by the State. If not, the designated lands statute appears to encompass the entire subject matter of 5 M.R.S.A. § 6209(6).

ascribed the purposes of the LMF program to all lands acquired with LMF funds, including lands held by the DACF, it did not. Instead, it adopted a definition of "substantially altered" that maintains the Bureau's flexibility in managing public reserved lands.[6] *See An Act to Designate Certain Lands Under the Constitution of the Maine, Article IX, Section 23: Hearing on L.D. 1953 Before the J. Standing Comm. on Energy & Nat. Res.*, 116th Legis. (1994) (testimony of C. Edwin Meadows, Jr., Commissioner of the Department of Conservation). Being the more recent expression of the Legislature as to the use of public reserved lands that were acquired using LMF funds, the designated lands statute "must be deemed a substitute" for 5 M.R.S.A. § 6209(6) when the LMF-funded lands are public reserved lands.[7] *Maine Senate*, 2018 ME 52, ¶ 23, 183 A.3d 749. Title 5 M.R.S.A. § 6209(6) therefore does not apply to public reserved lands acquired with LMF funds.

Review of Proposed Transmission Line Pursuant to 12 M.R.S.A. § 598-A

The Bureau needs 2/3 legislative approval to lease part of Cold Stream Forest for a transmission line if a transmission line will "substantially alter" Cold Stream Forest. 12 M.R.S.A. § 598-A. A transmission line will "substantially alter" Cold Stream Forest if it "would significantly alter physical characteristics [of Cold Stream Forest] in a way that frustrates . . . the protection, management and improvement of [that] propert[y] for the multiple use objectives" that govern public reserved lands. 12 M.R.S.A. § 598(5). As stated above, the Bureau's multiple use mandate includes the authority to lease public reserved lands for commercial and industrial uses and for the transmission of electricity. 12 M.R.S.A. § 1852(4), (6). That does not mean, however, that a use authorized by 12 M.R.S.A. § 1852 will never "substantially alter" public reserved lands. Rather, such inquiries should be resolved on a case-by-case basis after considering the resources and values of the public reserved lands at issue.

Here, there is no question that a transmission line will alter the physical characteristics of Cold Stream Forest. Such a project entails vegetation removal, surface alteration, and the placement of poles and wires. To determine whether that physical alteration is significant enough to frustrate the purposes for which the Bureau holds Cold Stream Forest, the Bureau must consider the impacts a transmission line will have on wild brook trout habitat, deer wintering habitat, other wildlife and habitat resources, recreational values, and timber harvesting. *See* Me. Dep't of Agric., Conservation & Forestry, Cold Stream Forest: Proposal to the Land for Maine's Future Board (proposing to manage Cold Stream Forest "under the Bureau's multiple use mandate for protection

[6] In contrast, whether a proposed use of LMF-funded land held by the Department of Marine Resources (the DMR) constitutes a substantial alteration would be measured against the purposes of the LMF program. 12 M.R.S.A. §§ 598(5), 598-A; *see* 12 M.R.S.A. § 6022(5) (Supp. 2017) (authorizing the DMR to acquire land).

[7] The Legislature subsequently amended both 12 M.R.S.A. § 598(4)-(5) and 5 M.R.S.A. § 6209(6)-(7) to clarify that the Bureau may grant access rights by easement across a rail trail without obtaining 2/3 legislative approval. P.L. 2011, ch. 278. Those changes, however, do not pertain to public reserved lands. *See* 12 M.R.S.A. § 1813 (Supp. 2017) (placing rail trails under subchapter 2 of chapter 220, which subchapter pertains to state parks and historic sites and not to public reserved lands).

and enhancement of wildlife habitat, rare or exemplary natural communities, recreation, and timber production"). Additionally, the Bureau and the DIFW must determine whether a transmission line is prohibited by or conflicts with any provision of the Habitat Management Agreements governing the property. P.L. 2011, ch. 696, § 5(2) ("Land . . . purchased by the State that contains wildlife or fish habitat must be managed by the Department of Conservation using protocol provided by the Department of Inland Fisheries and Wildlife."). If, after undertaking that review, the Bureau determines that a transmission line will not frustrate its management of the property for those resources, and the DIFW agrees that a transmission line is not prohibited by or in conflict with the habitat management agreements, the Bureau may enter into a valid transmission line lease with CMP without obtaining 2/3 legislative approval.

Conclusion

Title 12 M.R.S.A.§ 598-A, not 5 M.R.S.A. § 6209(6), applies to the Bureau's possible lease of Cold Stream Forest to CMP for a transmission line. If the Bureau determines that a transmission line will not "substantially alter" Cold Stream Forest, it does not need 2/3 legislative approval to enter into a valid transmission line lease with CMP.

From: Anthony Calcagni
Sent: Monday, April 20, 2020 10:01 AM
To: William Harwood <wharwood@verrilldana.com>
Subject: RE: CMP lease with BPL

Bill, here's the summary of the substantive revisions in what I just forwarded to Eben Adams:

- With input from Andy Cutko, we've characterized this as an "Amended and Restated Lease," and added a provision in Sec. 23 that specifies this Amended and Restated Lease expressly supersedes the 2014 Lease. (As opposed to just signing a new Lease and signing a separate agreement to terminate the 2014 Lease.) Idea is to help show that this 2020 Lease does nothing to "substantially alter" the leased premises now, while still providing a new lease agreement that is being executed after the 2019 CPCN.
- Sec. 2 – Rent
  - We've left the annual rent ("Initial Payment") amount blank for now.
  - Annual payment date has been changed from Dec. 1 to Apr. 1, on the assumption this will be executed sometime soon (may end up making sense to bump that to May 1).
  - Added a requirement that, within 12 months, CMP must commission an appraisal of the annual rent, at CMP's cost. If the appraised value is higher, the Initial Payment goes up; if the appraised value is lower, the Initial Payment remains unchanged.
  - Added details on how the CPI escalator will work, and now specifies that if the annual CPI goes down the rent does not (a "ratchet effect").
  - Added back the requirement that CMP pay for stumpage value of removed timber.
- Sec. 3 – Use
  - Adds a reference to the 2019 CPCN
  - Clarifies that CMP's right to use land outside the corridor is limited as specified in other Lease provisions.
- Exhibit A: Now uses a specific survey description of the leased Premises.
- We'll want to make sure the three attachments are the latest versions of the specified "Recommended Performance Standards."

Let me know if you need anything else or would like to discuss. Tony

Anthony M. Calcagni PARTNER
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Portland, ME 04101-4054
T (207) 253-4516

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From: Abello, Thomas <Thomas.Abello@maine.gov>

alteration or operation. Lessee shall provide written confirmation that Lessee has obtained all material permits and licenses to construct and operate the Facilities. Lessee shall furnish Lessor with copies of all such permits and licenses, together with renewals thereof to Lessor upon the written request of Lessor. This lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits. Prior to such termination, however, Lessor shall provide written notice to Lessee of such failure and Lessee shall have 30 days in which to cure such failure.

n. In the event Lessee constructs an electric transmission line on the Premises, Lessee agrees to enter into discussions with Lessor regarding the relocation of that part of the existing 100-foot wide utility corridor described in a lease dated July 9, 1963 and recorded in the Somerset County Registry of Deeds, ~~in~~ Book 679, Page 37 (the "Jackman Tie Line Lease") located westerly of the Premises. Lessor and Lessee agree that the relocation of the above described facilities will only occur if such relocation is cost effective for Lessee given other alternatives for addressing the electrical reliability of the Jackman area. In that event that the Jackman Tie Line is relocated pursuant to this section, upon completion of any such relocation of the Jackman Tie Line or its functional replacement and removal of Lessee's facilities from that portion of the Jackman Tie Line Lease lying westerly of the Premises, Lessor and Lessee agree to amend the Jackman Tie Line Lease to delete from the lease area that portion of the Jackman Tie Line Lease lying westerly of the Premises. All other terms and conditions of the Jackman Tie Line Lease shall remain in full force and effect.

~~Lessee shall relocate the existing utility line (100-foot corridor lease AKA the Jackman Tie Line) on Lessor's Johnson Mountain and West Forks Plantation North East Maine Public Reserved Lands property onto this new corridor, from the point of intersection with the new corridor. The relocation of the Jackman Tie Line will take place at the time the new utility corridor is constructed. Upon completion of the relocation, Lessee agrees to terminate the existing lease with Lessor on the abandoned utility corridor section and remove all of Lessee's facilities from the abandoned corridor section in accordance with the provisions of that lease.~~

7. Liability and Insurance.

a. Lessee shall without unreasonable delay inform Lessor of all risks, hazards and dangerous conditions caused by Lessee which are outside of the normal scope of constructing and operating the Facilities of which Lessee becomes aware of with regards to the Premises. Lessee assumes full control of the Premises, except as is reserved by Lessor herein, and is responsible for all risks, hazards and conditions on the Premises caused by Lessee.

b. Except for the conduct of Lessor and Lessor's guests and agents, Lessor shall not be liable to Lessee for any injury or harm to any person, including Lessee, occurring in or on the Premises or for any injury or damage to the Premises, to any property of the Lessee, or to any property of any third person or entity. Lessee shall indemnify and defend and hold and save Lessor harmless, including, but not limited

Commented [LP4]: NO!

CMP is responsible for and fully capable of obtaining all legally required permits in a timely fashion. Thirty days to cure a default that should not happen in the first instance is generous. Ninety days to seek to cure such failure (which falls short of actually curing) plus time to prosecute, plus time to cure afforded by ¶ 13(b) is excessive. If CMP fails to get a permit and is making a good faith effort to remedy any such failure, it can explain that to the Bureau and, because the Bureau is reasonable, successfully persuade the Bureau not to exercise its discretion to terminate this lease, pursuant to this paragraph and paragraph 13(b).

Commented [EK5]: Why should this decision to co-locate a line on Bureau property to reduce fragmentation of habitat, multiple crossings of Cold Stream, and interference with Bureau use be conditioned on CMP determining it is cost-effective for them? If they want this line, we should require this in the lease.

Koyanagi, Gayle

From: Cutko, Andy
Sent: Thursday, November 12, 2020 9:31 AM
To: Rodrigues, David
Subject: FW: CMP West Forks-Johnson Mountain Proposed Utility Line
Attachments: powerline.pdf

Here is the e-mail we discussed a few days ago.

From: Rodrigues, David <David.Rodrigues@maine.gov>
Sent: Friday, November 14, 2014 2:06 PM
To: Morrison, Tom <Tom.Morrison@maine.gov>
Cc: Eickenberg, Katherine <Katherine.Eickenberg@maine.gov>
Subject: RE: CMP West Forks-Johnson Mountain Proposed Utility Line

Tom,

Here is the proposed corridor map if you need it.

David

From: Rodrigues, David
Sent: Friday, November 14, 2014 2:00 PM
To: Morrison, Tom
Cc: Eickenberg, Katherine
Subject: CMP West Forks-Johnson Mountain Proposed Utility Line

Tom,

We are near finalizing a Lease Agreement with CMP for the installation of a new Utility Transmission Corridor across the Bureau's Public Reserved Lands in West Forks Plantation and Johnson Mountain Township. We have two issues we are working on resolving. One issue is the crossing of Tomhegan Stream with the new corridor. The current crossing location may have significant impacts to the stream due to the removal of mature trees at this location with little to no understory or regeneration to provide stream shading. CMP has proposed moving the corridor to avoid crossing in this location and we are reviewing their proposal and seeking fisheries guidance from MIFW. A second resolution could be to require replanting of 4 to 5-foot tall native shrub vegetation within 75 feet of the stream in this location, which could provide stream shading in the near future. We are also discussing this possible lease condition with IFW.

The second issue is that CMP and BPL have not been able to agree on the partial rerouting of the existing utility line on the West Forks parcel onto the new corridor which is proposed to cross it. BPL has requested that CMP commit to moving the existing corridor onto the new corridor at the crossing location of the two corridors at the time the new corridor is cleared and constructed. CMP is currently opposed to committing to doing this. This existing corridor does not provide any annual lease rental income to the Bureau. The current lease for the existing corridor had a one-time rent of $2,500 in 1963 with no provisions for a rental increase and a termination date of "until said Plantation becomes incorporated". If the Plantation does not incorporate the lease would go on endlessly or until CMP abandons it.

The positive results for BPL from co-location are:

- Reducing the amount of transmission line corridor on the public lands by approximately 9,900 feet long and 100 feet wide.

- Having an additional 23 acres of public lands for timber production.
- Reduce the fragmentation of the forest on the public lands

CMP is resisting committing to this reroute primarily due to cost:

1. The estimated cost for the reroute given to me by CMP is approximately $1,406,250.00.

At this time we must decide on whether we will:

1. Settle for allowing the new corridor to move forward with the lease and no commitment from CMP that they will reroute the existing corridor.
2. Decline to move forward with a new corridor lease if they do not commit to the reroute.
3. As an incentive, propose to reduce the rent on the new corridor if they agree to reroute the existing corridor.
4. Compromise with a lease condition that states that they shall not rebuild the existing transmission line in its current location and that any replacement transmission line shall be constructed in the new corridor. I have discussed this with Ken Frye and he thinks CMP may agree to this.

Please advise on how you would like the Bureau to move forward on this?

Thank you,
David

Exhibit A

Cutko, Andy

From: Cutko, Andy
Sent: Thursday, March 5, 2020 12:29 PM
To: Rodrigues, David
Subject: FW: CMP Transmission line lease from December 2014

FYI.

From: Parker, Lauren <Lauren.Parker@maine.gov>
Sent: Wednesday, March 4, 2020 9:21 AM
To: Abello, Thomas <Thomas.Abello@maine.gov>; Cutko, Andy <Andy.Cutko@maine.gov>
Cc: Horton, Emily K <Emily.K.Horton@maine.gov>; Malon, Marc <Marc.Malon@maine.gov>
Subject: FW: CMP Transmission line lease from December 2014

FYI.

From: Parker, Lauren
Sent: Wednesday, March 04, 2020 9:18 AM
To: Kinney, MaryAnne <maryanne.kinney@legislature.maine.gov>
Cc: Malon, Marc <marc.malon@maine.gov>
Subject: RE: CMP Transmission line lease from December 2014

Dear Rep. Kinney,

Thank you for your email regarding LD 1893. I offer the following in response to your questions.

Whether the 2014 Bureau Lease to CMP Constitutes a Substantial Alteration and Requires 2/3 Legislative Approval to be Valid:

Title 12 M.R.S. § 598-A, which implements Me. Const. art. IX, § 23, requires that any substantial alteration of designated lands, which includes public reserved lands, be approved by 2/3 of the Legislature. "Substantially altered" is defined by 12 M.R.S. § 598(5). Before entering into the 2014 CMP lease, the Bureau of Parks and Lands (the Bureau) did not ask the OAG, and the OAG did not advise, whether that lease would substantially alter the West Forks Plantation and Johnson Mountain Township public reserved lands and require 2/3 legislative approval to be valid. I understand that the Bureau did not seek 2/3 legislative approval of the 2014 CMP lease because it does not regard the 2014 CMP lease as substantially altering those lands. I have since advised the Bureau that this interpretation—the 2014 lease does not substantially alter the West Forks Plantation and Johnson Mountain Township public reserved lands, and therefore does not require 2/3 legislative approval to be valid--is legally defensible.

To determine whether a proposed use of public reserved lands will substantially alter those lands, I understand that the Bureau undertakes a case by case, fact-specific inquiry and analysis, not necessarily reduced to writing, that considers the resources, features, and uses of the land for which the new use is proposed. Thus, as the Bureau interprets Maine's designated lands statute, the existence of a 150-foot transmission line corridor on the West Forks Plantation and Johnson Mountain Township public reserved lands is particularly relevant to its determination that the 2014 CMP lease does not substantially alter the West Forks Plantation and Johnson Mountain Township public reserved lands. Although the Bureau's interpretation that the 2014 CMP lease does not substantially alter the West Forks Plantation and Johnson Mountain Township public reserved lands is legally defensible, only a court can finally determine whether it is the correct interpretation of 12 M.R.S. § 598(5).

For additional information regarding the existing transmission line corridor, I encourage you to contact the Bureau.

Whether the 2014 Bureau Lease to CMP Violates 35-A M.R.S. § 3132(13):

Title 35-A M.R.S. § 3132(13) provides that a State agency may not lease an interest in public land, "other than a future interest or option to purchase an interest in land that is conditioned on the 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." As you know, the 2014 CMP lease predates the Public Utilities Commission's order, dated May 3, 2019, granting to CMP a certificate of public convenience and necessity (CPCN). I understand that the Bureau does not consider the 2014 CMP lease to be invalid because it predates the PUC's order granting a CPCN to CMP. This Bureau interpretation that the 2014 CMP lease is valid despite it predating the CPCN is legally defensible based, at a minimum, on a harmless error standard. Again, only a court can finally determine whether this Bureau interpretation is correct.

I hope this is of assistance to you as you consider LD 1893.

Regards,
Lauren

From: Kinney, MaryAnne <MaryAnne.Kinney@legislature.maine.gov>
Sent: Tuesday, March 03, 2020 9:07 AM
To: Parker, Lauren <Lauren.Parker@maine.gov>
Cc: Malon, Marc <Marc.Malon@maine.gov>
Subject: CMP Transmission line lease from December 2014

Hi Lauren,
Thank you for attending the ACF Committee's work session recently on LD 1893, An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes, and answering questions about a July 2018 memo relating to parcel of public lands referred to as the "Cold Stream Forest."

I would like to follow up with additional questions which are more on-point with respect to LD 1893. I am hoping you could weigh-in on the validity of the lease agreement, dated December 2014, between the Bureau of Parks and Lands and Central Maine Power – specifically the 300-foot-wide, one-mile long transmission corridor across the West Forks Plantation and Johnson Mountain Township on public reserved lands.

Two primary issues have been raised. First, whether the planned transmission corridor will "substantially alter" designated public reserved lands and whether there should have been a vote of two-thirds of the Legislature per the Constitution of Maine. Second, is the lease valid since CMP did not receive a certificate of public convenience and necessity from the Public Utilities Commission prior to entering the lease agreement with the State?

As you know the ACF Committee voted unanimously "ought to pass" on LD 1893. It is my understanding that language review will be on Thursday, March 5th. If possible, I would like to get your thoughts prior to language review on Thursday. I realize this is short notice but I have been trying to decide how to go about getting your opinion and am finally able to send this email. Let me know either way.

Additionally, I have learned that there is currently a 150-foot wide transmission line corridor on the land in question. Any information around that lease would be very helpful as well. This may go against the "substantially altered" argument made for passage of LD 1893 as there is already a "corridor" on the land in question.

Thank you,
Rep. MaryAnne Kinney

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G. WILLIAM DIAMOND, DISTRICT 26
RUSSELL BLACK, DISTRICT 17

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STATE OF MAINE
ONE HUNDRED AND TWENTY-NINTH LEGISLATURE
COMMITTEE ON AGRICULTURE, CONSERVATION AND FORESTRY

January 30, 2020

Andy Cutko, Director
Bureau of Parks and Lands
Department of Agriculture, Conservation and Forestry
22 State House Station
Augusta, ME 04333-0022

Dear Director Cutko,

As you know, the Joint Standing Committee on Agriculture, Conservation and Forestry (ACF Committee) held a public hearing on Tuesday, January 21st for LD 1893, "An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes."

At the public hearing it became evident that LD 1893 was introduced to address concerns relating to the lease of public lands to Central Maine Power (CMP) for a transmission line through western Maine. This legislation also raises the question of whether the lease agreement between the State and CMP required approval by two-thirds of the Legislature. Article IX, Section 23 of the Constitution of Maine states:

> *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.*

As you know, at the public hearing last week, we requested that you provide the ACF Committee with relevant documents and communications regarding the lease of public lands to CMP. Please include documents and communications, including emails and handwritten notes or notations, among or between staff in the Bureau of Parks and Lands, the Bureau of Forestry, the Office of the Commissioner, the Office of the Attorney General, the Office of the Governor, and representatives of CMP. More specifically, we are interested in any materials from January 1, 2013 through January 1, 2016 and after July 1, 2018 relating to the determination that the lease of public lands on the West Forks Plantation and Johnson Mountain Township in Somerset County by CMP did not constitute a reduction or substantial alteration of those lands and, therefore, did not require a two-thirds vote of the Legislature.

(over)

It is our understanding that the public records search will require approximately 40 staff hours. With this in mind, we respectfully request that you complete this search by Friday, February 14th.

Sincerely,

Sen. James F. Dill
Senate Chair

Rep. Craig V. Hickman
House Chair

cc: Members, Joint Standing Committee on Agriculture, Conservation and Forestry
Amanda Beal, Commissioner, Department of Agriculture, Conservation and Forestry
Emily Horton, Department of Agriculture, Conservation and Forestry

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
BUREAU OF PARKS AND LANDS
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333

JANET T. MILLS
GOVERNOR

AMANDA E. BEAL
COMMISSIONER

February 14, 2020

Senator James F. Dill, Chair
Representative Craig Hickman, Chair
Committee on Agriculture, Conservation and Forestry
100 State House Station
Augusta, Maine 04333-0100

Dear Senator Dill and Representative Hickman,

In response to your request of January 30, 2020, regarding the Bureau's lease to CMP of public reserved lands in West Forks Plantation and Johnson Mountain Township, the Bureau has searched its e-mail records, digital files, and paper files, and found the following responsive documents:

1) A document titled "Considerations for locating a CMP Right of Way across BPL Lands in West Forks PLT. and Johnson Mt. TWP." This document was located in a digital file accessible to a number of BPL staff. The date on the digital file was August 25, 2014. I should note that the document's reference to 12 M.R.S. § 1852(4) mistakenly provides that the Governor's and Commissioner's consent is required. 12 M.R.S. § 1852(4) does not require consent of the Governor or Commissioner to approve a lease.
2) An e-mail dated July 9, 2014 from DACF Commissioner Walt Whitcomb to BPL Director Tom Morrison referencing correspondence with the Governor's Energy Office.
3) A document titled "CMP Lease Amendment: Summary 3-17-15." This document was also located in a digital file accessible to several BPL staff, and it summarizes the financial terms of the lease and amendment.

Director of Real Property Management David Rodrigues and I will be available at the work session to discuss questions related to these documents, to the extent that our knowledge of these documents and associated issues permit.

Sincerely,

Andy Cutko

Cc: Commissioner Amanda Beal, DACF
Emily Horton, DACF
Karen Nadeau, Legislative Analyst

ANDREW R. CUTKO, DIRECTOR
BUREAU OF PARKS AND LANDS
18 ELKINS LANE, HARLOW BUILDING

maine DEPARTMENT OF Agriculture Conservation & Forestry

PHONE: (207) 287-3821
FAX: (207) 287-6170
WEB: WWW.MAINE.GOV/DACF

From: Post, Tim
To: Rodrigues, David
Subject: RE: West Forks and Johnson Mountain Public Lots
Date: Monday, August 03, 2020 8:49:36 AM

None that I am aware of

Thanks,

Tim

From: Rodrigues, David <David.Rodrigues@maine.gov>
Sent: Thursday, July 30, 2020 4:05 PM
To: Post, Tim <tim.Post@maine.gov>
Subject: West Forks and Johnson Mountain Public Lots

Hi Tim,

Is there any constructed recreational facilities on these lots, trails, Kiosk, etc.? When I was out there 6 years ago all I saw was some tree stands for deer hunting on the power line.

David Rodrigues
Director of Real Property Management
Maine Bureau of Parks and Lands
22 State House Station
Augusta, Maine 04333
(207) 287-4916

From: Charles, Tom T.
To: Rodrigues, David
Subject: RE: Harvest Activity Information
Date: Tuesday, July 28, 2020 11:32:48 AM

None that I know of – they're mainly timber lots with dispersed hunting plus fishing in the ponds, some of which are P-RR if I remember rightly. Also, as you probably well know, the NECEC line will come along the existing powerline (widening it?) then turn south to cross the W. Forks lot.

From: Rodrigues, David <David.Rodrigues@maine.gov>
Sent: Tuesday, July 28, 2020 11:28 AM
To: Charles, Tom T. <Tom.T.Charles@maine.gov>
Subject: RE: Harvest Activity Information

This is good, Thanks Tom. Do you remember if there were any recreational improvements done to these lots, when you were manager or after?

David Rodrigues
Director of Real Property Management
Maine Bureau of Parks and Lands
22 State House Station
Augusta, Maine 04333
(207) 287-4916

From: Charles, Tom T. <Tom.T.Charles@maine.gov>
Sent: Tuesday, July 28, 2020 11:14 AM
To: Rodrigues, David <David.Rodrigues@maine.gov>
Subject: RE: Harvest Activity Information

The attached worksheet shows harvests on those lots 1985 on. I don't think any earlier harvests were done by BPL though MFS may have had harvests there prior to 1973. Sizable harvests late 1980s and lesser harvests 20 years later. Do you need anything beyond the volumes?

From: Rodrigues, David <David.Rodrigues@maine.gov>
Sent: Tuesday, July 28, 2020 11:03 AM
To: Charles, Tom T. <Tom.T.Charles@maine.gov>
Subject: RE: Harvest Activity Information

Yes, good assumption on the abutment lot, forgot there were a bunch of them. Not sure how far back to go, what would be a reasonable time period?

David Rodrigues
Director of Real Property Management
Maine Bureau of Parks and Lands
22 State House Station
Augusta, Maine 04333

129th MAINE LEGISLATURE

SECOND REGULAR SESSION-2020

Legislative Document **No. 1893**

S.P. 645 In Senate, December 24, 2019

An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes

(EMERGENCY)

Approved for introduction by a majority of the Legislative Council pursuant to Joint Rule 203.

Received by the Secretary of the Senate on December 20, 2019. Referred to the Committee on Agriculture, Conservation and Forestry pursuant to Joint Rule 308.2 and ordered printed.

DAREK M. GRANT
Secretary of the Senate

Presented by Senator BLACK of Franklin.
Cosponsored by Representative HICKMAN of Winthrop and
Senators: CARSON of Cumberland, DAVIS of Piscataquis, DILL of Penobscot, FARRIN of Somerset, President JACKSON of Aroostook, MIRAMANT of Knox, Representatives: HEPLER of Woolwich, KESCHL of Belgrade.

Printed on recycled paper

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, without immediate action to ensure the State is receiving adequate compensation for the lease of public lands, the State will suffer economic loss; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 12 MRSA §598-A, first ¶, as enacted by PL 1993, c. 639, §1, is amended to read:

The following lands are designated lands under the Constitution of Maine, Article IX, Section 23. Designated lands under this section may not be reduced or substantially altered, except by a 2/3 vote of the Legislature and compliance with the requirements in section 1852-A. It is the intent of the Legislature that individual holdings of land or classes of land may be added to the list of designated lands under this section in the manner normally reserved for amending the public laws of the State. Once so designated, however, it is the intent of the Legislature that designated lands remain subject to the provisions of this section, section 1852-A and the provisions of the Constitution of Maine, Article IX, Section 23 until such time as the designation is repealed or limited by a 2/3 vote of the Legislature.

Sec. 2. 12 MRSA §1852-A is enacted to read:

§1852-A. Fair market value for leased lands; approval of commercial leases

1. Fair market value. Notwithstanding any provision of section 1852 to the contrary, the bureau may lease public reserved lands for the purposes specified in section 1852, including the right to use those public reserved lands, only if the compensation for the lease entered into by the bureau under this subchapter is based on reasonable market value and the Legislature has approved the lease pursuant to the provisions of the Constitution of Maine, Article IX, Section 23. The director, by routine technical rulemaking pursuant to Title 5, chapter 375, subchapter 2-A, shall adopt rules for determining reasonable market value.

2. Approval of commercial leases. The bureau, prior to entering into a lease of public reserved lands for commercial purposes, shall submit the lease, including all pertinent terms regarding the lease, including, but not limited to, the length of the lease, the lessee and the amount and purpose of the lease, to the joint standing committee of the Legislature having jurisdiction over public lands matters for review and approval by the Legislature. The joint standing committee may recommend the approval of the lease, either with or without changes to the terms, including the requirement that the lease be approved by a 2/3 vote of the Legislature, or disapproval of the lease and report that

recommendation to the full Legislature for approval. If the Legislature fails to approve the lease, the bureau may not enter into the lease.

Sec. 3. Retroactive application; review of leases since 2014. The Director of the Bureau of Parks and Lands within the Department of Agriculture, Conservation and Forestry shall examine all leases of public reserved lands entered into by the State since January 1, 2014 to determine whether those leases are in compliance with the Maine Revised Statutes, Title 12, section 1852-A. The director shall report the findings of this examination, including any recommendations for action on leases entered into in violation of Title 12, section 1852-A, to the Joint Standing Committee on Agriculture, Conservation and Forestry no later than March 1, 2020. The joint standing committee may report out legislation related to the report of the director to the Second Regular Session of the 129th Legislature.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

SUMMARY

This bill requires that any lease of public lands by the State be at reasonable market value and be approved by the Legislature pursuant to the Constitution of Maine, Article IX, Section 23. The bill requires the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands to submit a lease of public lands for commercial purposes to the joint standing committee of the Legislature having jurisdiction over public lands matters for approval, amendment or disapproval by the committee. The joint standing committee must submit its recommendation to the Legislature for approval. If the Legislature does not approve the lease, the bureau may not enter into the lease.

The bill also requires the Director of the Bureau of Parks and Lands to examine all leases of public reserved lands entered into by the State since January 1, 2014 to determine whether those leases are in compliance with these requirements. The director is required to report the findings of this examination, including any recommendations for action on noncompliant leases, to the Joint Standing Committee on Agriculture, Conservation and Forestry no later than March 1, 2020. The joint standing committee may report out legislation related to the report of the director to the Second Regular Session of the 129th Legislature.

L.D. 1893

Date: (Filing No. S-)

AGRICULTURE, CONSERVATION AND FORESTRY

Reproduced and distributed under the direction of the Secretary of the Senate.

STATE OF MAINE

SENATE

129TH LEGISLATURE

SECOND SPECIAL SESSION

COMMITTEE AMENDMENT " " to S.P. 645, L.D. 1893, Bill, "An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes"

Amend the bill by striking out the title and substituting the following:

'Resolve, Regarding Legislative Review of the Lease to Central Maine Power Company of Constitutionally Protected Public Lands'

Amend the bill by striking out everything after the title and inserting the following:

'**Emergency preamble. Whereas,** acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands in December 2014 leased to Central Maine Power Company a 300-foot-wide, approximately one-mile-long transmission corridor across public reserved lands in West Forks Plantation and in Johnson Mountain Township; and

Whereas, the clearing and placement of large transmission towers and lines on a 300-foot-wide, approximately one-mile-long strip of land across constitutionally protected and unique public reserved lands is a substantially different use of these public lands; and

Whereas, the Constitution of Maine, Article IX, Section 23 and the implementing law, the Maine Revised Statutes, Title 12, section 598-A, require a vote of 2/3 of all the members elected to each House of the Legislature to approve any substantial alteration in the use of designated public reserved lands; and

Whereas, the Legislature did not have an opportunity to review or approve the lease to Central Maine Power Company of the above-mentioned designated public reserved lands, which will be substantially altered by the New England Clean Energy Connect project, a proposed 145-mile, 1,200-megawatt, high-voltage, direct-current transmission line passing through approximately 36 acres of designated public reserved lands; and

Whereas, Central Maine Power Company on May 3, 2019 received a certificate of public convenience and necessity from the Public Utilities Commission for the construction of the New England Clean Energy Connect project, also known as the transmission corridor project, to run from the Canadian border at the Province of Quebec to a conversion station in Lewiston; and

Whereas, Title 35-A, section 3132 prohibits leases of state public lands to any person for the purpose of constructing a transmission line that requires a certificate of public convenience and necessity from the Public Utilities Commission prior to the issuance of that certificate; and

Whereas, the Legislature has received a great deal of direct testimony and evidence raising significant doubt about the legality and validity of the lease under the Constitution of Maine and current state law; and

Whereas, in order to protect and preserve the public's vital interests in its public reserved lands and ensure the Legislature's constitutional responsibilities with regard to those lands is not usurped or undermined by potentially invalid leases of those lands, it is immediately necessary to direct the termination of the transmission corridor project across public reserved lands in West Forks Plantation and in Johnson Mountain Township before the use of the lands is substantially and immutably altered; and

Whereas, Central Maine Power Company is awaiting permits for the transmission corridor project from the Department of Environmental Protection and the United States Army Corps of Engineers and expects the approvals to be granted this spring and plans to begin construction of the transmission corridor project once the permits are issued; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1. Lease agreement between the Bureau of Parks and Lands and Central Maine Power Company. Resolved: That the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, referred to in this resolve as "the bureau," shall immediately terminate its lease to Central Maine Power Company of a portion of public reserved lands in West Forks Plantation and in Johnson Mountain Township in Somerset County for a 300-foot-wide and approximately one-mile-long transmission line corridor. The bureau may renegotiate a lease agreement with Central Maine Power Company for the same or a different portion of public reserved lands; and

Sec. 2. Considerations if lease renegotiated. Resolved: That, if the bureau renegotiates a lease agreement under section 1 with Central Maine Power Company, referred to in this resolve as "the lessee," the bureau shall consider post-completion rental payments and annual funding payments. Annual funding payments must be made to the bureau for funding recreation infrastructure on public lands for increased public access for recreational opportunities.

For purposes of this section, the following terms have the following meanings:

1. "Annual funding payments" means payments made by the lessee to the bureau each calendar year following the completion date and continuing until the expiration or termination of the lease, whichever is earlier, for funding recreation infrastructure for increased public access for recreational opportunities;

2. "Completion date" means the date on which the lessee notifies the bureau in writing that transmission line facilities are installed, energized and determined by the lessee to be operational; and

3. "Post-completion rental payments" means payments made by the lessee to the bureau each calendar year following the completion date and continuing until the expiration of the initial term or termination of the lease, whichever is earlier, based on the actual annual transmission corridor project net income filed with the Federal Energy Regulatory Commission; and

Sec. 3. Substantial alteration of designated public reserved lands. Resolved: That the Legislature finds that any lease of state park land, public lots or other real estate held by the State for conservation or recreation purposes and designated under the Maine Revised Statutes, Title 12, section 598-A to Central Maine Power Company for the purposes of the transmission corridor project for the transmission line described in Public Utilities Commission Docket No. 2017-00232 constitutes a substantial alteration of the use of such real estate under the Constitution of Maine, Article IX, Section 23 requiring the approval of the lease by a vote of 2/3 of all the members elected to each House of the Legislature. This provision is intended and may be interpreted only to clarify that this specific use of such constitutionally protected real estate constitutes a substantial alteration of that real estate for purposes of the Constitution of Maine, Article IX, Section 23. Nothing in this resolve may be interpreted as affecting the application or interpretation of the Constitution of Maine, Article IX, Section 23 with respect to any other use of real estate.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.'

SUMMARY

This amendment strikes the bill and replaces it with a resolve. The amendment directs the Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands to immediately terminate its lease to Central Maine Power Company of a portion of public reserved lands in Somerset County for a 300-foot-wide, approximately one-mile-long transmission corridor. The amendment also authorizes the bureau to renegotiate a lease agreement with Central Maine Power Company for the same or a different portion of public reserved lands.

FISCAL NOTE REQUIRED

(See attached)

Exhibit C

SENATE

JAMES F. DILL, DISTRICT 5, CHAIR
CHLOE S. MAXMIN, DISTRICT 13
RUSSELL BLACK, DISTRICT 17

KAREN S. NADEAU, LEGISLATIVE ANALYST
CHERYL McGOWAN, COMMITTEE CLERK

HOUSE

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WILLIAM D. PLUECKER, WARREN

STATE OF MAINE
ONE HUNDRED AND THIRTIETH LEGISLATURE
COMMITTEE ON AGRICULTURE, CONSERVATION AND FORESTRY

March 29, 2021

TO: Amanda E. Beal, Commissioner
Department of Agriculture, Conservation and Forestry
Andy Cutko, Director
Bureau of Parks and Lands

FROM: Senator Jim F. Dill, Senate Chair, JFD ksw
Representative Margaret M. O'Neil, House Chair, and mom ksw
Members of the Joint Standing Committee on Agriculture, Conservation and Forestry

SUBJ: Transmission Line Lease Between DACF, BPL and Central Maine Power

As you know, the Agriculture, Conservation and Forestry (ACF) Committee held a public hearing on March 18, 2021 for LD 471, An Act To Require Legislative Approval for Certain Leases of Public Lands. This bill, as well as LD 1893, An Act To Require a Lease of Public Lands To Be Based on Reasonable Market Value and To Require Approval of Such Leases for Commercial Purposes, from the 129th Legislature were introduced to address concerns relating to the lease of public lands to CMP for a transmission line through western Maine. These bills as well as others to come, namely LD 1075, An Act To Protect Public Lands, raise the question of whether the lease agreement between the State and Central Maine Power (CMP) required approval by two-thirds of the Legislature as required by the Constitution of Maine, Article IX, Section 23, which states:

> *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.*

To say the least, the ACF Committee was disappointed in Director Cutko's testimony opposing LD 471. As a result, last week, a majority of the ACF Committee voted (12 in favor, 1 opposed) to send this letter to you to memorialize that the ACF Committee finds that any lease of public lots or other real estate designated under the Maine Revised Statutes, Title 12, section 598-A to CMP for the purposes of the New England Clean Energy Connect (NECEC) transmission corridor project for the transmission line described in Public Utilities Docket No. 2017-00232 constitutes a substantial alteration of the uses of such real estate under the

Constitution of Maine, Article IX, Section 23 and accordingly requires the approval of the lease by a vote of two-thirds of all the members elected to each House of the Legislature.

It is our understanding that the Bureau of Parks and Lands (BPL) in December 2014 leased to CMP a 300-foot-wide, approximately one-mile-long transmission corridor bisecting public reserved lands in West Forks Plantation and in Johnson Mountain Township for a total of approximately 36 acres as part of a 145-mile, 1,200-megawatt, high-voltage, direct-current transmission line. The clearing and placement of large transmission towers and lines on an approximately one-mile-long strip of land across constitutionally protected public reserved lands is a substantially different use of these public lands and would substantially alter the uses of those lands identified in BPL's Upper Kennebec Management Plan. The Legislature was not given an opportunity to review or approve the 2014 lease to CMP of the above-mentioned designated public reserved lands.

In February of 2020, the ACF Committee made its position on the matter explicit to BPL Director Cutko when it unanimously supported LD 1893, as amended, in 2020. The amendment made the following findings:

> *Whereas, the clearing of and the placement of large transmission towers and lines on a 300-foot-wide, approximately one-mile-long strip of land across constitutionally protected and unique public reserved lands is a substantially different use of these public lands;*
>
> *Whereas, the Constitution of Maine, Article IX, Section 23 and implementing law, Title 12, section 598-A, require a vote of 2/3 of all the members elected to each House to approve any substantial alteration in the use of designated public lands;*
>
> *Whereas, the Legislature did not have an opportunity to review nor approve the 2014 lease or to Central Maine Power of the above-mentioned designated public reserved lands which will be substantially altered by the construction of a 145-mile, 1200-megawatt, high-voltage, direct-current transmission line, also known as the New England Clean Energy Connect project, passing through this portion, approximately 36 acres, of designated public reserved lands;*
>
> *Whereas, in order to protect and preserve the public's vital interests in its public reserved lands and ensure the Legislature's constitutional responsibilities with regard to those lands is not usurped or undermined by potentially invalid leases of those lands, it is immediately necessary to direct the termination of the 300-foot-wide, approximately one-mile-long transmission corridor across the West Forks Plantation and Johnson Mountain Township Maine Public Reserved Lands before the use of these lands is substantially and immutably altered;*

The ACF Committee later learned that the transmission line lease between BPL and CMP was renegotiated, amended, and signed by both parties in June 2020 without any communication or outreach to the Legislature. The Bureau's action is disappointing and gives the ACF Committee cause for great concern because the Bureau ignored the clear sentiment of the ACF Committee in renegotiating the lease without transparency and without first seeking the required legislative approval. This is especially true given that: (1) the Bureau renegotiated the lease only a few

months after it been made aware of the ACF Committee's view via both committee proceedings and unanimous committee action regarding LD 1893 and (2) during such proceedings, Director Cutko testified that he understood the level of public interest in the NECEC project, he acknowledged the need for transparency going forward, and he stated his intent to remedy the Bureau's lack of internal criteria for determining what constitutes a substantial alteration by developing such criteria and sharing it with the ACF Committee.

We send this letter to restate the ACF Committee's stance that the public lands in question are being substantially altered. In addition to undermining the ACF Committee's intent, the Bureau's decisions have undermined protections set in place by Maine people. The people of Maine amended our constitution to prevent substantial alteration of the lands that belong to them without a public process and without-obtaining the approval of two-thirds of the members of each House of the Legislature. In signing the lease, you have undermined their intent.

c: Members, Joint Standing Committee on Agriculture, Conservation and Forestry

PROCEEDING TYPE: Speech/Q&A

TITLE: Andy Cutco on LD 1893

RECORDED ON:

CLIENT: DWM Law

(Beginning of recorded material.)

MR. CUTCO: Good afternoon. I'm Andy Cutco, the Director of the Bureau of Parks and Lands and I'm joined by David Rodrigues from the Bureau, who is the Director of Property Management.

REP. HICKMAN: Thank you for being here, Director, and I'm sorry, I wanted your name one more time.

MR. RODRIGUES: David Rodrigues.

REP. HICKMAN: I just want you to just introduce yourself into the mic.

MR. RODRIGUES: David Rodrigues with the Bureau of Parks and Lands, the Director of Real Property Management.

REP. HICKMAN: Thank you. First, Director, can you just walk us through the documents that you were able to find based upon the committee's letter to you dated January --

MR. CUTCO: Yes, I can. So, it was an extensive undertaking. I can tell you that in the nine months that I've been on the job, I've gone through over 12,000 emails, and that's just me. So, we went and looked through the email correspondence of the director at the time, the commissioner at the time, and the director of the Maine Forest Service as well as all electronic files and the hard copy files. And the

three documents of relevance that we came up with are being passed out and the order that they're referred to in the letter, the first is a -- well, I think they're not in the order that the letter refers to them in, so I guess I'll take them in the order that they're included here. The first is a summary document which describes the financial terms of the lease amendment, the arrangement, and the amount of money that was in the initial lease and then what the amended amount was. That's dated March 17th of 2015.

The second document I think is perhaps the one that is the most relevant. This did not have a date on it, although the date of the electronic file, I believe, was August 25, 2014. And the top of this document refers to the authority to grant the right-of-way across existing public lots. So I think that's the real meat of the document and I can describe that further, if you like.

And then the last email of relevance is one from Patrick Woodcock(sp?), who was in the Governor's Energy Office, correspondence between he and Commissioner Witcombe(sp?) and Tom Morrison(sp?) which initiated the process of looking at this piece of land and the possibility of having a lease go across it.

REP. HICKMAN: Thank you. So, the original lease

in question in LD 1893 was entered into on December the 15, 2014. I understand that you were part of how this came to be; can you just walk us through the discussions that you remember having at the time around this particular lease?

MR. RODRIGUE: Well, at the time, I was a planner for the Bureau which things would come to me and then we started developing the lease, writing the lease, going through any due diligence that we needed to do. So, at that point, it's probably been determined that the lease is going to move forward. By the time it would come to me, the decisions were made that it was -- to move forward -- the lease forward and start working on it.

REP. HICKMAN: Okay. And were there ever any discussions that you recall around whether or not the Legislature needed to approve this lease because it might change the use of the land?

MR. RODRIGUE: Those -- those decisions were made in the director/commissioner's level. At times, I -- I don't ever remember those discussions being made when I was present, so I can't really answer whether I was involved with that at all.

REP. HICKMAN: Okay. Do people in the committee having any questions? Representative Maxmin.

REP. MAXMIN: Thank you, Mr. Chair. Thank you so much for being here. If I remember correctly during our public hearing, you had said that there was communication between the Bureau and the Attorney General's office when the lease was being finalized; is that correct?

MR. RODRIGUE: I can answer that. Yes, the Attorney General's office worked closely with me in developing the lease and writing the lease.

REP. MAXMIN: Okay.

MR. RODRIGUE: Along with CMP staff.

REP. MAXMIN: Okay. And I also remember from the public hearing that we had requested to see that communication and I was wondering why it wasn't included in the documents that we -- we got this week.

MR. RODRIGUE: The communication -- but --

REP. MAXMIN: The communication between the Bureau and the Attorney General's office.

MR. RODRIGUE: Those were lease drafts that would go back and forth. I believe the request was for anything having to do with 598-A or the Constitution of significant alteration. So, am I correct, Andy, on --?

MR. CUTCO: Yes, there are -- there are a number of different lease drafts which are not included here. We'd be happy to provide those, but I don't know that

those speak to the determination that was the subject of the inquiry from the committee.

MR. MAXMIN: Okay, a follow-up. Well, in our letter, it says that we wanted any materials from January 1, 2013 to January 1, 2016 including any communications from -- with the office of the Attorney General. So, are you saying that there were no communications that were relevant?

MR. RODRIGUE: To --?

MR. MAXMIN: To what we're discussing today.

MR. RODRIGUE: To the significant alteration or -- that's correct, to my knowledge. We didn't find any communications.

MR. MAXMIN: Okay, so there was no relevant communication between the Bureau and the Attorney General's office when the lease was being finalized.

MR. RODRIGUE: On that subject.

MR. MAXMIN: There is no clarification with the Attorney General's office if the lease was appropriate and constitutional?

MR. RODRIGUE: I don't remember ever discussing that or seeing it in any document.

MR. MAXMIN: Okay, thank you.

MR. CUTCO: If I could just direct you to the -- the attachment here that is the -- the most substantive

document, it suggests that, under A, MRSA Section 1852, section -- subsection 4 allows the Bureau to lease public reserve lands for utility rights of way for a term not exceeding 25 years with the consent of the Governor and the Commissioner. My understanding is that that was -- that was the predominant legal guidance that the Bureau used in issuing leases and I did actually confirm that. I spoke with Tom Morrison, who was the director at the time, who confirmed that -- that the primary legal guidance that they used was 1852 and when it came to 598-A, that that was primarily -- from my understanding is that that primarily applied, A, to sales of land and, B, to alterations that were conversion of habitat to pavement or a road or -- as opposed to an alteration. So, I'm just conveying what I learned from my communication with Tom Morrison.

REP. HICKMAN: So, I just want to be clear that as far as you remember and you could find, there are no written opinions from the Attorney General's office on the execution of the original lease in question.

MR. CUTCO: That's correct.

REP. HICKMAN: Representative Skolfield.

REP. SKOLFIELD: Thank you, Representative Hickman. Thank you for being here, both of you. This question, I guess, is to -- to Mr. Rodrigue. When this

REP. HICKMAN: And do you know when that budget was presented to this committee that year, did it include the amount of revenue for this lease in that budget?

MR. RODRIGUE: For 2014?

REP. HICKMAN: Whichever year would be covered by this lease the Department of --

MR. RODRIGUE: That was in December, so most likely it wouldn't've been in that twenty -- it would've gone probably the next budget.

REP. HICKMAN: But do you know if it was included in the -- whatever appropriate budget it would be in that would be presented to the Legislature as a part of your report?

MR. RODRIGUE: We generally would put together an estimate of what the lease income is going to be when we're doing the budgeting. That number would go into the budget.

REP. HICKMAN: Okay. And so do you -- were you aware at the time when that budget was presented to this committee, if this committee got any information about the exact lease that the revenue came from?

MR. RODRIGUE: I don't work on the report to the committee, so I'm not quite sure whether --

REP. HICKMAN: Okay. At the time that this lease

was drafted, was it clear what the intent from CMP was to use this public lands for a future corridor project? Was that clear in the negotiations?

MR. RODRIGUE: To me, it wasn't. It was a renewable -- to me, I thought it was for windmills, it was going to be a corridor for future windmills.

REP. HICKMAN: Say that one more time, please?

MR. RODRIGUE: Me, when I was working on it, I believed that it was for renewable energy and possibly windmills to be built in that region. I didn't -- I knew nothing about any other reason for the corridor, but other people may have, but I didn't.

REP. HICKMAN: Okay. So, it wasn't clear to the Department at the time that CMP was entering into this lease for a public lot for the purposes of a future corridor transmission line project?

MR. RODRIGUE: No.

REP. HICKMAN: You actually thought that it was for windmills.

MR. RODRIGUE: In that region.

REP. HICKMAN: Okay. Is that perhaps why the Department didn't look at Title 35-A, Section 3132, Subsection 13? And we have a pink document, and I don't know if you have that in front of you or not and have seen it, but if you -- if you look at subsection

13, paragraph 13 of that document, section 13, it says that the State in the 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 considered 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 statute. If you look at that today, knowing what you know now about how CMP is using the corridor, would that have given you pause?

MR. RODRIGUE: Say that --

REP. HICKMAN: In executing the lease --

MR. RODRIGUE: Yes.

REP. HICKMAN: -- or suggesting that this lease be done for the purposes of a corridor project. If you had seen this paragraph --

MR. RODRIGUE: Right.

REP. HICKMAN: -- under the public utilities code about how we cannot lease public land without that certificate of public convenience and necessity from the party that wants the lease, if you had known that this project was going to be for the corridor and you

had seen this paragraph in the law, would it have given you pause that perhaps the lease needed to be based upon the issuance of this certificate of public convenience and necessity?

MR. RODRIGUE: Yes, if I had known anything about that statute.

REP. HICKMAN: Director, can you tell me if the Department is still in conversation about any project where the CMP corridor would go through public lands?

MR. CUTCO: Not that I'm aware of.

REP. HICKMAN: Currently. This is under this administration and your leadership; do you know of any conversations that are happening now between the Governor and the Department around any other lands that might be considered for this corridor project that go through public land?

MR. CUTCO: For this corridor project? I don't know of any, no.

MR. RODRIGUE: Nor do I.

REP. HICKMAN: Have there been any communications of any kind at all around where other land that we might acquire for the purposes of CMP to have access to a state-owned land that might be coming down the pike?

MR. CUTCO: Prior to my tenure, I believe there was an exploration of a crossing of the Coldstream

CERTIFICATE OF SERVICE

I, Lauren E. Parker, hereby certify that I have on this day, November 15th, 2021, caused to be served a copy of Director Cutko's and the Bureau of Parks and Lands' Appendix on counsel of record by electronic mail and U.S. mail, first class postage prepaid, at the following addresses:

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Dated at Augusta, Maine, this 15th day of November, 2021.

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