



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

April 25, 2019

U.S. Army Corps of Engineers
New England District
Maine Project Office
442 Civic Center Dr., Suite 350
Augusta, ME 04330
jay.l.clement@usace.army.mil

SUBMITTED VIA EMAIL AND U.S. CERTIFIED MAIL #7004 0750 0000 9336 6994

Re: Sierra Club, Maine Chapter's Comments on U.S. Army Corps of Engineers' Public Notice Regarding Central Maine Power Company's Application to Construct a New High Voltage Direct Current Electrical Transmission Line and Related Facilities (File No. NAE-2017-01342)

Dear Mr. Clement:

The Sierra Club, Maine Chapter ("Sierra Club"), submits the following comments on the United States Army Corps of Engineers' ("Corps") March 26, 2019 Public Notice ("Notice") regarding Central Maine Power's ("CMP") permit application to conduct work in the waters of the United States in order to construct a new High Voltage Direct Current electrical transmission line and related facilities capable of delivering up to 1,200 megawatts of electrical power from hydroelectric sources in Quebec to the New England Control Area ("CMP Transmission Project" or "Project"). As detailed below, in order to comply with the National Environmental Policy Act ("NEPA"), an Environmental Impact Statement ("EIS") is required for the proposed project. Moreover, the Notice lacks information regarding endangered species and historic properties required by the Corps' public notice regulations. Accordingly, the Corps must reissue the Notice with the required information and provide the public additional time for comments.

As the Corps is aware, the CMP Transmission Project is the second attempt by the state of Massachusetts to acquire electric power from large hydropower dams in northern Canada via transmission lines through other New England states. The first attempt was the Northern Pass Transmission Line Project ("Northern Pass Project"), which is largely indistinguishable from the CMP Transmission Project in its scope and overall environmental impacts. If anything, the CMP Transmission Project poses more risk the environment given its plan to drill under the Kennebec River and its greater potential to adversely affect endangered and threatened species and their critical habitat. For the Northern Pass Project, the Department of Energy ("DOE"), in coordination with the Corps, determined immediately that federal law required an EIS be completed. When DOE issued the Final EIS for that project, after multiple years of agency review and public participation, it totaled 3,676 pages and included 19 appendices.



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

NEPA directs federal agencies to complete an EIS for projects that are significant in their scope and intensity, highly controversial, and that will affect endangered and threatened species. The CMP Transmission Project meets all of these elements. Moreover, there is no justification for the Corps to deviate from the environmental review process established by the federal government for a recent, substantially similar project. The Northern Pass Project demonstrated conclusively that an EIS is required for transmission line projects of this scale and intensity. The public deserves, and federal law requires that the public be given, the opportunity to provide input through the EIS process on the proposed project, which will affect Maine's citizens and environment for decades; and the Corps will benefit from such informed public participation.

Founded in 1892, the Sierra Club's mission is to "explore, enjoy and protect the planet" and "to practice and promote the responsible use of the Earth's ecosystems and resources." The Maine Chapter of the Sierra Club is a volunteer-run, grass roots organization representing approximately 18,000 members and supporters who care deeply about Maine's natural environment. The Maine Chapter works to, *inter alia*, protect Maine's wilderness heritage, fight global warming, safeguard Maine's clean water, and promote clean air and energy efficiency. Sierra Club has many members who regularly visit and recreate in the areas of Maine where CMP proposes to construct its high voltage transmission lines and related facilities, and their use and enjoyment of those areas will be directly and/or indirectly affected by the proposed project.

I. Factual Background

For nearly a decade, Massachusetts has sought electrical power from large hydropower dams in northern Canada. The first project chosen to transmit this electricity was the Northern Pass Project, which was to run through New Hampshire. Because the proposed transmission project would cross the international boundary between Canada and the United States, it required a Presidential Permit from DOE. As part of the Presidential Permit process, DOE, in coordination with several federal agencies including the Corps and the U.S. Environmental Protection Agency ("EPA"), conducted an extensive environmental review of the project pursuant to NEPA.

DOE quickly determined an EIS was necessary for the Northern Pass Project. In its Notice of Intent to Prepare an EIS, DOE stated:

After due consideration of the nature and extent of the proposed project, including evaluation of the "Information Regarding Potential Environmental Impacts" section of the Presidential permit application, DOE has determined that the appropriate level of NEPA review for this project is an EIS.

76 Fed. Reg. 7,828, 7,829 (Feb. 11, 2011). Over the next seven years, DOE provided multiple public comment periods at various stages of the EIS development, from the initial scoping period to



the Final EIS, and held multiple public hearings.¹ On August 18, 2017, DOE issued the Final EIS, and on November 27, 2017, DOE issued its Record of Decision to authorize the Presidential Permit. However, in February 2018, the New Hampshire Site Evaluation Committee denied a necessary permit for the project, which caused Massachusetts to look elsewhere for its large hydro-sourced electrical power.

Massachusetts' "Plan B" turned out to be the CMP Transmission Project, a substantially similar transmission line project proposed to run through Maine. On July 27, 2017, CMP applied to DOE for a Presidential Permit for the project. *See* 82 Fed. Reg. 45,013 (Sept. 27, 2017). Since then, CMP has been seeking state level approvals for the project. Many towns along the transmission corridor have either opposed the project from the start or rescinded their initial support, based largely on concerns about the project's adverse impacts on Maine's environment and natural resources.

There are multiple major federal actions associated with the proposed project, including the Presidential Permit pending before DOE and a Clean Water Act Section 404 permit required from the Corps. As explained in more detail below, the project requires extensive environmental review to ensure compliance with several federal laws, including NEPA, the Endangered Species Act ("ESA"), the Clean Water Act, the Magnuson Stevens Act, and the National Historic Preservation Act ("NHPA"). On March 26, 2019, the public portion of the federal evaluation of the CMP Transmission Project began with the issuance by the Corps of Notice of CMP's permit application to conduct work in the water of the United States.² These comments respond to the Corps' Notice.

II. Legal Requirements

A. The National Environmental Policy Act

NEPA is this country's "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA seeks to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. To this end, NEPA requires all federal agencies to prepare a "detailed statement" assessing the environmental impacts of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). This statement is known as an Environmental Impact Statement ("EIS"). The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. Those regulations are found at 40 C.F.R. Parts 1500–1508.

¹ *See* <https://www.energy.gov/nepa/listings/eis-0463-documents-available-download>.

² The Notice references the additional authorization this project will need from DOE in the form of a Presidential Permit (Notice at 3), however it does not indicate whether DOE will be the lead agency for the NEPA review as it was for the Northern Pass Project. Regardless, DOE has an independent duty to ensure that its major federal action—the Presidential Permit—complies with all applicable federal laws, including NEPA. *See* 10 C.F.R. § 1021.300.



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

To determine the significance of a federal action, and whether or not to prepare an EIS, CEQ regulations require agencies to evaluate both the context and intensity of an action. 40 C.F.R. § 1508.27. Context refers to the significance of the action in regards to society as a whole, the affected region, the affected interests, and the locality. *Id.* § 1508.27(a). Both short- and long-term effects are relevant to the action's context. *Id.* The intensity of the action is evaluated based on several factors, including, but not limited to, the degree to which the effects on the quality of the human environment are likely to be highly controversial, the degree to which the possible effects on the human environment are highly uncertain or involve unknown characteristics, and the degree to which the action may adversely affect an endangered or threatened species or its habitat. *Id.* § 1508.27(b). The scope of NEPA's environmental effects review is broad, including consideration of direct, indirect and cumulative impacts on "ecological . . . aesthetic, historic, cultural, economic, social, or health" interests. *Id.* § 1508.8.

NEPA further obligates agencies to make high-quality information available to the public, including accurate scientific analyses, expert agency comments, and public comments, "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). NEPA's public disclosure goals are twofold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action; and (2) to insure that the public has sufficient information to review (and challenge if necessary) the agency's action. *Id.*

B. The Clean Water Act and the 404(b)(1) Guidelines

The discharge of any pollutant shall be unlawful, except in compliance with the Clean Water Act ("CWA"). 33 U.S.C. § 1311(a). In order to discharge dredge or fill material into waters of the United States, the CWA requires persons to obtain a Section 404 permits. *See* 33 U.S.C. § 1344. An application for a Section 404 permit must contain certain information, including a complete description of the proposed activity, a discussion of the source of fill material, the purpose of the discharge, and the location of the disposal site, and a statement of how impacts from the project will be avoided or minimized. 33 C.F.R. § 325.1(d). The applicant also must include a determination of the project's compliance with the CWA Section 404(b)(1) guidelines. *Id.* at § 325.1(e).

The CWA 404(b)(1) Guidelines prohibit the discharge of dredge or fill materials into waters of the United States if there is a practicable alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem. 40 C.F.R. § 230.10(a). In addition, the discharge may not "cause or contribute . . . to violations of any applicable State water quality standard." *Id.* at § 230.10(b)(1). Nor may the discharge "cause or contribute to significant degradation of the waters of the United States." *Id.* at § 230.10(c). Finally, appropriate and practicable steps to minimize potential adverse impacts of the discharge on the aquatic ecosystem must be taken. *Id.* at § 230.10(d).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

Only after ensuring a project complies with the necessary requirements and providing notice and opportunity for public comment and hearings, may the Corps issue a Section 404 permit. *Id.* at § 1344(a). The Corps' public notice must "provide sufficient information concerning the nature of the activity to generate meaningful comments," including, *inter alia*, statements of the district engineer's current knowledge of endangered species and historic properties. 33 C.F.R. §§ 325.3(a)(5), (10) & (11).

C. The Endangered Species Act

The Endangered Species Act requires the Secretary of the Interior to promulgate regulations listing those species of animals that are "threatened" or "endangered" under specified criteria, and to designate their "critical habitat." 16 U.S.C. § 1533. The ESA requires each federal agency to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." 16 U.S.C. § 1536(a)(2) ("ESA Section 7"). Federal regulations broadly define the scope of agency actions subject to ESA Section 7's requirements. Agency actions include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . ." 50 C.F.R. § 402.02.

If an agency determines that an action it proposes to take may adversely affect a listed species or its designated critical habitat, it must engage in formal consultation with Fish and Wildlife Service ("FWS") or the National Marine Fisheries Service ("NMFS") (collectively the "Services"). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. This is commonly known as "Section 7 consultation." Section 7 consultation is generally initiated when the action agency submits a Biological Assessment to the Services that identifies the listed species and critical habitat that may be in the action area and the possible effects the proposed action may have on such species and habitat. 50 C.F.R. §§ 402.14(c); 402.02. Consultation will generally result in the Services providing the action agency with a written statement, known as a "Biological Opinion," explaining how the proposed action will affect the species or its habitat. 16 U.S.C. § 1536(b)(3)(A). If the Services conclude that a proposed action will jeopardize any listed species or destroy or adversely modify its critical habitat, the Biological Opinion must outline any "reasonable and prudent alternatives" the Services believe will avoid that consequence. 16 U.S.C. § 1536(b)(3)(A). If the Biological Opinion concludes the agency action will not result in jeopardy or adverse habitat modification, or if it offers reasonable and prudent alternatives to avoid that consequence, the Services must provide the agency with a written statement, known as an "Incidental Take Statement." 16 U.S.C. § 1536(b)(4).

D. The Magnuson Stevens Act

It is the purpose of the Magnuson Stevens Act to conserve and manage anadromous species of the United States and promote the protection of essential fish habitat ("EFH") in the review of projects conducted under Federal permits. 16 U.S.C. § 1801(b)(1), (7). EFH "means those waters and



substrate necessary to fish for spawning, breeding, feeding or growth to maturity.” *Id.* at § 1802(11). Each Federal agency shall consult with NMFS if they authorize any action that may adversely affect any EFH. *Id.* at § 1855(b)(2). In initiating consultation with NMFS, the action agency must submit an EFH Assessment to NMFS that provides a description of the proposed action and the location and characteristics of EFH in the action area.³ Following consultation, NMFS may provide EFH conservation recommendations in order to protect the EFH and anadromous species.

E. The National Historic Preservation Act

It is the policy of the federal government to encourage the public and private preservation of the Nation’s historic built environment. 54 U.S.C. § 300101(5). “Section 106 of the National Historic Preservation Act (“NHPA”) requires Federal agencies to take into account the effects of their undertakings on historic properties.” 36 C.F.R. § 800.1(a). “The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.” *Id.* Consultation must be completed before the authorizing agency issues any license. *Id.* § 800.1(c).

Parties to be consulted under the NHPA include the relevant State historic preservation officer, any relevant Indian tribes, representatives of the local governments, the permit applicant, interested individuals and organizations, and the public. *Id.* at § 800.2. Further, public input is essential to the Section 106 consultation process. The action agency must “seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties.” *Id.* at § 800.2(d).

III. The Corps Must Prepare an Environmental Impact Statement for this Project

The Notice states that “[c]omments are used in the preparation of an Environmental Assessment and/or Environmental Impact Statement pursuant to the National Environmental Policy Act.” Notice at 2. NEPA requires agencies of the federal government to prepare an EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “The issuance of a section 404 permit is considered a major federal action under the National Environmental Policy Act.” *Tillamook Cty. v. United States Army Corps of Eng’rs*, 288 F.3d 1140, 1142 (9th Cir. 2002). While the Corps may issue an environmental assessment (“EA”) before preparing an EIS, here the more efficient and prudent approach would be to prepare an EIS in the first instance, because it is clear an EIS is required. *See* 40 C.F.R. § 1501.3(a) (“An [environmental] assessment is not necessary if the agency has decided to prepare an environmental impact statement.”). The Corps can simply begin the scoping process on a draft EIS and save itself

³ *See generally* <https://www.greateratlantic.fisheries.noaa.gov/habitat/efh/efhassessment.html>.



the time and resources of preparing an EA.⁴ See 40 C.F.R. § 230.12 (“As soon as practicable after a decision is made to prepare an EIS or supplement, the scoping process for the draft EIS or supplement will be announced in a notice of intent.”).

To determine if a project will “significantly” affect the environment “NEPA requires considerations of both context and intensity.” 40 C.F.R. § 1508.27. Context refers to “significance of an action...in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.” *Id.* at § 1508.27(a). Intensity “refers to the severity of impact” and involves the consideration of several factors, including:

- The degree to which the effects on the quality of the human environment are likely to be highly controversial;
- The degree to which the action may establish a precedent for future actions with significant effects;
- Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; and
- The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the ESA.

Id. at § 1508.27(b). The presence of “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2005). Here, the proposed project is significant in several contexts, and it meets *all* of the intensity factors that mandate a federal agency undertake an EIS for its proposed action.

The controversial nature of the CMP Transmission Project is undeniable. For NEPA analysis, the term “controversial” refers to projects where a “substantial dispute exists as to the size, nature, or effect of the major federal action.” *Found. For N. Am. Wild Sheep v. U.S. Dep’t. of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982). Disagreement among experts or knowledgeable individuals regarding a proposed project’s impacts is often regarded as evidence that the project is controversial. See *Wild Sheep*, 681 F.2d at 1181 (“[T]he [agency] received numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and [its] conclusion...[T]his is precisely the type of ‘controversial’ action for which an EIS must be prepared”); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988) (finding a project controversial where “[t]he Sierra Club introduced affidavits and testimony of conservationists, biologists, and other experts who were highly critical of the EAs and disputed the [agency’s] conclusion”).

⁴ Such a procedure would be consistent with how the federal government conducted the NEPA review for the Northern Pass Project. See 78 Fed. Reg. 7828 (Feb. 11, 2011) (Notice from Department of Energy, in cooperation with the Corps and other federal agencies, of its intent to prepare an EIS and conduct public scoping meetings).



SIERRA
CLUB
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

The CMP Transmission Project has generated significant debate regarding its direct environmental impacts, as well as whether hydropower electricity sourced from large “megadams” in Canada is in fact a “clean” source of energy. Many studies show that the construction and operation of large hydro dams and their reservoirs will increase greenhouse gas emissions and further exacerbate climate change.⁵ The scientific studies cited here represent only a few of the reports on the interplay between hydropower and climate change. The studies show that there is “disagreement among experts” regarding the proposed project’s impacts, thus meeting the “highly controversial” element necessitating an EIS.

In addition to the controversy among scientists, the project has also created a divide among state government officials as well as the general public.⁶ While Maine’s governor appears to support the project, a number of bipartisan state legislators have expressed their opposition. In particular, legislators on both the Environment and Natural Resources and the Energy, Utilities and Technology Committees have voiced strong opposition to the project.⁷ While some believe the project will reduce Maine’s carbon emissions and create tax benefits, others conclude that it will actually increase total greenhouse gas emissions, as well as lead to a loss of jobs and disruption to the environment, scenery, and wildlife in the state.⁸ Additionally, a number of towns that will be affected by the transmissions lines have either voted against the project or rescinded their previous support.⁹ It is clear the proposed project evokes strong opinions and emotions on both sides of the issue, and the news articles cited in these comments are representative of hundreds of articles that

⁵ See, e.g., Energyzt Advisors, LLC, *Greenwashing and Carbon Emissions: Understanding the True Impacts of New England Clean Energy Connect*. (Oct. 2018); Andreas Maeck et. al, *Sediment Trapping by Dams Creates Methane Emission Hot Spots*, Environmental Science & Technology (June 25, 2013); Bridget R. Deemer et. al, *Greenhouse Gas Emissions from Reservoir Water Surfaces: A New Global Synthesis*, BioScience Vol. 66 Issue 11, 949 (Oct. 5, 2016).

⁶ See *PUC’s Decision on CMP Corridor Deeply Flawed*, NAT. RES. COUNCIL OF MAINE, <https://www.nrcm.org/maine-environmental-news/pucs-decision-cmp-corridor-deeply-flawed/> (Apr. 11, 2019). As the Natural Resources Council of Maine notes, a recent state-wide poll found 65% of Mainers oppose the project, with higher percentages opposing in the regions directly affected, more than 10,000 Mainers have signed a petition in opposition to the project, and legislation has been introduced in the Maine Legislature that would, among other issues, require an independent analysis of the project’s climate impacts.

⁷ See *Legislators Battle with LePage Over CMP’s Proposed Transmission Line*, NAT. RES. COUNCIL OF MAINE, <https://www.nrcm.org/maine-environmental-news/legislators-battle-lepage-cmps-proposed-transmission-line/> (May 31, 2018).

⁸ See, e.g., Rachel Ohm, *Public Weighs in on Proposed CMP Power Line Project in Farmington*, <https://www.sunjournal.com/2019/04/04/public-weighs-in-on-proposed-cmp-power-line-project-in-farmington/> (Apr. 4, 2019).

⁹ Fred Bever, *Opponents, Supporters of CMP’s 145-Mile Transmission Line Weigh in on Bills That Could Sink Project*, <https://www.mainepublic.org/post/opponents-supporters-cmps-145-mile-transmission-line-weigh-bills-could-sink-project> (Apr. 11, 2019).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

have been written about this proposed project in the past couple of years. Such media coverage is indicative of the public interest in the project and additional controversy surrounding it.

Further, permitting the project would set a precedent for future actions. With regard to the local area, development sets a precedent in allowing additional projects throughout this region, which may result in expanded development of pristine areas near the proposed project location. Permitting transportation through Maine of electricity sourced from hydropower in Canada also sets a precedent for future transmission through Maine of such hydropower to fulfill clean energy requirements, despite significant negative effects associated with hydropower generation and transportation. The transmission lines are inextricably related to the dams generating the hydropower, and the development of hydropower creates significant cumulative impacts, which is discussed in more detail in Section XI.

Additionally, the project would heavily impact the Maine environment and its natural resources. It would be the largest fragmenting feature (totally nearly 1,000 acres) in the Western Maine Mountains region, which is a significant region ecologically due to its biodiversity and uniqueness. It is in the heart of the Northern Appalachian and Acadian Forests, the largest and most intact area of temperate forest in North America, and the project crosses part of a National Scenic Trail.¹⁰ This region is also a critical ecological link between forests in Vermont and New Hampshire and northern Maine. Moreover, this action may impact a number of wildlife species, including several that are listed under the ESA as threatened or endangered. The project, according to CMP's Presidential Permit Application, will pass through the territory of three federally listed species and their habitat. Canada Lynx, a threatened species, and Atlantic salmon, an endangered species, are both located in and have potential/suitable habitat in the proposed project area. The Northern Long-eared Bat, listed as threatened under the ESA, is also presumed to occur in areas consistent with the forest type that will be clear-cut for the project route.

Due to complexity and intensity of the proposed project, the substantial amount of controversy it has generated and continues to generate, the direct, indirect and irreversible impacts to Maine's wilderness and wildlife, including to ESA-listed species, this project will have, and the project's significant impacts on the quality of the human environment, including historic properties, the Corps must prepare an EIS. A failure to do so will result in a violation of NEPA.

A. The Corps Should Make All NEPA Documents Available for Public Review and Comments

NEPA requires that "[f]ederal agencies shall to the fullest extent possible encourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 C.F.R.

¹⁰ See Haselton, et al. 2014, *Assessing Relatively Intact Large Forest Blocks in the Temperate Broadleaf & Mixed Forests Major Habitat Type*, The Nature Conservancy ((2014); Riitters, et al., *Global-scale Patterns of Forest Fragmentation*, Conservation Ecology Vol. 4 No. 2, Art. 3 (2000).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

§ 1500.2(d). Agencies shall also make diligent efforts to involve the public in preparing and implementing their NEPA procedures and solicit appropriate information from the public. *Id.* at §§ 1506.6(a); 1506.6(d).

As explained above, it is apparent that this project requires an EIS. During the EIS process, public comments are mandatory. After a draft EIS is prepared the Corps is required to request comments from the public and affirmatively solicit comments from persons or organizations who may be interested or affected by the project. *Id.* at § 1503.1(a)(4); *see also* 33 C.F.R. § 230.19. This ensures that the agency is aware of all relevant concerns and has the ability to address them in the final document. Further, the Corps may also request comments on the final EIS, or persons may comment on the EIS, before a final decision is made. 40 C.F.R. § 1503.1(b). However, if the Corps nevertheless decides to prepare an EA prior to an EIS, the Sierra Club formally requests that it be given the opportunity to comment on the draft and final EA.¹¹ Public scrutiny is one of the core purposes of NEPA. *Id.* at § 1500.1(b). By allowing interested persons and groups to comment on the draft and final EAs, the Corps will be fulfilling one of NEPA's core purposes and it will also make the overall process more efficient. Seeking public comment on a draft EA also allows the Corps to learn of and address relevant concerns at an early stage of the NEPA process.

B. Lack of Identification of Alternatives

NEPA requires analysis of reasonable alternatives, including a no action alternative. *See* 40 C.F.R. § 1502.14. The Corps does not identify any potential alternatives to the proposed project in the Notice. Instead, the Notice "solicits recommendations for alternative sites or measures *not yet identified by the applicant.*" Notice at 2. But the Corps fails to inform the public about what, if any, alternatives CMP has identified. Nor does the Corps inform the public about alternatives, if any, it is considering or has considered. Identifying a range of reasonable alternatives to the proposed project is required as part of the Corps' NEPA process and compliance. *See* 40 C.F.R. § 1502.14. As explained below, an alternatives analysis also is required before the Corps may grant a CWA § 404 permit. This element is "the heart" of an agency's NEPA analysis and is necessary to "defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker *and the public.*" *Id.* (emphasis added). This is yet another reason the Corps must do an EIS for this project.

IV. Clean Water Act 404(b) Guidelines

The Notice states that "the evaluation of the impact of the activity in the public interest will also include application of the guidelines promulgated by [EPA] under authority of Section 404(b) of the Clean Water Act." Notice at 2. This obligation requires the Corps to ensure that any proposed

¹¹ While the circulation of a draft EA for public comment may not be required in every case, courts have found that circulating draft EAs for comment is mandatory in certain circumstances. *See Alliance to Protect Nantucket Sound v. U.S. Dept. of Army*, 398 F.3d 105, 114-15 (1st Cir. 2005).



discharge is consistent with the “404(b) Guidelines.” A § 404 permit is invalid if it does not conform to the Guidelines. *Bersani v. U.S. Env'tl. Prot. Agency*, 850 F.2d 36, 39–40 (2d Cir. 1988). The Guidelines set out in 40 C.F.R. § 230.10 require the Corps, *inter alia*, to ensure (1) no practicable alternatives to the proposed project are present, (2) the activities do not cause or contribute to significant degradation of the waters, (3) the activities do not jeopardize the continued existence of species listed as endangered or threatened, and (4) that there will be appropriate and practicable steps which will minimize potential adverse impacts. The Notice does not provide sufficient information to allow the public to evaluate and comment on the proposed project’s compliance with the Guidelines. The Sierra Club requests that once the Corps completes its analysis of the project pursuant to the 404(b) Guidelines that it publish the results of that analysis for notice and comment by the public. *See* 33 C.F.R. § 325.3(a) (“The public notice is the primary method of...soliciting...information necessary to evaluate the probable impact on the public interest”). The Corps could accomplish this in conjunction with an additional notice and comment phase for a draft EIS. Without this information, the Sierra Club and the general public cannot provide fully informed comments and are left guessing as to the alternatives identified already by CMP, any alternatives already identified and/or analyzed by the Corps, and the evaluation of the practicability of any identified alternatives in light of the 404(b) Guidelines.

A. The Corps Must Ensure That No Practicable Alternatives Are Reasonably Available

No discharge of fill material shall be permitted if there is a practicable alternative that would have less adverse impacts on the aquatic ecosystem. 40 C.F.R. § 230.10(a). The Corps has a duty to state the purpose and identify the need for the proposed action. 33 C.F.R. § 325.1(d)(1). The identified purpose and need creates the scope of available alternatives. 40 C.F.R. § 230.10(a)(1). An alternative is practicable if it is available and capable of being done after considering cost, existing technology and logistics in light of the overall project purpose. *Id.* § 230.10(a)(2).

The Corps does not identify any potential alternatives to the project. Instead, the Notice “solicits recommendations for alternative sites or measures *not yet identified by the applicant.*” Notice at 2. But the Corps fails to inform the public about what, if any, alternatives CMP has identified. Nor does the Corps inform the public about alternatives, if any, it is considering or has considered. Further, the Notice does not acknowledge the possible alternative of “no action.” *See* 40 C.F.R. 1502.14(d) (mandating agencies, when developing an EIS, to include the alternative of no action). Identification and analysis of a range of practicable alternatives, including no action, is at the heart of both the 404(b) Guidelines’ and NEPA’s requirements to avoid and minimize environmental impacts. The public should have every opportunity to review and provide the Corps comments on the proposed project’s range of alternatives, and such public participation will most effectively occur during the EIS process.

B. The Proposed Temporary and Permanent Fill of Wetlands is Likely to Cause Significant Degradation of Waters of the United States



SIERRA
CLUB
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

From the scant information provided by the Notice, the proposed filling of waterways throughout Maine appears to be contrary to the standards set forth in the Guidelines. The Guidelines mandate that no discharge of fill material shall be permitted if it will cause or contribute to significant degradation of waters of the United States. 40 C.F.R § 230.10(c). The Corps' assessment of whether the filling will cause significant degradation of Maine's waters must be based on "appropriate factual determinations, evaluations, and tests . . . with special emphasis on the persistence and permanence of the effects" described in 40 C.F.R. § 230, subparts C through F. 40 C.F.R. § 230.10(c). Such effects include potential impacts on physical and chemical characteristics (Subpart C), biological characteristics of the aquatic ecosystem (Subpart D), and human use characteristics (Subpart F).

Importantly, it is not apparent from the Notice exactly which wetlands, waterways, and streams CMP's Transmission Project will impact, the Notice simply states the amount of each resource that will be impacted and the general route of the transmission corridor. Notice at 9. In issuing its draft EIS for public comment, the Corps must be more specific and provide a list of each wetland, waterway, and stream as well as identify the specific segment of each resource that will be affected by the Project. *See* 33 C.F.R. § 325.1(d)(4) (A Section 404 Permit application to discharge fill material must include the location of the disposal site(s)). In addition to identifying the segment at issue, the Corps must also identify whether or not the wetland, waterway, or stream is included on Maine's Clean Water Act Section 303(d) list.¹² Only with such information can the public fully understand the context and intensity of the project's direct, indirect and cumulative impacts to the waters of the United States so as to provide meaningful comments.

Under the Guidelines, contributing effects to degradation include significant adverse effects "on aquatic ecosystem diversity, productivity, and stability," which "may include, but are not limited to, loss of fish and wildlife habitat" and the adverse effects "on recreational, aesthetic, and economic values." 40 C.F.R. § 230.10(c)(3)-(4). The proposed transmission lines would impact several ESA listed species and their critical habitat, as outlined in Section V. The project also would adversely affect Atlantic salmon EFH. In addition to impacts on the aquatic ecosystem, CMP's Transmission Project also would have negative impacts to the economic and recreational values of the area. Many people who call the Western Maine Mountains region home rely on the resources in the area. Many others visit and use the area for recreation through fishing, hunting, or non-consumptive uses such as birding, but the transmission lines will significantly impact all such recreational opportunities in the project area. The permanent and temporary fill of wetlands and waterways will impact local fish stocks and the permanent fragmentation caused by the transmission line corridor will isolate species and reduce biodiversity, impacting both hunters and non-consumptive users. Additionally, many Maine citizens make their livings guiding outdoor trips in the proposed project area, including the

¹² Each state must compile a list of the impaired and threatened waters in the state, as well as identify the pollutants causing the impairments. 33 U.S.C. § 1313(d). This list is referred to as a state's 303(d) list. Maine's 303(d) list can be found here: <https://www.maine.gov/dep/water/monitoring/305b/index.html>.



Kennebec River Gorge, or are otherwise reliant on the tourist industry. The risks this proposed project poses to outdoor recreation in the project area are real and the Corps must evaluate those impacts.

The Corps must also assess impacts to sightseeing and aesthetics. 40 C.F.R. §§ 230.52, 230.53. By creating a 300-foot wide corridor that spans 53 miles and removes close to 1,000 acres of forest, CMP is proposing to fundamentally change the area. The large and imposing transmission line would have significant negative aesthetic impacts on the natural area that is primarily undeveloped. Finally, the Corps must consider the periodic spraying of herbicides that will occur as part of “maintaining” the clear-cut transmission lines’ rights of way, and the risk of harms this poses to wildlife and ground and surface water resources. All of this information must be included and evaluated in the Corps’ draft EIS.

C. The Corps Must Ensure Appropriate and Practicable Steps Are Taken to Minimize Potential Adverse Impacts of the Discharge

Due to these direct adverse impacts resulting from the proposed dredge and fill activities, the Corps must ensure that CMP takes appropriate and practicable steps to minimize the potential adverse impacts on the aquatic system. *See* 40 C.F.R. § 230.10(d). To achieve the least environmentally damaging result, EPA provides a three-step sequence: (1) avoid adverse impacts to the maximum extent possible; (2) minimize the impacts to the maximum extent possible; and (3) mitigate or compensate the impacts to the maximum extent possible. *See* 40 C.F.R. § 230.91(c). The Corps must describe in sufficient detail how it will ensure that the fill operations proposed under this permit will meet these important requirements.

To start, the Corps must ensure CMP takes all available steps to avoid filling wetlands and waterways and reduce any resulting impact to the aquatic ecosystem. 33 C.F.R. § 320.4(r)(1). Because the Notice does not identify any alternatives to the project’s proposed wetland fills, it is not clear what steps the Corps has taken, if any, to determine if avoiding the proposed fill is possible or how to minimize any resulting impacts to the maximum extent possible. The Corps’ regulations explicitly provide ways to minimize an action’s impacts; of particular import for CMP are ways to minimize adverse effects on plants and animals as well as effects on human use. *See* 40 C.F.R. §§ 230.75, 230.76. The Corps must take a hard look at these minimization options and not leave these important and legally required permit elements to the discretion of CMP.

Instead of seeking to avoid or minimize the project’s impacts, the Notice states that CMP plans to provide compensation for the significant and irreversible impacts its project will impose by preserving a total of 1,022 acres of wetland and upland and contributing to the Maine In Lieu Fee Program. Notice at 1-2. This compensatory mitigation is insufficient. The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States. 40 C.F.R. § 230.93(a)(1). While compensatory mitigation may take several forms—restoration, enhancement, establishment, or preservation—restoration should be the



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

first option considered. *Id.* at § 230.93(a)(2). While an applicant may seek to preserve wetlands, as CMP is proposing, preservation may only be used when certain criteria are met:

(1) the resources to be preserved provide important physical, chemical, or biological functions for the watershed; (2) the preserved resources contribute significantly to the ecological sustainability of the watershed; (3) preservation is appropriate and practicable; (4) the resources are under threat of destruction or adverse modification; and (5) the preserved site will be permanently protected through an appropriate legal instrument.

40 C.F.R. § 230.93(h).

While the Notice gives a brief discussion of the areas to be preserved, it fails to discuss why another method of mitigation was not considered and how the preservation criteria are satisfied. *See* Notice at 26-27. The CMP Transmission Project will result in more than 1,589 acres of permanent filling of wetlands, significant vernal pool habitat, and inland wading bird and waterfowl habitat. By failing to analyze whether compensatory wetlands restoration is an option, the Corps risks authorizing a net loss of wetlands, vernal pool habitat and inland wading bird and waterfowl habitat.¹³ In addition to neglecting to identify the resources that will be impacted by the Project, the Notice also fails to adequately describe the resources to be preserved by CMP, fails to discuss whether those resources are under a threat of destruction, and fails to discuss the permanence of CMP's proposed preservation. Without more detail about the important functions these preserved areas provide and the threat they face without permanent protection, the Sierra Club and the general public cannot provide fully informed comments on CMP's proposed mitigation. The Corps must provide all of this information and related agency evaluation as part of its draft EIS.

D. Public Interest Review

The Corps may not issue a 404 permit if doing so would contravene the public interest, and when completing its public interest review the Corps must evaluate a project's probable impacts, including cumulative impacts. 33 C.F.R. §§ 323.6(a). 320.4(a)(1). The Notice states that "[t]he decision whether to issue a permit will be based on an evaluation of the probable impact of the proposed activity on the public interest" and then lists several factors that may be relevant to the proposal and will be considered including "energy needs." Notice at 2. If the purpose of the project is to facilitate delivery of electricity from Canada to Massachusetts "in response to a Request for Proposals for Long-Term Contracts for Clean Energy Projects from the State of Massachusetts," it is incumbent on the Corps to do an independent analysis as part of its public interest review that answers, at a minimum, two questions: (1) Can the source of the electricity be considered "Clean

¹³ A substantial amount of vernal pool habitat will be permanently filled. However, the proposed compensatory mitigation provides only in-lieu fee compensation for those losses. While in-lieu fee programs are permitted, mitigation banks are preferred and the Corps and CMP fail to establish whether a mitigation bank was analyzed and why this option was not chosen. 40 C.F.R. § 230.93(b).



Energy” or, in other words, What are the greenhouse gas emissions associated with the source of this electricity? and (2) Is this particular project required to meet Massachusetts’ Clean Energy needs?

On the first question, there is considerable debate regarding whether the electricity sourced from large hydro dams in Canada is truly clean energy given the methane gas releases associated with the construction and operation of such dams.¹⁴ A bill was recently introduced in the Maine Legislature (and voted through committee) to require the Maine Department of Environmental Protection to conduct an independent analysis of the carbon emissions impacts of the proposed project.¹⁵ As State Senator Brownie Carson asked, “Are the climate benefits real, or are they not?” Given the stated purpose and need for the proposed project, this is a question the Corps also must answer.

The second question raises several additional and important questions the Corps must consider, including: What are Massachusetts’ “Clean Energy” needs? How are those needs determined and by whom? Why is it necessary to degrade Maine’s natural environment to supply energy needs of Massachusetts? Is there a practicable alternative to this project for meeting those needs? The Corps must examine these questions and more in any public interest review related to this proposed project, and it must make the results of its analysis available for public notice and comment in the draft EIS.

One factor that is conspicuously absent from mention in the Notice is climate change, which is clearly an important factor when evaluating any project’s impact on the public interest. Given that the proposed project is premised on meeting Massachusetts’ clean energy needs—which is a direct result of Massachusetts seeking to comply with its state laws to address climate change, the Corps must evaluate the public interest of the project in this context. Such evaluation must be included in the Corps’ draft EIS.

E. Specific Request to Formally Consult With and Involve EPA Region 1 in 404(b)(1) Analysis

In the Clean Water Act, Congress gave the Corps and EPA joint jurisdiction over waters of the United States. EPA, in conjunction with the Corps, developed the 404(b) Guidelines that govern the Corps’ activities related to CMP’s permit application. 40 C.F.R. 230.2(a); *see also Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers*, 524 F.3d 938, 946-47 (9th Cir. 2008) (“The Section 404 permit process is governed simultaneously by Corps Regulations, 33 C.F.R. Parts 320–29, and by EPA guidelines, 40 C.F.R. Part 230. Both sets of rules must be observed.”). Accordingly, if it has not already, the Corps should formally consult with and

¹⁴ *See, e.g.*, <https://www.nrcm.org/maine-environmental-news/new-study-shows-cmp-transmission-project-would-not-reduce-climate-changing-carbon-pollution/>.

¹⁵ *See* <https://www.mainepublic.org/post/climate-impact-study-sought-foes-1b-cmp-hydro-project-clears-committee-hurdle>.



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

involve EPA Region 1 in the Corps' 404(b) analysis, beyond simply soliciting comments from EPA as if it were just any other cooperating federal agency.

V. Endangered Species Act Consultation

Section 7 of the ESA establishes the requirement that federal agencies must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of critical habitat. 16 U.S.C. § 1536(a)(2). The Corps, as the action agency, must consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) (collectively the Services) to insure that the proposed project will not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. *Id.* § 1536(a)(4). To assist this consultation the Corps must prepare biological assessments for all species that may be present within the area of the proposed project. *Id.* § 1536(c).

A. The Corps Failed to Identify Affected Species

Public notice for Clean Water Act § 404 permits should include “[a] statement of the district engineer’s *current knowledge* on endangered species.” 33 C.F.R. § 325.3(a)(11) (emphasis added). The Notice states that the Corps has reviewed a list of ESA-protected species that might occur along the project corridor and has made a preliminary determination that the project “is not likely to adversely affect any federally listed endangered or threatened species or their designated critical habitat.” Notice at 3. However, the Corps fails to give the public the basic information of which listed species may be affected by the project. Nor does the Corps identify the locations, if any, of those potentially affected species’ critical habitat generally or in relation to the proposed project. The Corps clearly has this information since it has made a preliminary determination that the project is not likely to adversely affect these unidentified species and their critical habitat, but for some unknown reason it decided not to include that basic and essential information in the Notice.¹⁶ Thus, the Corps has not provided the public with the district engineer’s “current knowledge on endangered species.” The Corps must reissue the Notice with this required information and provide the public additional time to comment.

B. Federally Listed Species that May Be Affected

Given the Notice’s failure to identify potentially affected ESA-listed species, the Sierra Club has conducted its own investigation and has identified at least four potentially affected listed species—

¹⁶ The Notice further states that the Corps is requesting appropriate federal agencies—presumably NMFS and FWS, although this also is not clear—“provide comments regarding the presence of and potential impacts to *other listed species or its [sic] critical habitat not already identified.*” Notice at 3 (emphasis added). This is further indication that some potential species and critical habitat already have been identified but that the Corps has not included such information in the Notice.



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

three animals and one plant. We also have identified designated critical habitat that will be impacted by the proposed project. Those species and their habitat are discussed further below.

In 2000, Canada Lynx in the contiguous U.S. were designated as a distinct population segment (“DPS”) and listed as a threatened species under the ESA. 65 Fed. Reg. 16,051 (March 24, 2000). A large portion of Maine has been designated critical habitat for the species. 71 Fed. Reg. 8,258 (February 16, 2006). Importantly, of the eastern states, Maine is the only state with any lynx critical habitat; thus, consideration of the proposed project’s effects on lynx and their habitat in Maine is of critical importance.

The Atlantic Salmon Gulf of Maine DPS was listed as endangered under the ESA in 2009. 74 Fed. Reg. 29,343 (June 19, 2009). Critical habitat has been designated for the Atlantic salmon throughout most of southern Maine, including in the proposed project area. 74 Fed. Reg. 29,299 (June 19, 2009). Importantly, in February of this year the National Oceanic and Atmospheric Administration issued a final recovery plan for the Atlantic salmon. In addition to the required consultation, the Corps must review this recovery plan to ensure that the proposed project will not adversely affect Atlantic salmon or that species’ critical habitat.

In January 2016, the Northern Long-eared Bat was listed as threatened under the ESA. 81 Fed. Reg. 1,900 (January 14, 2016). The FWS also imposed final 4(d) rules for the species at the same time; these 4(d) rules allow the agency to issue regulations it “deems necessary and advisable to provide for the conservation of [threatened] species.” 16 U.S.C. § 1533(d). The 4(d) rule for the Northern Long-eared Bat tailors protections to areas affected by white-nose syndrome during the bat’s most sensitive life stages. A significant portion of Maine is designated as “white-nose syndrome zone” and several counties have confirmed areas with white-nose syndrome infections.¹⁷ The Corps must initiate and conclude consultation with the FWS and review all applicable 4(d) regulations before permitting the CMP Transmission Project.

In addition to the listed wildlife, the project area is also home to a threatened plant species. In 1994, the Small Whorled Pogonia was listed as threatened, after previously being listed as endangered. 59 Fed. Reg. 50,852 (October 6, 1994). The primary threat to this species is habitat loss. The Corps must analyze whether this species is found within the proposed project area and consult with the necessary agencies before making a final decision on CMP’s permit.

C. The Corps Should Not Issue a Final Decision Until ESA Consultation is Completed and the Public Has Had an Opportunity to Comment on the Consultation Process

¹⁷ Northern Long-eared Bat Final 4(d) Rule, FISH & WILDLIFE SERV., <https://www.fws.gov/Midwest/endangered/mammals/nleb/pdf/WNSZone.pdf> (Oct. 1, 2018).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

The primary goal of the ESA is the recovery of endangered and threatened animals and plants. Actions, such as those proposed in this permit application, which may impede achieving this goal for multiple ESA-listed species must be given a high degree of scrutiny. Further, the ESA prohibits the action agency—the Corps in this case—from making “irreversible or irretrievable commitment[s] of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives would avoid jeopardizing the continued existence of any endangered or threatened species.” 16 U.S.C. § 1536(d). Given the number of listed species potentially affected by the proposed project, as well as the presence of designated critical habitat intersecting with the project area, a robust consultation with the Services is required. The Sierra Club requests that the results of the Corps’ consultation be made available for public comment and input prior to any irretrievable or irreversible resources are committed toward the proposed project. Such public participation prior to agency action will ensure that the Corps is fully informed of all information that may bear on the agencies’ consultation procedure.

VI. Essential Fish Habitat

Essential fish habitat is the area necessary for fish to reproduce, grow, feed, and shelter. 16 U.S.C. § 1802(11). Marine fish could not survive without these vital, healthy habitats. The Notice indicates the project “may impact [Essential Fish Habitat] for Atlantic salmon,” which is a federally listed endangered species, and that the “District Engineer has made a preliminary determination that the site-specific adverse effect will be minimal.” Notice at 3. However, the Notice does not explain the basis for that preliminary determination, nor does the Notice identify the specific sites within the project area where EFH occurs or may occur so that the public can fully evaluate the proposed project’s impacts on those sites. The Notice states that “[f]urther consultation with [NMFS] regarding EFH conservation recommendations is being conducted and will be concluded prior to the final decision.” However, the Notice gives no information regarding the results of the Corps’ consultation with NMFS to date, nor does the Notice identify any EFH conservation recommendations that are being or will be considered. The Sierra Club agrees that EFH consultation with NMFS must be concluded prior to the Corps making a final decision on the project. The Corps must make the results of that consultation available as part of the draft EIS so the public can make informed comments on this aspect of the proposed project. *See* 40 C.F.R. § 1508.27(b)(9).

VII. Analyzing Impacts to All Species

The Corps should analyze the proposed project’s impacts on all affected species. The Notice provides that the comments “are used to assess impacts on *endangered species*” (Notice at 2) and specifically, but inadequately, raises potential issues related to Atlantic salmon habitat and unidentified endangered and threatened species. Notice at 3. However, this proposed project would affect many species, not just those that are listed as endangered or threatened under the ESA. Accordingly, the Corps must take a more comprehensive approach than the Notice indicates by analyzing impacts to all species potentially affected by the proposed CMP Transmission Project. *See* 40 C.F.R. §§1502.16(f), 1508.27(b)(9).



A. The Proposed Project May Impact Bald and Golden Eagles

Although they are no longer listed under the ESA, the Bald and Golden Eagles are protected by the Migratory Bird Treaty Act (“MBTA”) and the Bald and Golden Eagle Protection Act (“BGEPA”). Both bald and golden eagles are found in Maine, with the golden eagle being listed as a state endangered species by the Maine Department of Inland Fisheries and Wildlife.¹⁸ The MBTA and BGEPA prohibit taking, possessing, transporting, or even disturbing bald and golden eagles, or their parts, nests, or eggs without prior authorization. 16 U.S.C. § 703(a); 16 U.S.C. §§ 668, 668c. The Notice, again, entirely fails to mention these species. It is possible this proposed project would have an impact on nesting eagles as it has been found that distance from power lines is one of the most important factors in determining the nest and rest sites of migratory birds. The Corps must take a hard look at the impacts that the proposed project may have on eagles to ensure that these species and their habitat will be protected to the maximum extent possible. The results of this evaluation must be included in the Corps’ draft EIS.

B. The Proposed Project Will Impact Other Species, Including Iconic Maine Wildlife

In addition to the ESA-listed species and eagles, the proposed project likely will impact other iconic Maine wildlife. Maine is home to more than half of all subwatersheds that are designated as supporting intact populations of brook trout and it is the only state with any significant remaining lake and pond bull trout populations. The proposed project route will transect the heart of the largest reservoir of intact aquatic habitat in the Northeast. This area supports populations of native brook trout that are identified as the last true stronghold for the species in the United States. The project will largely fragment this habitat with multiple stream crossings and create a new corridor, which could lead to increased human use of the area, including increased off-road motor vehicle traffic. Although virtually every stream and river in the region through which the proposed project cuts support wild brook trout, the Corps fails to mention brook trout or the impacts the species may face due to the CMP Transmission Project.

The proposed project also will impact vernal pools and species that rely on such habitat. Vernal pools are ephemeral or temporary inundated wetlands that are known for providing critical breeding habitat to amphibian and invertebrate species, including spotted and blue-spotted salamanders and wood frogs. Vernal pools also provide resting or foraging habitat to a suite of other species, including turtle and snakes. In addition to the habitat they provide, vernal pools aid in multiple ecological functions such as nutrient exchange, nutrient and sediment retention, and biodiversity support. Unfragmented connections and the quality of vernal pool habitats are key to population vitality, as well as to their support of ecological functions. While the Notice states that some vernal

¹⁸ *Golden Eagle*, <https://www.maine.gov/ifw/fish-wildlife/wildlife/species-information/birds/golden-eagles.html> (last accessed Apr. 23, 2019).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

pools will be filled or converted by the proposed project, it fails to provide any specific locations of the effected pools or a discussion on the impacts of vernal pool loss. See Notice at 9.

Further, there are a number of species that require large habitats that will be adversely affected by the CMP Transmission Project's fragmentation of the Western Maine Mountains region. Marten, moose, and bobcat all prefer large mature forest habitat. The CMP Transmission Project will cause a direct loss of almost 1,000 acres of forest, and heavily increase the amount of edge habitat in the region. This change in forest composition will have direct impacts on these iconic Maine species that thrive in large interior, intact forests.

The Corps must evaluate impacts to these and other species in the area, regardless of their designations (or non-designations) under federal or state law. Such evaluation, and associated public notice and comment, could occur in conjunction with the NEPA public participation process, and accordingly must be included in the Corps' draft EIS.

VIII. Section 106 Consultation Is Required, and Opportunity for Public Comment Must Be Granted after the Public Is Made Aware of the Proposed Project's Anticipated Effects on Historic Properties

Public notice for Clean Water Act § 404 permits should include "a statement of the district engineer's *current knowledge* on historic properties." 33 C.F.R. § 325.3(a)(10) (emphasis added). The Notice acknowledges that the district engineer "has determined that the proposed work may impact properties listed in, or eligible for listing in, the National Register of Historic Places." Notice at 3. But the Notice gives no further information or details about those identified properties or the nature of the impacts. Thus, the Corps has not provided the public with the district engineer's "current knowledge on historic properties." The Corps must reissue the Notice with the required information and provide the public with additional time to comment.

The Notice also does not fulfill the public participation requirements under the National Historic Preservation Act. "Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties." 36 C.F.R. § 800.1(a). Further, "[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." *Id.* The authorizing agency must complete consultation according to Section 106 before "issuance of any license." *Id.* § 800.1(c).

The NHPA requires a number of participants be consulted in determining impacts to historic properties, as well as designation of "a lead Federal agency" when multiple Federal agencies are involved in a project's approval. *Id.* § 800.2(a)(2). Parties to be consulted include the relevant State historic preservation officer, any relevant Indian tribes, representatives of the local governments, the permit applicant, interested individuals and organizations, and the public. *Id.* § 800.2(c). The Notice



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

did not indicate whether the Corps is the designated “lead Federal agency” for Section 106 consultation or whether, as happened with the Northern Pass Project, DOE will be the lead agency.

Specifically, “[t]he views of the public are essential to informed Federal decisionmaking in the section 106 process.” *Id.* § 800.2(d). To facilitate input from the public, the NHPA requires the permitting agency to “provide the public with information about an undertaking and its effects on historic properties and seek public comment and input.” *Id.* The Notice fails to provide sufficient detail regarding effects of the proposed project on historic properties, only stating that consultation pursuant to the NHPA “will be ongoing as part of the permit review process.” Notice at 3. Pursuant to the NHPA, the Corps’ Section 106 consultation must be completed before the permit can be issued. As with the EFH and ESA consultation, the Corps must make the results of that consultation available for public comment once the consultation is concluded as part of the Corps’ draft EIS.

IX. Consultation with National Park Service – Appalachian Trail Crossing

It is the Sierra Club’s understanding that the transmission lines will cross the Appalachian Trail, a National Scenic Trail, in at least one area, and will be viewable from multiple Appalachian Trail elevated viewpoints. The Notice does not mention this impact at all, much less provide any information about where these crossing or crossings will occur or where the transmission lines will be viewable from the Trail. The Appalachian Trail is managed by the U.S. National Park Service, with which the Corps must consult prior to making its final determination given the impact to this federal natural resource area. The Corps must make the results of such consultation available for public notice and comment as part of its draft EIS.

X. Wildfire Threats Due to High Voltage Transmission Lines

Transmission lines have caused multiple wildfires throughout the United States. Despite this, the Notice fails to mention the potential for wildfires from the proposed project or the effects a wildfire would have on the state. Transmission lines have been linked to numerous destructive and deadly wildfires, including being the possible cause of the deadliest fire in California’s history—the November 2018 Camp Fire.¹⁹ The Corps must evaluate the potential for wildfires and the effects a wildfire would have, and should seek comments from the public on its evaluation and analysis. *See* 42 U.S.C. § 4331(b); 40 C.F.R. § 1508.27(b)(2). When evaluating the potential for wildfires, the

¹⁹ Ivan Penn, *Power Lines and Electrical Equipment Are A Leading Cause of California Wildfires*, <https://www.latimes.com/business/la-fi-utility-wildfires-20171017-story.html> (Oct. 17, 2017); Peter Eavis, *PG&E Says It Probably Caused the Fire that Destroyed Paradise, Calif.*, <https://www.nytimes.com/2019/02/28/business/energy-environment/pge-camp-fire.html> (Feb. 8 2019); *How Do Power Lines Cause Wildfires?*, TEXAS WILDLIFE MITIGATION FUND, <https://wildfiremitigation.tees.tamus.edu/faqs/how-power-lines-cause-wildfires> (last accessed Apr. 23, 2019).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

Corps also must consult with local and state firefighters regarding the risk of fire and their ability to respond to fires in the proposed project areas, some of which are remote.

XI. Climate Change

Although the Notice states the purpose of the project is to construct a high voltage transmission line to deliver electrical power from “hydroelectric sources in Quebec,” the Notice does not again mention or discuss the environmental or human impacts of the “hydroelectric sources.”

Transmission of electricity is inextricably intertwined, and indeed directly connected via power lines, to the source generating that electricity. NEPA requires consideration of: “Connected actions, which... are closely related and therefore should be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a). “Actions are connected if they: . . . Cannot or will not proceed unless other actions are taken previously or simultaneously,” or if the actions “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” *Id.* The transmission lines and associated equipment installations proposed here cannot proceed without the existing hydropower generating stations in place in Canada. The transmission lines will transport energy from generating stations, and are interdependent parts of the larger project of producing and delivering hydropower to Massachusetts. Without the dams generating the hydropower, there would be no need for transmission lines to transport dam-generated hydropower. Likewise, the transmission lines would not be necessary to deliver 1,200 megawatts of electrical power but for the “Long-Term Contracts for Clean Energy Projects from the State of Massachusetts.” Notice at 1. Approval of permits for transmission lines for delivery of hydropower is connected to the action of generating hydropower, as well as the purported need for that power.²⁰

NEPA requires consideration of indirect and cumulative effects of connected actions. For NEPA analysis purposes, indirect effects are those: “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). Approval of the Section 404 permit for the transmission lines in Maine unavoidably results in the foreseeable increased or at minimum continued generation of hydropower by HydroQuebec, which will foreseeably result in emission of greenhouse gases (GHGs) in the form of methane whose contribution to climate change is demonstrable. Climate change affects natural resources regardless of international boundaries, including local water, air, and ecosystems in Maine.

Thus, the project in its entirety, transmission lines and hydropower generating dams, will have a significant effect on the domestic environment, in the form of indirect and cumulative climate

²⁰ Again, when federal agencies evaluated a prior, similar project—the Northern Pass—they recognized this direct connection. *See* 78 Fed. Reg. at 7830 (noting one of the environmental issues the federal government intended to analyze as air quality, which included “climate change and greenhouse gas emissions”). The Corps should not deviate from this reasonable interpretation of the scope of the project, or, if it intends to so deviate, it must explain its rationale for doing so.



SIERRA
CLUB
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

change effects, beyond the direct effects of the transmission lines and related facilities to waterways and wetlands. Further, as previously discussed, there is an ongoing debate over the GHG emissions impacts of the proposed project. The Corps must understand these impacts for itself, and it must make its evaluation of the climate change impacts of the proposed project in its entirety available for public comment. Such information will inform, *inter alia*, the range of alternatives analysis under NEPA and the public interest review under the 404(b) Guidelines.²¹ This information and related agency evaluation must be included in the Corps' draft EIS.

XII. Insufficient Comment Period

The Corps provided 30 days for the public to comment on the CMP Transmission Project. On April 12, 2019, the Sierra Club requested the Corps extend the comment period for an additional 30 days due to the complex and controversial nature of the project. *See* Attachment A (incorporated herein by reference). On April 15, 2019, in an email to Sierra Club's counsel, you denied the request for extension. *See id.* In your email, you stated as one reason for denying the extension: "irrespective of the comment period, our review process remains open until a permit decision is made and even comments that are received after the 30 days become part of the official file and are no less carefully considered." *See id.*

The Sierra Club certainly appreciates the Corps' open-ended comment period and fully intends to submit supplemental comments. However, this approach creates an obvious problem. The general public is not privy to the understanding that the Corps will accept comments after the comment period ends. Thus, it creates an unfair situation whereby only those citizens or groups who contact the Corps regarding the comment deadline will learn that the Corps will consider comments submitted after the deadline; other members of the public will reasonably conclude, based on the April 25, 2019 deadline stated in the Notice that the Corps will not accept comments after that date.

The Sierra Club requests that the Corps make a public announcement to inform the general public that it will be accepting comments on this project up until the date the decision is made. Further, the Sierra Club requests that the Corps announce when it is approximately 60 days from finalizing its decision so the general public will know to submit their comments as soon as possible so that the Corps will have sufficient time to consider them prior to making its final decision.

²¹ Recently, several courts have chastised federal agencies for failing to sufficiently consider the climate effects of their actions as part of their NEPA analysis. *See, e.g., WildEarth Guardians v. U.S. BLM*, 870 F.3d 1222, 1228 (10th Cir. 2017); *San Juan Citizens Alliance v. U.S. Bureau of Land Mgmt.*, 326 F. Supp. 3d 1227, 1242–44 (D. N.M. 2018); *Wilderness Workshop v. U.S. Bureau of Land Management*, 342 F. Supp. 3d 1145, 1158 (D. Colo. 2018); *Western Org. of Res. Councils v. U.S. Bureau of Land Mgmt.*, No. CV 16-21-GF-BMM, 2018 WL 1475470 (D. Mont. Mar. 26, 2018); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189–93 (D. Colo. 2014).



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B

Portland, Maine 04101

Phone: (207) 761-5616

Fax: (207) 773-6690

<http://maine.sierraclub.org>

XIII. The Corps' Public Notice Contains Insufficient Information and Analysis Making Fully Informed Public Comment on the Proposed Project Impossible

As discussed throughout these comments, the Notice does not provide enough detail regarding the proposed project or its impacts to provide the public a meaningful opportunity for public comment. Pursuant to Corps' regulations, public notice for a Section 404 permit must "include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment." 33 C.F.R. § 325.3(a). An application for a § 404 permit must include "a complete description of the proposed activity including necessary drawings, sketches, or plans sufficient for public notice," and a description of "the location, purpose and need for the proposed activity." 33 C.F.R. § 325.1(d)(1). Specifically, the public notice must include "brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments." 33 C.F.R. § 325.3(a)(5).²²

The Corps' Notice states the placement of temporary and permanent fill in numerous waterways and wetlands is:

to construct a new High Voltage Direct Current (HVDC) electrical transmission line and related facilities capable of delivering up to 1,200 megawatts of electrical power from hydroelectric sources in Quebec to the New England Control Area, specifically in response to a Request for Proposals for Long-Term Contracts for Clean Energy Projects from the State of Massachusetts.

Notice at 1. The Notice fails to clarify if this describes the project purpose and need as defined by the Corps or by the permit applicant. Agencies, not applicants, are responsible for defining a proposed action's purpose and need. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195–96 (D.C. Cir. 1991). An agency determines the purpose and need based on the goals of the applicant but, more importantly, by considering Congress's intent in the statute authorizing the agency's action. *Id.* at 196; *Stand Up for California! v. Department of Interior*, 204 F. Supp.3d 212, 306 (D.D.C 2016). In particular, the project includes a 26.5 mile 345kV transmission line between Windsor and Wiscasset (with additional equipment installation and upgrades) that is separate from the 145.3 mile, +/- 320 kV HVDC transmission line from the Canadian Border to the new convertor station at Lewiston, and the Notice provides no explanation of how this separate transmission line is necessary or otherwise related to the project purpose as stated in the Notice.

²² CMP's permit application, which would provide important information for the public to consider, was not provided as part of the Notice. The Sierra Club checked the Corps' New England Region website and did not find any further information posted there related to the proposed project. If the Corps has made CMP's application or any other documents related to the Corps' evaluation of the proposed project publicly available in any other format or venue, the Sierra Club requests the Corps inform it where such materials can be found or obtained. As a matter of course, the Corps should post on its website all materials and documentation related to the proposed project so that the public can easily access such information.



SIERRA
CLUB
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

Further, in addition to the Notice's deficiencies already discussed, the Notice provides no information regarding the controversial plan for horizontal directional drilling under the Kennebec River, how it will be accomplished, precisely where it will occur, or what specific measures are planned to minimize risks to the resource associated with this element of the proposed project.

These and other deficiencies in the Notice impede the Sierra Club's and the general public's ability to fully participate in the public process envisioned by Congress when it included public participation requirements in NEPA and the Clean Water Act. *See League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) ("[T]he public should not be required to parse the agency's statements to determine how an area will be impacted Informed public participation in reviewing environmental impacts is essential to the proper function of NEPA"). Accordingly, the Corps must include the information missing from its Notice in its draft EIS. Such information is necessary to provide the public with a clearer picture of the full scope and impacts of the proposed project, as well as potential practicable alternatives, if any, which will in turn allow for more tailored and project-specific comments.

XIV. Request for Public Hearing

The Sierra Club seeks the opportunity to understand and provide meaningful comments on the proposed project and any EA, FONSI, or EIS issued detailing the Corps' or CMP's analysis of project impacts. For all of the reasons outlined in these comments, pursuant to Corps' regulations and the Notice, the Sierra Club also requests a public hearing with regard to the CMP Transmission Project.²³ *See* 33 C.F.R. § 327.4(b). The Corps' regulations' presumption is, upon request, a public hearing "shall be granted" unless the Corps makes a determination that the issues raised are insubstantial or there is no valid interest to be served by a hearing. *Id.* Here, the issues raised are substantial and involve coordination among several federal agencies. Once that coordination and consultation are completed, the Corps must publish a draft EIS for public comment. A public hearing provides the opportunity for the public to ask questions about the proposed project in real time, and also gives the Corps, and other coordinating federal agencies, a chance to present critical data and information in visual and auditory format that may assist members of the public in gaining a further understanding of the proposed project. Further, given the widespread impacts across the state of this lengthy transmission line, it would be appropriate for the Corps to hold multiple public hearings in different venues to provide an opportunity for all affected citizens to attend and have their voices heard.

²³ The Notice references public hearings held by the Maine Department of Environmental Protection and the Maine Land Use Planning Commission. Notice at 4. The Sierra Club does not consider the Corps' presence at state level hearings as in any way equivalent to or taking the place of a public hearing on this application. The Maine Department of Environmental Protection and the Land Use Planning Commission are state agencies with statutory and regulatory obligations and mandates that differ from the Corps'. The fact that those state agencies held public hearings should further support the idea that the Corps should follow suit.



**SIERRA
CLUB**
FOUNDED 1892

Maine Chapter

565 Congress St, 206B
Portland, Maine 04101
Phone: (207) 761-5616
Fax: (207) 773-6690

<http://maine.sierraclub.org>

CONCLUSION

The CMP Transmission Project is complex, controversial, and will have both immediate and direct impacts on Maine's citizens and natural environment, as well as long-term, irreversible impacts both within and outside of Maine. Accordingly, NEPA requires the Corps complete an EIS for the project, as well as complete consultation under all relevant federal laws prior to making its decision on CMP's Section 404 permit application or committing any irretrievable resources to the project. Any failure of the Corps to complete an EIS will be a violation of NEPA. The Corps has a duty to provide the general public with as much information as it can to enable the citizens of Maine to fully understand the project and its implications, and to provide the Corps with meaningful, informed comments that will assist the Corps' decision-making. The risks posed by this project to Maine's environment, natural resources and citizens are significant, and require robust public participation opportunities and an environmental review process that meets or exceeds all applicable federal law requirements.

The Sierra Club welcomes any opportunity to meet with Corps personnel to discuss any of these comments, and looks forward to continuing to participate in this process.

Sincerely,

Alice Elliott
Director
Sierra Club, Maine Chapter

CC via email only: EPA, Region 1
Representative Seth Berry
Senator Brownie Carson
Sandra Howard, Say NO to NECEC
Sue Ely, Natural Resources Council of Maine

Attachment A
Sierra Club, Maine Chapter Comments on U.S. Army
Corps of Engineers'
Public Notice Regarding File No. NAE-2017-01342



Kevin Cassidy
Senior Staff Attorney

Earthrise Law Center
Lewis & Clark Law School
phone 781-659-1696
cassidy@lclark.edu
earthriselaw.org

Jay L. Clement
Maine Project Office, Corps of Engineers
442 Civic Center Dr., Suite 350
Augusta, Maine 04330
Jay.L.Clement@usace.army.mil

April 12, 2019

VIA EMAIL & U.S. MAIL

*Re: Request for Extension of the Comment Period and for Public Hearings for
U.S. Army Corps of Engineers Permit Application No.: NAE-2017-01342*

Dear Mr. Clement,

On behalf of Sierra Club, Maine Chapter, I write to respectfully request an extension of the 30-day public comment period for the proposed Central Maine Power Company Transmission Lines project by an additional 30 days. This project is complex, has generated and is still generating significant controversy, and has long-term environmental and social implications for citizens inside and outside the state of Maine. Due to the magnitude and complexity of this project and the enormous demonstrated level of public interest, a 30-day comment period is insufficient.

On March 26, 2019, the Maine Project Office of the U.S. Army Corps of Engineers issued a public notice announcing a 30-day public comment period for the Transmission Lines project (Application Number NAE-2017-01342) ending on April 25, 2019. The Transmission Lines project would include the installation of multiple High Voltage Direct Current (HVDC) transmission lines totaling approximately 173.3 miles through the state of Maine, including wetlands and waterways. Of the 173 miles, 53 miles of new transmission lines will be located in a previously undeveloped area. The public notice states that 406 water bodies and more than 100 acres of wetlands, several of which are wetlands of special significance, will face permanent impacts.

Public notice is the primary method for soliciting "information necessary to evaluate the probable impact on the public interest." 33 C.F.R. § 325.3(a). The original 30-day comment period may be extended an additional 30 days, if the agency finds it is warranted. *Id.* at § 325.2(d)(2)(iv). When determining if an extension is warranted, the agency may look at whether the proposal is routine or noncontroversial. *Id.* at § 325.2(d)(2)(i). This Transmission Lines project has generated a significant amount of

controversy throughout the state and certainly cannot be considered “routine.” The Corps may also consider the “need for comments from remote areas,” which is also a factor weighing in favor of providing additional time for comments on this project. Finally, the Corps’ regulations permit the district engineer to consider “[c]omments from similar proposals” in determining the need for a comment period extension. By comparison, a similar project to this one—the Northern Pass transmission project—had multiple and extensive public comment opportunities. And, for perspective, just over a month ago, the U.S. Army Corps, Savannah, GA District extended a comment period for 30 days “related to plans to pass fish upstream of the existing New Savannah Bluff Lock and Dam.”¹ In explaining the extension, the District Commander put it best: “We want to make sure everyone with an interest in the fish passage project has ample time to understand and provide comment on this extremely important mitigation project.” So for much smaller and far less controversial projects, the Corps has granted 30-day extensions, and it should do so in this case as well.

The controversial nature of the CMP Transmission Lines project is undeniable. It has created a divide among state government officials as well as the general public.² While Maine’s governor appears to support the project, a number of bipartisan state legislators have expressed their opposition. In particular, legislators on both the Environment and Natural Resources and the Energy, Utilities and Technology Committees have voiced strong opposition to the project.³ While some believe the project will reduce Maine’s carbon emissions and create tax benefits, others fear that it will actually increase total greenhouse gas emissions, as well as lead to a loss of jobs and disruption to the environment, scenery, and wildlife in the state.⁴ Additionally, a number of towns that will be affected by the transmissions lines have either voted against the project or rescinded their previous support.⁵ It is clear this project evokes strong opinions and emotions on both sides of the issue, and the news articles cited in this letter are representative of hundreds of articles that have been written about this project in the past couple of years. Such media coverage is indicative of the public interest in the project and the controversy surrounding it.

The project also implicates many environmental and societal issues. Providing additional time to comment would ensure that interested persons and groups are able to inform the Corps of all of their concerns so the agency can take them into account during the decision-making process. This project will have acknowledged impacts to wetlands and

¹ <https://www.sas.usace.army.mil/Media/News-Releases/Article/1767553/corps-of-engineers-extends-comment-period-on-future-of-lock-dam-passing-fish-re/>

² See <https://www.nrcm.org/maine-environmental-news/pucs-decision-cmp-corridor-deeply-flawed/>. As the Natural Resources Council of Maine notes, a recent state-wide poll found 65% of Mainers oppose the project, with higher percentages opposing in the regions directly affected, more than 10,000 Mainers have signed a petition in opposition to the project, and legislation has been introduced in the Maine Legislature that would, among other issues, require an independent analysis of the project’s climate impacts.

³ See <https://www.nrcm.org/maine-environmental-news/legislators-battle-lepage-cmps-proposed-transmission-line/>

⁴ See, e.g., <https://www.sunjournal.com/2019/04/04/public-weighs-in-on-proposed-cmp-power-line-project-in-farmington/>

⁵ <https://www.mainepublic.org/post/opponents-supporters-cmps-145-mile-transmission-line-weigh-bills-could-sink-project>

waterways throughout the state, including to the scenic Kennebec River Gorge. The Corps' notice also indicates possible impacts to endangered species and their designated critical habitat, as well as to essential fish habitat. It is our understanding that the transmission lines will cross the Appalachian Trail in multiple areas. Further, the additional transmission lines throughout the state, especially those proposed in currently undeveloped areas, may increase the possibility of wildfires.⁶ The notice also solicits "recommendations for alternative sites and [mitigation] measures not yet identified by the applicant." Such investigation and identification of alternatives and mitigation measures is daunting undertaking that should not be limited to a 30-day period. Finally, commenters may also want to address the climate change impacts of the project. This is only a small and incomplete list of possible issues that commenters may want to address, and additional time to comment will provide the Corps with valuable perspectives. A 30-day period does not provide enough time for the interested public to address all of these, and other as yet unknown, concerns.

For all the same reasons described above as supporting the extension of the comment period, the Sierra Club also requests, pursuant to 33 C.F.R. 327.4(b), that the Corps hold public hearings on this application. We understand the public notice states that the comments will be used to determine the need for public hearings; however, the need for such hearings and the public interest in this project are already abundantly clear. And public hearings at this early stage in the process will ensure that the Corps hears from the public with sufficient time to incorporate and address citizens' concerns. Such early public hearings would and should not preclude the Corps from holding additional public hearings once it has received and reviewed written comments. The Sierra Club does not consider the Corps' presence at state level hearings as in any way equivalent to or taking the place of a public hearing on this application. The Maine Department of Environmental Protection and the Land Use Planning Commission are state agencies with statutory and regulatory obligations and mandates that differ from the Corps'. The fact that those state agencies held public hearings should further support the idea that the Corps should follow suit.

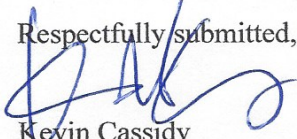
Due to the highly controversial nature of this large-scale project and the numerous concerns commenters may address, the Sierra Club Maine Chapter respectfully requests a 30-day extension of the public comment period to extend through May 28, 2019 (since 30 days falls on a weekend and Monday, May 27th is a federal holiday), and for the Corps to schedule public hearings related to this project. This will enable the Sierra Club, as well as the many other individuals, organizations and businesses affected by and interested in this project to assemble and submit substantive and thoughtful comments to better enable the Corps to make an informed decision. Thirty days is a small and reasonable delay to a process that has been ongoing for years already and that will affect the citizens and the environment of Maine for decades to come.

////

⁶ <https://www.ecmag.com/section/systems/link-between-power-lines-and-wildfires>

Please do not hesitate to contact me at 781-659-1696 or cassidy@lclark.edu if you have any questions. The Sierra Club would appreciate a response as soon as possible so it can plan its comment strategy accordingly.

Respectfully submitted,



Kevin Cassidy
Senior Staff Attorney
Earthrise Law Center

CC via email only: Alice Elliott, Sierra Club, Maine Chapter
Representative Seth Berry
Sandra Howard, Say NO to NECEC
Sue Ely, Natural Resources Council of Maine



Kevin Cassidy <cassidy@lclark.edu>

RE: [Non-DoD Source] RE: Permit Application NAE-2017-01342

Clement, Jay L CIV USARMY CENAE (US) <Jay.L.Clement@usace.army.mil>

Mon, Apr 15, 2019 at 6:42 AM

To: Kevin Cassidy <cassidy@lclark.edu>

Cc: Alice Elliott <alice.elliott@sierraclub.org>, Becky Bartovics <bartovi@earthlink.net>

Mr. Cassidy:

We have received your comments and request for a public hearing on the application of Central Maine Power Company to construct and maintain the electrical transmission line known as the New England Clean Energy Connect, extending from the Maine/Canadian border at Beattie Township to Lewiston, Maine.

Public hearings are held only when they are the best way to understand a wide variety of concerns from a diverse public. Further, those concerns must be pertinent to our jurisdiction over the proposed project.

We will forward your response to the applicant, who may contact you or Club representatives directly in an effort to resolve your concerns. If a mutual resolution can be reached, a public hearing would not be needed. Otherwise, we will determine whether there is a valid public interest to be served by holding a hearing. If so, we will notify you of the hearing's time, date, and location.

Your letter has been made part of the official file, and your views, along with all other comments received, will be carefully weighed in determining what action, if any, is not contrary to the public interest.

Concerning your request for an extension to the comment period, the Corps has no intention of officially extending the public notice's comment period at this time. The regulations that you cite in your letter indicate that a public notice's comment period should be not more than 30 days nor less than 15 days from the date of the notice and it is only when designating comment periods LESS THAN 30 days, that the district engineer will consider whether the proposal is routine or noncontroversial or the comments will be from remote areas. Our notice provides the FULL 30 days and we have already received many comments - from statewide respondents, both in support and opposed to the project. The 30 days allows our process to move forward in a timely manner, but as I've at least twice told the Club's Maine representative, Becky Bartovics, irrespective of the comment period, our review process remains open until a permit decision is made and even comments that are received after the 30 days become part of the official file and are no less carefully considered.

If you have any questions, feel free to contact me at 207-623-8367 at our Augusta, Maine Project Office.

Sincerely,

Jay L. Clement
Senior Project Manager
Maine Project Office

-----Original Message-----

From: Kevin Cassidy [mailto:cassidy@lclark.edu]

Sent: Friday, April 12, 2019 3:37 PM

To: Clement, Jay L CIV USARMY CENAE (US) <Jay.L.Clement@usace.army.mil>

Cc: Alice Elliott <alice.elliott@sierraclub.org>; Sue Ely <sely@nrcm.org>; sandrahowardnh@gmail.com;

Seth.Berry@legislature.maine.gov; Becky Bartovics <bartovi@earthlink.net>; Dot Kelly <dot@dkelly.org>; Joan Saxe <joansaxe@gmail.com>

Subject: [Non-DoD Source] RE: Permit Application NAE-2017-01342

Dear Mr. Clement,

Please see the attached correspondence on behalf of the Sierra Club, Maine Chapter. Thank you for your consideration and attention to this matter.

Best regards,
Kevin Cassidy

--

<Blockedhttp://law.lclark.edu/livewhale/content/images/456/31862_wordmark-law-center-email-sig.jpg>

Kevin Cassidy, Senior Staff Attorney | Earthrise Law Center | Lewis & Clark Law School
Blocked<http://earthriselaw.org> | <Blocked<https://www.facebook.com/pages/Earthrise-Law-Center/168992463236286>> | cassidy@lclark.edu <<mailto:cassidy@lclark.edu>> | Phone: 781-659-1696

This communication and any attachments may be attorney-client privileged and confidential and are intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately destroy it and notify the sender.