APPEAL

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Docket No. BCD-21-43
BCD Docket No. 20-36

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

BRIEF FOR APPELLANT

Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

ATTORNEYS FOR PLAINTIFF

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

Docket No. BCD-21-43
BCD Docket No. 20-36

Appeal

NOW COME Appellants, Friends of Merrymeeting Bay, Kathleen McGee, Ed Friedman, and Colleen Moore, Plaintiffs in the Maine Business and Consumer Court case bearing the docket number BCD-CV-20-36, to file this appeal of the *Combined Order on the Environmental Health Trust's Motion for Leave to File* Amicus Curiae *Brief and Defendant's Motion to Dismiss* issued on January 15, 2021.

A. TABLE OF CONTENTS

SECTIONS

TABLE OF AUTHORITIES

Cases

Statutory Authority

Additional Authority

B. STATEMENT OF THE CASE

PROCEDURAL HISTORY

Plaintiffs are three residents living near Merrymeeting Bay and one non-profit organization formed to "preserve, protect and enhance the unique ecosystems of Merrymeeting Bay." Plaintiffs filed this lawsuit on July 21, 2020, seeking to hold Defendant Central Maine Power Company liable for the nuisance caused by its unnecessary tower lighting system at the Chops Passage . Defendants responded by filing a *Motion to Dismiss Plaintiffs' Complaint* on September 15, 2020. While the *Motion to Dismiss* was pending, the Environmental Health Trust filed a motion for leave to file an *amicus curiae* brief. The court denied both

motions in a combined order issued on January 15, 2021. This appeal was docketed in the Law Court on February 9, 2021, with Appellant's brief due May 4, 2021.

SUMMARY OF FACTS

For at least eight decades, there have been two 195-foot-tall powerline towers at the Chops Passage of the Kennebec River at Merrymeeting Bay, Maine. The towers were painted with alternating bands of red and white paint to make them more visible to air navigation.

In 2018, the Central Maine Power Company ("CMP") replaced and extended the towers by 23%, to a height of 240 feet. Around the same time, CMP removed the red and white paint, and added orange, white, and yellow marking balls to the powerline. It also attached ten lights to the towers that, when active, each flash sixty times a minute and are visible over an area of nearly four thousand square miles. These lights are forbidden by local zoning codes and CMP did not disclose the lights as required under the Maine Natural Resources Protection Act when obtaining permits. No public hearings were held prior to the light installation.

Plaintiffs have no objection to marking the towers with bands of red and white paint, or the orange, white, and yellow marking balls. But the flashing lights are more than a mere annoyance – Plaintiffs have had difficulty sleeping, their businesses have been adversely impacted, and the value and enjoyment of their property has decreased. Further, the flashing lights have negatively affected the

wildlife in the area which has undermined the purpose and value of the conservation easements owned by Plaintiff Friends of Merrymeeting Bay ("FOMB"). Plaintiffs proposed alternative, less impactful, sets of air safety measures: marking the towers with paint, marking the powerlines and towers with colored balls, issuing a Notice to Airmen, or alternatively keeping the lights and having them activated only by passive detection or pilot-controlled systems. CMP declined to adopt those alternative measures.

Prior to installing the lights, CMP contacted the Federal Aviation Administration ("FAA"), which issued a "No Hazard" determination regarding the towers. In that determination, the FAA recommended – but did not require – that CMP install lights on the towers. In fact, the towers do not meet the necessary criteria for mandatory lighting under FAA regulations. This was confirmed by CMP's expert, Clyde Pittman, Director of Engineering of Federal Airways & Airways in an opinion letter in which he agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport." App'x Ex. O at 2.

Because the lights are unnecessary; not mandated by the FAA; and cause harm, Plaintiffs brought this lawsuit for nuisance.

C. ISSUES PRESENTED FOR REVIEW; ARGUMENT SUMMARIES AND STANDARD OF REVIEW

1) Whether Plaintiffs' nuisance claim is preempted by the Federal Aviation Act.

The trial court determined that the FAA's regulatory framework preempted Plaintiffs' state law claims because the FAA has exclusive regulatory authority over airspace and that the agency's recommendations carry the same effect as an order.

Respectfully, the trial court's Order erred in a number of ways. For instance, courts have repeatedly held that the FAA recommendations on which the preemption argument hinges have "no enforceable legal effect." The Order also overstates the FAA's authority, finding that it controls *all* airspace, when federal law specifies the specific types of airspace over which the FAA has authority. The Order is also internally inconsistent, finding both that the claims are subject to field preemption and also that a party can seek a state law remedy for non-compliance with FAA recommendations, which could not both be possible if field preemption applied. And although the Order held that a party can seek a state law remedy for non-compliance with FAA recommendations, the order wrongfully dismissed Plaintiffs' claims based on CMP's non-compliance. Finally, the order relies in part on an "intuition" not supported by logic: just because the towers are *not* a hazard

with the lighting system does not mean that removing the lighting system would cause them to be a hazard.[1]

Standard of Review: De Novo.

D. ARGUMENT

I. The Law of Federal Preemption

In any federal preemption case, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). Although the Supremacy Clause of the United States Constitution creates a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding," such power is limited by the central constitutional concept of federalism, which ensures that both federal and state governments can operate with sovereignty. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Sovereign governments will inevitably be in conflict, however, and so courts have developed three circumstances where federal law will preempt state law: express preemption, field preemption, and conflict preemption. *See, e.g., Crosby v. National Foreign*

[1] Plaintiffs' complaint also challenged CMP's choice to equip the towers with an active radar system that blankets the area in microwave radiation, rather than a passive detection system. Compl. at ¶ 54-57. The trial court held that objections to the radar system are preempted by the Federal Communications Act. Plaintiffs do not concede that the unnecessary radar system is not a problem, but have chosen not to raise that issue on appeal.

Trade Council, 530 U.S. 363, 372 (2000). However, the three categories "are not rigidly distinct." *Id.* at, 372, n. 6.

Here, neither the Federal Aviation Act (49 U.S.C. §§ 1301-1542) nor any other federal law relevant to this lawsuit includes a clause expressly preempting state law. And so, the Maine state laws at issue will only be preempted if such preemption is "implicitly contained in the [Act's] structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). That "implicit" preemption could take the form of field or conflict preemption.

Field preemption applies only when "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992), quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In other words, in order to preempt state law, the federal law must "provide a **full** set of standards" that not only impose their own obligations under federal law, "but also confer a federal right to be free from any other" obligations. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 200 L.Ed.2d 854 (2018) (emphasis added).

Conflict preemption is when "(1) 'it is impossible for a private party to comply with both state and federal requirements,' or (2) 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.'" *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). The First Circuit uses a "functional approach" which considers "the effect which the challenged enactment will have on the federal plan." *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989). However, Congressional intent, as determined by the "structure and purpose of the statute as a whole" is the "ultimate touchstone" for preemption. *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996).

II. The trial court erred in ruling that FAA recommendations – which have "no enforceable legal effect" – preempt Plaintiffs' state law claims.

The trial court decided that the FAA Notice of No Hazard Determination preempts Plaintiffs' state law claims. That decision was in error, in that it misapprehends the legal force of the FAA's Notice.

It is not disputed that that the federal government has sovereignty over the airspace throughout the United States (49 U.S.C. § 40103) or that the Secretary of Transportation is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. It is further agreed that CMP was required to provide notice of the towers to the FAA, which in turn must determine whether the structures "may result in an obstruction of the navigable airspace" and potentially "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." 49 U.S.C. § 44718(b)(1). The issue is not whether the FAA could take those steps but, rather, the scope and

effect of the FAA's recommendations once that process has been completed and the FAA has determined a structure is *not* an obstruction of navigable airspace.

Here, the FAA received notice of the expansion of the towers and conducted an aeronautical study. It ultimately determined that the towers did not interfere with navigable airspace and would not be a hazard, provided they adhere to the FAA lighting guidelines. App'x Exs J, L. This was reflected in a document called a "Notice of No Hazard Determination." *Id.* The FAA further found – and this is not disputed – that the towers were not an "obstruction to air navigation" due to their height, location, and lack of any other relevant factor (such as being near an airport). *Id.*; *see also* 11 CFR § 77.17. In their initial application to the FAA, CMP suggested a package of air hazard mitigation efforts (colored balls and lights), and the FAA endorsed those suggestions. App'x at Ex. N.

But at no point did the FAA say each of those air hazard mitigation items were necessary or mandatory. As explained in the Complaint, an exceptionally low number of aircraft use the area and the towers do not interfere with the few aircraft which do. Compl. at ¶ 29-36. It is precisely for these reasons that Plaintiffs approached CMP with a list of alternatives to the lighting system which would still adhere to the FAA lighting guidelines but alleviate the nuisance -- but each of those alternatives was rejected by CMP. Compl. at ¶ 12, 52-65.

This context is critical when considering the actual requirements under FAA regulations as well as the legal effect of recommendations. The trial court – and CMP – concede that "the FAA does not claim enforcement authority for its 'no hazard' determinations" but still finds that the no hazard determinations have the same practical effect as orders because "a party could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations." Order at 11 (emphasis in original). But this contradicts the FAA's own stance, which is that "lighting and marking requirements are recommendations, not requirements" (August 17, 2018, FAA Obstructions, Marking and Lighting Advisory Circular) and that no hazard determinations are "of an advisory nature." FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

Indeed, the no hazard determination even states that the recommendation "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, **State**, or local government body." App'x Exs J, L (emphasis added). This position is consistent with other federal and state precedent which has found that no hazard determinations "have '**no enforceable legal effect**'" and therefore preemption does not apply. *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011) (emphasis added), citing *BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also*, *Davidson County Broadcast.*

v. Rowan County, 649 S.E.2d 904, 911, 186 N.C.App. 81 (N.C. App. 2007); *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019) ("we decline to hold the FAA no-hazard determination preempted enforcement of local zoning requirements"); *Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages voluntary cooperation with the regulatory framework and is legally unenforceable") *citing Flowers Mills Assoc. v. United States*, 23 Cl. Ct. 182, 188-89 (1991). Reinforcing this position is the fact that the FAA rejected plaintiffs' request for environmental review because marking and lighting recommendations are only "advisory in nature." App'x Ex. E at 4; FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

Thus, the trial court erred in finding federal preemption based on an FAA document that makes recommendations with "no enforceable legal effect" and which explicitly states that it does not relieve CMP of the obligation to comply with state or local laws.

III. The trial court erred in holding that the FAA "has authority over all airspace," when the statute limits its authority to particular kinds of airspace.

In its Order, the trial court concluded that the "FAA has authority over all airspace, not just navigable airspace," citing 49 U.S.C. § 40103. Order at 10. But that statute does not stand for that proposition. Section 40103(a)(1) notes that the

"United States Government has exclusive sovereignty of airspace of the United States." But although the U.S. has sovereignty over all airspace, the FAA only has authority over three kinds of airspace: "navigable airspace" (40103(b)(1)), "airspace necessary to ensure the safety of aircraft" (*id*.), and "areas in the airspace . . . necessary in the interest of national defense" (40103(b)(3)).

Here, there is no indication that the towers fall in any of those areas of airspace. The towers do not fall within navigable airspace.[2] And they are not obstructions to air navigation.[3] Moreover, there has been no suggestion that they intersect air necessary for the national defense.

Instead, the trial court found – and CMP argues – that the FAA nevertheless maintains control because "it appears that the regulations presume that structures existing below navigable airspace could be a hazard to air navigation and establish a process for determining whether they are and providing safety standards." Order

[2] Under federal law, "[n]avigable airspace means airspace at and above minimum flight altitudes … including airspace needed for safe takeoff and landing." 49 U.S. Code § 40102. As described in the Complaint, the FAA's determination falls in line with the definition of navigable airspace as the minimum safe altitude for aircraft over a city, town, or settlement is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 and, over open water, no aircraft may be operated closer than 500 feet to any person, vessel, vehicle, or structure, prohibiting air travel in the Chops Passage which is only 790' wide. 49 U.S. Code § 91.119. The FAA determined as much in a May 18, 2016, Traffic Pattern Report which classified the area as "No Traverseway." Complaint at Exhibit 8.

[3] 14 CFR § 77.17 specifies that an object is "an obstruction to air navigation" if it meets certain criteria. Objects under 499 feet AGL (like the towers at issue here) are only presumptively obstructions if within a certain distance of qualifying airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.19, 77.21, or 77.23." The towers do not, however, fall within surface of a takeoff and landing area of an airport or any imaginary surface defined by the regulations.

at 11. That may be true, and that process is what occurred here – notice was provided to the FAA (14 CFR § 77.9) and the FAA conducted a study. 14 C.F.R. § 77.25(b). But after such a process was followed, the FAA issued a finding of no-hazard to air traffic, which included recommendations with "no enforceable legal effect." App'x. Exs. J, L; *see also Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), citing *BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002). It is at that point that the FAA's regulatory authority ceased beyond a continuing requirement to be noticed and potential conditional determinations. 14 C.F.R. § 77.31 (d)(I).

It would be different, however, if the towers were much closer to an airport. If they were, the lighting would become mandatory. But as CMP's expert agreed, "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport." App'x. Ex. O at 2.

The trial court's assertion that the FAA has authority over literally all airspace goes far beyond the statute, and would absurdly result in granting the FAA authority over *all* air, including air one-foot off the ground. That conclusion, paired with the trial court's finding of field preemption, would eliminate Maine's law of nuisance in its entirety – except, perhaps, for nuisances that lie below the ground.

IV. The trial court incorrectly stated that federal law on FAA preemption "consistently" finds in favor of preemption.

In its Order, the trial court found that "[c]ase law at the federal level has consistently held that the Act preempts the field of airspace safety" and cites a handful of cases to that effect. Order at 8. But federal precedent is not nearly as settled as the trial court suggests.

Rather, many jurisdictions have found that local and state ordinances are not preempted simply because they affect aviation. *See, e.g., Faux-Burhans v. Cty. Comm'rs of Frederick County*, 674 F.Supp. 1172, 1174 (1987), aff'd, 859 F.2d 149 (4th Cir.1988) (finding no preemption of ordinances regulating the "size, scope, and manner of operations at a private airport"); *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 789-90 (6th Cir. 1996) (FAA authority "does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may have some tangential impact on the use of airspace"); *Aeronautics Comm'n v. State ex rel. Emmis Broad. Corp.*, 440 N.E.2d 700, 704 (Ind.App. 1982) (holding that ordinances regulating the height of structures near airports were not preempted); *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005) (finding no preemption of local land use regulations of a helipad); *Davidson County Broadcast. v. Rowan County*, 649 S.E.2d 904, 911, 186 N.C.App. 81 (N.C. App. 2007) ("a majority of courts in the United States which have considered the issue have held that federal aviation law

does not preempt all local or state land use regulation which may affect aviation"); *Sikkelee v. Precision Airmotive Corp*., 822 F.3d 680 (3rd Cir. 2016). Successful federal preemption claims have generally been limited to those cases where attempts have been made to actually halt air commerce via such constraints as curfews or noise complaints. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). The instant case attempts no such impingement on air traffic.

The trial court ignores a significant portion of federal precedent when it simply stated "[t]he FAA has been granted exclusive regulatory authority over the airspace of the United States." Order at 9. Clearly, there are limits to that authority and the trial court's failure to address whether this case falls outside of those limits resulted in error.

V. The trial court erred in that its Order was internally inconsistent with regard to field preemption and state-law remedies.

As the trial court noted, field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Order at 6, *quoting Arizona v. United States*, 567 U.S. 387, 399 (2012).

Here, the trial court found that because of the federal government's interest in regulating air safety, claims about the operation of the Chops Point Towers were

subject to "both field and conflict preemption." Order at 8. But the trial court also found that a party "could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations." Order at 11 (emphasis in original).

These two propositions – that claims about the Chops Point Towers are subject to field preemption, but that there could also be a common law remedy for noncompliance with FAA recommendations – cannot both be true. *Arizona, supra,* at 399 (field preemption means "no room" for state law enforcement). The trial court's acknowledgement of common law remedies in state court related to the operation of the tower's lights is a tacit admission that the FAA regulations and recommendations do not preclude state-law analysis of the subject.

VI. The trial court erred when it held that a party can sue for noncompliance with FAA recommendations – but then dismissed Plaintiffs' claim about noncompliance with FAA recommendations.

As described above, the trial court found that a party can "seek a common law remedy in state court" for a defendant's noncompliance with FAA regulations and recommendations. Order at 11 (emphasis in original).

But here, noncompliance with FAA recommendations is one of Plaintiffs' claims against CMP. The Complaint explains that according to the FAA, the "optimal flash rate for the brighter lights to flash simultaneously was determined to be between 27 and 33 flashes per minute." Compl. at ¶ 43, *quoting* James W.

Patterson, Jr., *Evaluation of New Obstruction Lighting Techniques to Reduce Avian Fatalities*, DOT/FAA/TC-TN12/9. U.S. Department of Transportation, Federal Aviation Administration Technical Note. (May 2012).[4] But Plaintiffs' complaint points out that CMP's lights flash at 60 flashes per minute – nearly double what the FAA has recommended as the upper end of what is appropriate. Compl. at ¶ 43. That excessive rate is one of Plaintiffs' core problems with the lights. *Id*. at ¶¶ 6, 9, 43.

But the trial court dismissed Plaintiffs' claims in their "entirety" (Order at 15), even though Plaintiffs were, in part, seeking a remedy for Defendant's *noncompliance* with FAA regulations and recommendations. Compl. at ¶¶ 45, 162-179. Because Plaintiffs are pursuing, in part, a claim that the trial court said is viable, the trial court's order should be reversed.

VII. The trial court erred in relying on its "intuition" to reach a conclusion unsupported by authority or logic.

The trial court noted that the FAA issued a determination that the towers were not hazardous on the condition that they were marked and lighted. Order at 9, referencing Compl. ¶ 46 ("As a condition to this Determination, the structure is to be marked/lighted"). "Marking" refers to the way the towers and powerline are

[4] This is confirmed in the FAA Advisory referenced in the Marking and Lighting Recommendation ("This dual lighting system includes red lights (L-864) for nighttime and medium intensity, flashing white lights (L-865) for daytime and twilight use"; FAA Advisory Circular 70/7460-1, L Change 2 , Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12) and the corresponding flash rate (Table on page 1-1 https://www.faa.gov/documentLibrary/media/Advisory_Circular/150-5345-43J.pdf).

made more visible through use of paint, flags, and spherical devices on wires. FAA Advisory Circular 70/7460-1 at Ch. 2.7.2 – 3.5.2.[5] "Lighting" refers to the use of flashing or steady-burning lights. *Id*. at Ch. 4.

The "marking/lighting" proposal did not originate with the FAA; it was a proposal offered by CMP. Compl. ¶ 47. The FAA assessed that proposal and concluded that the towers would not be a hazard with the CMP-proffered system of marking and lighting. *Id*. at ¶¶ 45-48. And, indeed, it is not.

But the trial court went a step further and concluded that "[i]ntuitively, one would read the no-hazard determination's conditional language to mean that, absent lights meeting the FAA standard, the towers could qualify as a hazard to air navigation." Order at 9.

That is not, however, a logical or intuitive conclusion from the premise. The FAA assessed that the towers would *not* be a hazard with the proposed multi-element package. It does not follow that the towers *would* be a hazard without one element of that package.

For example, imagine that CMP had proposed equipping the towers with marking and lighting – and a hot-pink blimp tied to the towers. And suppose that the FAA, like here, determined that the towers would not be a hazard with those three elements. Would that mean the FAA had determined that the blimp was

[5]Available online at www.faa.gov/documentLibrary/media/Advisory_Circular/Advisory_Circular_70_7460_1M.pdf

essential, such that the towers would be a hazard with marking and lighting alone? It would not mean that. So, too, here. The FAA's determination that the towers are not a hazard with marking and lighting does not mean they *would* be a hazard with marking alone. The trial court did not cite any authority for its conclusion, and relied on intuition alone. Because that intuition is contrary to logic, the trial court's order should be reversed.

E. CONCLUSION

For the reasons stated herein, the trial court's order regarding FAA preemption should be reversed.

Respectfully Submitted,

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SIGNATURE

Pursuant to Rule 7A(g)(1)(B), I, Bruce M. Merrill, have participated in preparing this brief and the brief, together with all associated documents, is filed in good faith and conforms to the page and word count limits.

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill

CERTIFICATE OF SERVICE

Pursuant to Rule 7A(i)(1), I, David Lanser, certify that two printed copies of this brief have been served on Defendant.

/s/ *David Lanser*
David Lanser
Law Office of William Most

APPENDIX

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Docket No. BCD-21-43
BCD Docket No. 20-36

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

ATTORNEYS FOR PLAINTIFF

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

Docket No. BCD-21-43

Appendix

NOW COME Appellants, Friends of Merrymeeting Bay, Kathleen McGee, Ed Friedman, and Colleen Moore, Plaintiffs in the Maine Business and Consumer Court case bearing the docket number BCD-CV-20-36, to file this appendix to their appeal of the *Combined Order on the Environmental Health Trust's Motion for Leave to File* Amicus Curiae *Brief and Defendant's Motion to Dismiss* issued on January 15, 2021.

TABLE OF CONTENTS

A. Combined Order on the Environmental Health Trusts' Motion for Leave to File *Amicus Curiae* Brief and Defendant's Motion to Dismiss

B. Transcript of Hearing on Motion to Dismiss

III. Complaint

IV. Exhibits

A. Friends of Merrymeeting Bay letter to Central Maine Power, Dec. 14, 2019

B. Central Maine Power letter to Ed Friedman, Apr. 13, 2020

C. William Most letter to Central Maine Power, April 29, 2020

D. Central Maine Power letter to William Most, May 11, 2020

E. Correspondence between Ed Friedman and the Federal Aviation Administration

F. Federal Aviation Administration DOD and DHS Long Range Radar Report

G. ADLS Certification documents

H. Federal Aviation Administration Traffic Pattern Report

I. William Most letter to Federal Aviation Administration, April 14, 2020

J. Bath Determination of No Hazard to Air Navigation

K. Bath Marking and Lighting Recommendation

L. Woolwich Determination of No Hazard to Air Navigation

M. Woolwich Determination of No Hazard to Air Navigation

N. Central Maine Power Application to the Federal Aviation Administration

O. Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc., letter, January 27, 2020

P. FCC Radio Station Authorization

Q. Correspondence between William Most and FCC

R. Brief of *Amicus Curiae* of the Federal Aviation Administration in *Big Stone Broadcasting v. Lindbloom*

Respectfully Submitted,

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

CIVIL CASE SUMMARY

REGISTRY OF ACTIONS

CASE NO. BCDWB-CV-2020-00036

FRIENDS OF MERRYMEETING BAY VS CENTRAL MAINE POWER	Location:	**Business Court**
	Judicial Officer:	**Murphy, M. Michaela**
	Filed on:	**07/21/2020**
	Law Court Appeal Case Number:	**BCD-21-43**
	Other:	**BATSC-CV-2020-00019**
	UTN Number:	**AOCSsr-2020-0037062**

CASE INFORMATION

Case Type: **Civil**
Subtype: **Declaratory Judgment**

Case Status: **01/15/2021 Closed**

DATE	CASE ASSIGNMENT

Current Case Assignment

Case Number	BCDWB-CV-2020-00036
Court	Business Court
Date Assigned	07/21/2020
Judicial Officer	Murphy, M. Michaela

A True Copy, Attest:
Danielle A. Young, Clerk

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**FRIEDMAN, ED**	**Merrill, Bruce** *Retained* 207-775-2166(F) 207-775-3333(W) *LAW OFFICE OF BRUCE M. MERRILL PA* *225 COMMERCIAL ST., SUITE 501* *PORTLAND, ME 04101*
	FRIENDS OF MERRYMEETING BAY	**Merrill, Bruce** *Retained* 207-775-2166(F) 207-775-3333(W) *LAW OFFICE OF BRUCE M. MERRILL PA* *225 COMMERCIAL ST., SUITE 501* *PORTLAND, ME 04101*
	MCGEE, KATHLEEN	**Merrill, Bruce** *Retained* 207-775-2166(F) 207-775-3333(W) *LAW OFFICE OF BRUCE M. MERRILL PA* *225 COMMERCIAL ST., SUITE 501* *PORTLAND, ME 04101*
	MOORE, COLLEEN	**Merrill, Bruce** *Retained* 207-775-2166(F) 207-775-3333(W) *LAW OFFICE OF BRUCE*

CIVIL CASE SUMMARY

REGISTRY OF ACTIONS

CASE NO. BCDWB-CV-2020-00036

M. MERRILL PA
225 COMMERCIAL ST.,
SUITE 501
PORTLAND, ME 04101

Defendant **CENTRAL MAINE POWER**

Mccarthy, Gavin
Retained
207-791-1350(F)
207-791-1100(W)
PIERCE ATWOOD
MERRILLS WHARF
254 COMMERCIAL ST
PORTLAND, ME 04101

Visiting Attorney **Lanser, David**
Plaintiffs

Most, William
Plaintiffs

DATE	EVENTS & ORDERS OF THE COURT	INDEX
07/21/2020	Filing Document-Complaint-Filed	
07/21/2020	Attorney-Retained-Entered Party: Attorney - Retained Merrill, Bruce	
07/21/2020	Attorney-Retained-Entered Party: Attorney - Retained Merrill, Bruce	
07/21/2020	Attorney-Retained-Entered Party: Attorney - Retained Merrill, Bruce	
07/21/2020	Attorney-Retained-Entered Party: Attorney - Retained Merrill, Bruce	
07/21/2020	Assignment-Single Judge/Justice-Assigned To Justice (Judicial Officer: Billings, Daniel)	
07/21/2020	Assignment-Single Judge/Justice-Recused (Judicial Officer: Billings, Daniel)	
07/22/2020	Note-Other Case Note-Entered (Judicial Officer: Cahill, Jayne)	
07/23/2020	Order-Special Assignment-Entered (Judicial Officer: McKeon, Thomas)	
09/14/2020	Transfer-Application To Transfer To Bcd-Filed Party: Attorney - Retained Altieri, Matthew	
09/14/2020	Transfer-Application To Transfer To Bcd-Sent To Bcd (Judicial Officer: Cahill, Jayne)	
09/17/2020	Transfer-Application To Transfer To Bcd-Accepted (Judicial Officer: Murphy, M. Michaela)	
09/16/2020	Motion-Motion For Enlargement Of Time-Filed Party: Attorney - Retained Altieri, Matthew; Defendant CENTRAL MAINE POWER	
09/16/2020	Motion-Motion For Enlargement Of Time-Granted (Judicial Officer: McKeon, Thomas) Party: Defendant CENTRAL MAINE POWER	
09/16/2020	Motion-Motion To Dismiss-Filed Party: Attorney - Retained Altieri, Matthew; Defendant CENTRAL MAINE POWER	
01/15/2021	Granted (Judicial Officer: Murphy, M. Michaela)	

REGISTRY OF ACTIONS

CASE NO. BCDWB-CV-2020-00036

09/16/2020 Attorney-Retained-Entered
Party: Attorney - Retained Altieri, Matthew; Defendant CENTRAL MAINE POWER

09/17/2020 Order-Special Assignment-Entered (Judicial Officer: Murphy, M. Michaela)

09/18/2020 Finding-Permanent Transfer-Transferred (Judicial Officer: Cahill, Jayne)

09/18/2020 Transfer-Permanent Transfer-EDI

09/22/2020 Note-Other Case Note-Entered (Judicial Officer: Young, Danielle)

09/25/2020 Motion-Motion To Admit Visit. Atty-Filed
Party: Plaintiff FRIENDS OF MERRYMEETING BAY; Plaintiff FRIEDMAN, ED; Plaintiff MCGEE, KATHLEEN; Plaintiff MOORE, COLLEEN

10/09/2020 Motion-Motion To Admit Visit. Atty-Granted (Judicial Officer: Murphy, M. Michaela)
Party: Plaintiff FRIENDS OF MERRYMEETING BAY; Plaintiff FRIEDMAN, ED; Plaintiff MCGEE, KATHLEEN; Plaintiff MOORE, COLLEEN

09/30/2020 Order-Court Order-Entered (Judicial Officer: Murphy, M. Michaela)

10/09/2020 Order-Scheduling Order-Entered (Judicial Officer: Murphy, M. Michaela)

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff FRIENDS OF MERRYMEETING BAY

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff FRIEDMAN, ED

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff MCGEE, KATHLEEN

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff MOORE, COLLEEN

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff FRIENDS OF MERRYMEETING BAY

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff FRIEDMAN, ED

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff MCGEE, KATHLEEN

10/09/2020 Attorney-Retained-Entered
Party: Attorney - Retained Attorney, Visiting; Plaintiff MOORE, COLLEEN

10/09/2020 **Pretrial/Status** (Judicial Officer: Murphy, M. Michaela)
Resource: Courtroom 1 Legacy Hearing Location

10/09/2020 Hearing-Pretrial/Status-Held (Judicial Officer: Murphy, M. Michaela)

10/09/2020 Hearing-Pretrial/Status-Scheduled (Judicial Officer: Murphy, M. Michaela)

10/26/2020 Other Filing-Opposing Memorandum-Filed
Party: Plaintiff FRIENDS OF MERRYMEETING BAY; Plaintiff FRIEDMAN, ED; Plaintiff MCGEE, KATHLEEN; Plaintiff MOORE, COLLEEN

11/06/2020 Motion-Motion For Leave-Filed

01/15/2021 Denied (Judicial Officer: Murphy, M. Michaela)

REGISTRY OF ACTIONS
CASE NO. BCDWB-CV-2020-00036

11/09/2020	Responsive Pleading - Reply Memorandum - Filed Party: Defendant CENTRAL MAINE POWER
11/17/2020	Responsive Pleading - Opposing Memorandum - Filed Party: Defendant CENTRAL MAINE POWER
11/30/2020	Responsive Pleading - Reply Memorandum - Filed Party: Amicus Curiae Environmental Health Trust
12/29/2020	**Other Motion Hearing** (Judicial Officer: Murphy, M. Michaela)
01/15/2021	Order - Court Order - Entered (Judicial Officer: Murphy, M. Michaela)
01/15/2021	**Dismissed** (Judicial Officer: Murphy, M. Michaela)
02/05/2021	Appeal - Notice of Appeal to Law Court - Filed $175 Party: Plaintiff FRIENDS OF MERRYMEETING BAY; Plaintiff FRIEDMAN, ED; Plaintiff MCGEE, KATHLEEN; Plaintiff MOORE, COLLEEN
02/08/2021	Appeal - Notice of Appeal - Sent to Law Court
02/05/2021	Other Filing - Transcript & Audio Order Form - Filed Party: Plaintiff FRIENDS OF MERRYMEETING BAY; Plaintiff FRIEDMAN, ED; Plaintiff MCGEE, KATHLEEN; Plaintiff MOORE, COLLEEN
02/08/2021	Sent to ER/Reporter
02/17/2021	Appeal - Record on Appeal - Due in Law Court
03/09/2021	Appeal - Record on Appeal - Sent to Law Court
09/01/2021	Discovery Filing-Discovery Deadline-Entered

	DATE		OTHER DOCUMENTS	
	11/17/2020	Non-Public	Responsive Pleading - Reply Memorandum - Filed	74 Pages
	11/17/2020	Non-Public	Responsive Pleading - Opposing Memorandum - Filed	93 Pages
	01/15/2021	Non-Public	CV-124, Order to File Docket Entries	1 Pages
	01/15/2021	Non-Public	CV-124, Order to File Docket Entries	1 Pages

DATE	FINANCIAL INFORMATION		
	Defendant CENTRAL MAINE POWER		
	Total Charges		0.00
	Total Payments and Credits		0.00
	Balance Due as of 05/03/2021		**0.00**
09/18/2020	Charge	Defendant CENTRAL MAINE POWER	0.00
09/18/2020	Charge	Defendant CENTRAL MAINE POWER	0.00
	Plaintiff FRIENDS OF MERRYMEETING BAY		
	Total Charges		1,575.00
	Total Payments and Credits		1,575.00
	Balance Due as of 05/03/2021		**0.00**

REGISTRY OF ACTIONS

CASE NO. BCDWB-CV-2020-00036

09/18/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	0.00
09/18/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	0.00
09/18/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	0.00
09/25/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	100.00
09/25/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	100.00
09/25/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	600.00
09/25/2020	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	600.00
09/25/2020	Payment	Receipt # BCDWB-20200925-0003	Plaintiff FRIENDS OF MERRYMEETING BAY	(100.00)
09/25/2020	Payment	Receipt # BCDWB-20200925-0004	Plaintiff FRIENDS OF MERRYMEETING BAY	(100.00)
09/25/2020	Payment	Receipt # BCDWB-20200925-0005	Plaintiff FRIENDS OF MERRYMEETING BAY	(600.00)
09/25/2020	Payment	Receipt # BCDWB-20200925-0006	Plaintiff FRIENDS OF MERRYMEETING BAY	(600.00)
02/05/2021	Charge		Plaintiff FRIENDS OF MERRYMEETING BAY	175.00
02/05/2021	Business Court E-File Payment Type	Receipt # 2021-00004002	Plaintiff FRIENDS OF MERRYMEETING BAY	(175.00)

STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER COURT
DOCKET NO. BCD-CV-2020-36

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY

Defendant.

COMBINED ORDER ON THE ENVIRONMENTAL HEALTH TRUST'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND DEFENDANT'S MOTION TO DISMISS

Before the Court are the Environmental Health Trust's (the "EHT's") motion for leave to file an *amicus curiae* brief, and Defendant Central Maine Power Company's ("CMP's") motion to dismiss Plaintiffs' complaint for failure to state a claim upon which relief can be granted in accordance with M. R. Civ. P. 12(b)(6).

In its motion for leave to file an *amicus curiae* brief, the EHT asserts that neither the Maine Rules of Civil Procedure, nor the Business and Consumer Docket Procedure Rules prohibit the filing of an amicus brief by a non-party. For this reason, and because the EHT asserts it has a substantial and compelling interest in the case, it requests leave from the Court to file its brief. The Court denies EHT's motion.

Separately, CMP moves to dismiss the Plaintiffs' complaint asserting that the nuisance claim is preempted by both Federal Aviation Administration ("FAA") and Federal Communications Commission ("FCC") regulations. Conversely, Plaintiffs assert that the FAA's guidance to CMP constitutes a legally unenforceable recommendation rather than a set of requirements, and that the FCC regulations cited by CMP are inapplicable to the facts of this

case. The Court finds Plaintiffs' nuisance claims subject to preemption, and thus grants CMP's motion to dismiss in its entirety. Plaintiffs are represented by Attorneys Bruce Merrill, William Most, and David Lanser. CMP is represented by Attorneys Gavin McCarthy and Matthew Altieri. The Environmental Heath Trust is represented by Attorney Scott Sells.

FACTUAL BACKGROUND

In 2019, CMP replaced two utility towers that support power lines across the Chops Passage of the Kennebec River as the river flows into Merrymeeting Bay. While the old towers were 195-feet-tall, the new towers reach approximately 240-feet-tall. The towers are outfitted with flashing safety lights, aimed at alerting aircraft of their presence. Additionally, in response to concerns from Plaintiffs and other members of the public about the frequency of flashing lights, the towers will include an Active Aircraft Detection Lighting System (the "Radar System") that uses radar to trigger the flashing lights when aircraft are detected within approximately 3.5 miles of the towers.

In accordance with FAA regulations, CMP filed public notice of the proposed tower construction with the Secretary of the FAA. In response, the FAA issued a "determination of no hazard to air navigation" with respect to the towers on March 12, 2018. (Pl.'s Ex. A). The no hazard determination explained that the FAA had conducted an aeronautical study, which "revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation, provided certain conditions are met. *Id.* The FAA's determination was conditioned on the structure being "marked/lighted in accordance with an FAA Advisory Circular.'

[1] See FAA Circular 70/746001 L Change 1, Obstruction Marking and Lighting, a med-dual system—Chapters 4, 8,(M-Dual),&12" ("The FAA Safety Lighting Standards")

On March 25, 2020, in response to a revised submission by CMP to cover the use of the Radar System, the FAA issued a new determination of no hazard, again conditioned on the marking of the towers and utilization of a lighting system. In issuing its determination, the FAA provided that the towers are subject to the licensing authority of the FCC. Next, on July 21, 2020 the FCC issued CMP a radio station authorization permitting the towers to broadcast using frequencies of 9.2-9.5 GHz. Plaintiffs requested the FCC conduct an environmental assessment, but the FCC declined, apparently finding that the Radar System did not cause RF exposure exceeding the FCC's safety standards. *See* 47 C.F.R. § 1.1306(c)(2) & 1.1307.

LEGAL STANDARD

Two motions are before the Court in this matter: 1) the EHT's motion for leave to file *amicus curiae,* and 2) CMP's motion to dismiss the complaint for failure to state a claim under M. R. Civ. P. 12(b)(6).

First, the term *amicus curiae* implies "the friendly intervention of counsel to remind the Court of some matter of law which might otherwise escape its notice and in regard to which it might go wrong." *Hamlin v. "Perticuler Baptist Meeting House",* 103 Me. 343, 69 A. 315, 318 (Me. 1907). Unlike appeals, the Maine Rules of Civil Procedure neither authorize nor prohibit the filing of an amicus brief by a non-party in the Business and Consumer Court when it serves as a trial court. Though not applicable at the trial court level, the Rules of Appellate Procedure permit *amicus curiae* briefs to be filed if parties to the appellate proceeding consent, "or by leave of the Law Court." M.R. App. P. 7A(e)(l)(A).

Maine Trial Courts have previously considered *amicus* filings under limited circumstances. *See e.g. United States Bank N.A. v. Cozzone, 2019 Me. Super. LEXIS 109, *4.*

However, the First Circuit Court of Appeals has urged caution with respect to the federal trial courts: "We believe that a district court lacking joint consent of the parties should go slow in accepting" an amicus brief. *Strasser v. Doorley,* 432 F.2d 567, 569 (1st Cir. 1970).[2] As such, the Court will grant an *amicus curiae* brief only where there is good reason to believe it can assist the Court reach a correct legal conclusion.

Second, when reviewing a motion to dismiss under Rule 12(b)(6), the Court "consider^] the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.,* 2011 ME 46, If 16, 17 A.3d 123. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. *Id.* (quoting *Saunders* v. *Tisher,* 2006 ME 94, ¶ 8, 902 A.2d 830). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that [it] might prove in support of [its] claim." *Id.*

DISCUSSION

I. EHT's Motion for Leave to File an *Amicus Curiae* Brief

In support of its motion for leave to fde an *amicus curiae* brief, EHT asserts that it has a substantial and compelling interest in the case, and can aid the Court in addressing the unique and significant harm suffered by those who cannot seek relief from federal agencies. Specifically, EHT describes the light and radio frequencies emitted from the Towers as "needless" and believes there is a likelihood of harmful health and environmental effects stemming therefrom. "As a leader in state-of-the art scientific research into the areas of harm

---

[2] The First Circuit has also noted that "the prime if not sole, purpose of an amicus curiae brief is what its name implies, namely, to assist the court on matters of law." *Banjeree* v. *Bd. Of Trustees,* 648 F.2d 61,65 n.9 (1st Cir. 1981).

alleged," EHT asserts it can ensure a "complete and plenary" presentation of the issues before the Court, (EHT's Mot. at 4).

While the Court does not question EHT's substantive experience researching the alleged harms at issue, it is unclear what *legal* aid EHT hopes to provide the Court. It is clear EHT feels well-positioned to weigh in on "difficult and complex technical issues." However, EHT does not allege that Plaintiffs failed to address any specific legal arguments, or that they cannot represent the relevant issues in this matter. Instead, EHT repeats the exact harms alleged in Plaintiffs' complaint, and further expanded on in their opposition to CMP's motion to dismiss.

At the motion to dismiss stage, the Court is not being asked to make factual evaluations, nor to balance competing policy views. Instead, CMP's motion to dismiss contends that Congress has exclusively delegated such determinations to the FAA and FCC, and for that reason Plaintiffs' claims are preempted. The Court's role is to determine, in the light most favorable to the plaintiff, whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory. EHT has failed to demonstrate how it can aid the Court in making a correct legal determination. Accordingly, EHT's motion for leave to file an *amicus curiae* brief is denied.

II. CMP's Motion to Dismiss

According to the Supremacy Clause of the United States Constitution, federal law "shall be the supreme Law of the land; and the Judges in every state shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding." U.S. Const, art. VI, cl. 2. "Congress has the power to preempt state law." *Arizona* v. *United States,* 567 U.S. 387, 399 (2012). Preemption applies equally to all forms of state law, including civil actions based on

state tort law. *See, e.g. Buckman* v. *Plaintiffs' Legal Comm.,* 531 U.S. 341, 351 (2001). There are three categories of preemption: 1) express preemption; 2) field preemption; and 3) conflict preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985),

Field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 567 U.S. at 399. Courts may infer Congress's intent to occupy a field to the exclusion of state law "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it. . . reveal the same purpose. *French v. Pan Am. Exp., Inc.,* 869 F.2d 1, 2 (1st Cir. 1989) (quoting *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Conflict preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress." *Freightliner Corp. v. Myrick,* 514 U.S. 280, 287 (1995); *see also Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.,* 589 F.3d 458, 472-73 (1st Cir. 2009). Analysis of conflict preemption requires Courts to examine "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones* v. *Rath Packing Co.,* 430 U.S. 519, 527 (1977). This analysis is a two-step process of first ascertaining the construction of the [state and federal laws] and then determining the constitutional question whether they are in conflict." *Chicago &N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 U.S. 311, 317 (1981). Courts consider the nature of the activities states seek to regulate, rather than on the method of regulation adopted. *Id.* Courts in

the First Circuit have taken a "functional approach" to preemption, focusing "on the effect which the challenged enactment will have on the federal plan," *French,* 869 F,2d at 2.

A. FAA Hazard Determination and Regulation of Light System

According to the complaint, the operation of the Lighting System has negatively impacted Plaintiffs' enjoyment, and the economic value of properties in Merrymeeting Bay. However, in its motion to dismiss, CMP contends that Plaintiffs' nuisance claim is preempted by the Federal Aviation Act ("The Act"). According to the Act, the United States Government has exclusive sovereignty of airspace of the United States. 49 U.S.C, § 40103. The Secretary of Transportation is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. The Secretary's review begins by requiring adequate public notice, in the form and way the Secretary prescribes, of the proposed construction of structures when said notice will promote "(1) safety in air commerce; and (2) the efficient use and preservation of the navigable airspace." ZJ. § 44718(a).

After receiving public notice, the Secretary determines whether the proposed structure "may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace. *Id.* § 44718(b)(1). If so, the Secretary must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." *Id.* The Secretary must then issue a report disclosing any adverse impacts on the "safe and efficient use" of the airspace resulting from the construction of the structure, subject to an aeronautical study. *Id.* § 44718(b)(2).

The FAA's statutory obstruction standards "are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration." 14 C.F.R. § 77.25(c). One such supplementation is the FAA Safety Lighting

Standards, which set forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation. *See* FAA Lighting Standards at i. The FAA Lighting Standards recommend minimum standards "in the interest of safety, economy, and related concerns." *Id.* § 2.3. "To provide an adequate level of safety, obstruction lighting systems should be installed, operated, and maintained in accordance with the recommend standards." *Id.*

Case law at the federal level has consistently held that the Act preempts the field of airspace safety. In *City of Burbank* v. *Lockheed Air Terminal,* the United States Supreme Court found a municipal ordinance assigning curfew to airplane takeoffs and landings was preempted by the Act because it had an impact on airspace congestion and therefore safety. 411 U.S. 624, 633 (1973). Likewise, the 1st, 2nd, 3rd, 6th, and 10th circuits have all indicated that the FAA has exclusive authority over the airspace of the United States.[3]

In light of the FAA's regulatory framework, read alongside numerous Supreme Court and Circuit Court holdings, the Court finds that Plaintiffs' state law nuisance action is subject to both field and conflict preemption. As previously stated, field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Arizona,* 567 U.S. at 399. The comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to

[3]*See French v. Pan Am Express Inc.,* 869 F.2d 1, 3 (1st Cir. 1989); *Airline Pilots Ass'n, Int'l v. Quesada,* 276 F.2d 892, 894 (2nd Cir. 1960)(explaining that the Federal Aviation Act "was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nations airspace.") *Abdullah v. Am. Airlines, Inc.,* 181 F.3d 363, 371 (3rd Cir. 1999)("Because the legislative history of the FAA and its judicial interpretation indicate that Congress's intent was to federaliy regulate aviation safety, we find that any state or territorial standards of care relating to aviation safety are federally preempted."); *Greene v. B.F. Goodrich Avionics Sys., Inc,* 409 F.3d 784, 795 (6th Cir. 2005); *U.S. Airways, Inc. v. O'Donnell,* 627 F.3d 1318,1327 (10th Cir. 2010)(collecting cases and concluding "that the comprehensive regulatory scheme promulgated pursuant to the FAA evidences the intent for federal law to occupy the field of aviation safety exclusively.

occupy the field of aviation safety exclusively. *U.S. Airways, Inc.,* 627 F.3d at 1327 (10th Cir. 2010). The FAA has been granted exclusive regulatory authority over the airspace of the United States. According to the FAA's regulations, when a company like CMP wants to build towers, it must file public notice with the FAA. Under certain circumstances the FAA must conduct an aeronautical study. The resulting report is issued to determine whether the structure being built will be an obstruction, or hazard to air safety. In this case, the report determined the towers were not hazardous, *under the condition* the towers are outfitted according to the FAA's Lighting Standards. Intuitively, one would read the no-hazard determination's conditional language to mean that, absent lights meeting the FAA standard, the towers could qualify as a hazard to air navigation. It would be not only counterintuitive, but directly in conflict with the FAA's regulatory scheme to negate the agency's safety recommendations. For this reason, the Court also finds Plaintiffs' nuisance claim subject to conflict preemption. To punish a party for following the FAA's safety standards and explicit recommendations surely creates an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See Freightliner Corp.* v. *Myrick,* 514 U.S. 280, 287 (1995).

Plaintiffs concede that generally, the Act, enforced by the FAA, preempts state regulation of airspace safety. However, Plaintiffs contend that the FAA lacks authority over the towers, and that because the FAA Lighting Standards take the form of "recommendations", the FAA is not empowered to sue to enforce non-compliance with its determinations. For these reasons, Plaintiffs also contend their state tort claim is not preempted.

Plaintiffs point out that while certairi structures, including CMP's towers, require notice to be given to the FAA, because CMP's towers do not in fact interfere with air commerce, the FAA lacks jurisdiction over the safety of the towers. Therefore, Plaintiffs' contend that the Act

does not apply beyond the notice requirement. Plaintiffs argument here rests on two related assertions: 1) the Chops Passage where CMP build the towers is not a navigable airway; and 2) the towers are not an "obstruction to air navigation" according to 14 C.F.R. § 77.17.

Plaintiffs first assert that Chops Passage fails to qualify as navigable airspace because navigable airspace exists "only at and above minimum flight altitudes. . ." 49 U.S.C. § 40102. The minimum safe altitude for aircraft over a city, town, or settlement is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet, and over open water, no aircraft may be operated closer than 500 feet to any person, vessel, vehicle, or structure. 49 U.S.C. § 91.119. Because Chops Passage is only 790' wide, it has been previously labeled by the FAA as a "No Traverseway", and Plaintiff asserts that it fails to qualify as navigable airspace. Relatedly, Plaintiffs also assert that the towers fail to qualify as an obstruction to air navigation. According to 14 C.F.R. § 77.17, objects under 499 feet (like the towers at issue) are only presumptively obstructions within certain distance of airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under §§ 77.19, 77.21, or 77.23." Plaintiffs assert that the towers do not fall within the required distance of a takeoff or landing area of an airport or any imaginary structure defined by the regulations. Thus, Plaintiffs argue that because the towers do not intersect navigable airspace, the FAA's regulatory authority fails to reach CMP's towers.

Plaintiffs' arguments are, however, inconsistent with the Court's interpretation of the regulatory framework. The FAA has authority over all airspace, not just navigable airspace. 49 U.S.C. § 40103. CMP was therefore required to provide public notice of the construction and did so. The FAA was then required to conduct an aeronautical study to assess the safety of the towers and did so. 14 C.F.R. § 77.25(a). Then, the FAA was required to determine, based on that

study, whether the tower was a safety hazard. The FAA concluded that it was not, conditioned on CMP's compliance with the Lighting Standards. (Pl.'s Ex. A). In addition to CMP's compliance with the FAA's regulatory scheme, the Court notes that the definition of navigable airspace is relative to the "highest obstacle" or nearest "structure", and therefore this structure could never actually be in "navigable airspace" as defined. For this reason, it appears that the regulations presume that structures existing below navigable airspace could be a hazard to air navigation and establish a process for determining whether they are and providing safety standards. Congress has granted the FAA discretion to determine whether structures qualify as hazards to air navigation or obstructions. The FAA has a codified process for making such a determination, and in this case the FAA's recommendations follow directly from that process.

Plaintiffs also assert that because the FAA's determination included *recommendations* rather than a legally enforceable *order,* state court action is not preempted. Plaintiffs are correct that the FAA's determinations are phrased as *recommendations,* and that the FAA does not claim enforcement authority for its "no hazard" determinations. Instead of issuing enforceable orders, the FAA relies on other means to obtain compliance, and the federal statutory and regulatory scheme for managing air safety maintains its preclusive effect. For instance, a party could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations. However, the Court concludes that a common law action brought in state court is subject to conflict preemption when the injury described is a defendant's adherence to FAA guidance. A holding to the contrary would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Thus, the Court grants CMP's motion to dismiss Plaintiffs nuisance claim relating to the Lighting System.

B. FCC Regulations and Telecommunications Act Preemption of Nuisance Claim Regarding the Tower's Radar System

CMP also moves to dismiss Plaintiffs' nuisance claim regarding the tower's radar system. In their complaint, Plaintiffs contend that installation of the proposed Radar System would create a potentially injurious impact on the residents of Merrymeeting Bay and the Bay's special environment. CMP contends that, like Plaintiffs' nuisance claim relating to the lighting system, a nuisance claim aimed at preventing the installation of the Radar System is preempted by the FCC regulatory authority.

The United States government has for over a century, maintained control "over all the channels of radio transmission." 47 U.S.C. § 301. Pursuant to this authority, any person seeking to transmit signals by radio must first obtain a license from the FCC. *See Id.* The Federal Communications Act ("FCA") directs the FCC to regulate, among other things, the "kind of apparatus to be used with respect to its external effects and the purity and shaipness of the emissions from each station and from the apparatus therein. *Id.* § 303(e). The FCC also has broad authority to develop regulations as needed to implement the FCA. *Id.* §§ 154(i), 201(b), and 303(r).

Pursuant to the FCC's authority under the FCA and its obligations under the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-35, the FCC began evaluating the potential biological effects of radiofrequency ("RF") emissions in the early 1980's and adopted standards for RF exposure in 1985. *See In re Responsibility of the FCC to Consider Bio. Effects of Radiofrequency Radiation,* 100 F.C.C.2d 543, ¶¶ 2-3, 24 (1985). The FCC has since engaged in formal rulemaking to determine whether it should revise its standards regarding RF emissions, and has adopted RF testing, certification, and emission standards to "protect the

public health with respect to RF radiation from FCC-regulated transmitters," *In re Guidelines for Evaluating the Envt. Effects of Radiofrequency Radiation,* 11 F.C.C.R. 15123, 15127, ¶ 10 (1996). The FCC reported that the standards "represent a consensus view of the federal agencies responsible for matters relating to public safety and health," *Id.* at 51 2. In 2019 the FCC reviewed these standards and concluded that no changes were necessary in light of the existing science. As such, the FCC's standards regarding limits on permissible absorption rates of RF emissions are published at 47 C.F.R. § 1.1310, falling under the subpart "Procedures for Implementing the National Environmental Policy Act of 1969." The FCC requires a person obtaining a license to operate a radio transmitter to complete an environmental assessment unless the absorption standards of Section 1.1310 are met. See 47 C.F.R. § 1.1307.

Federal Courts have consistently held that state law efforts to regulate the health and environmental health effects of RF emissions are preempted. For instance, in *Robbins v. New Cingular Wireless PCS, LLC,* 854 F.3d 315 (6th Cir. 2017), the plaintiffs sought to enjoin the construction of a cell-phone tower by filing state law tort claims against the telephone service provider. *Id.* at 318. The plaintiffs claimed the cellular tower would endanger public health and safety. *Id.* However, the trial corn! dismissed the state-law tort claims because federal law "impliedly preempts claims based on RF emissions that comply with Federal Communications Commission ('FCC') standards." *Id.* at 319. The Sixth Circuit surveyed the law of conflict preemption and determined that permitting "RF-emissions based tort suits" would create an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* Other circuits have come to similar conclusions. *See Farina v. Nokia, Inc.,* 625 F.3d 97, 126 (3d Cir. 2010) (holding that "a jury determination that cell phones in compliance with the FCC's. . . guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess

the FCC's conclusion on how to balance its objectives). In summary, Congress lias granted the FCC authority under the FCA and NEPA to regulate RF-emissions stemming from the transmission of radio signals. Likewise, federal case law has consistently held that RF-emissions based tort suits are preempted by the FCC's regulatory scheme.

Conversely, Plaintiffs contend that their state-law nuisance claim is not preempted because, while the Telecommunications Act of 1996 ("TCA") (the law governing cell-phone towers) contains a preemption clause, the broader FCA governing radar systems does not. Plaintiffs' argument is unavailing. CMP does not rely on the preemption provision in the TCA. Instead, CMP asserts that preemption occurs because the state tort action interferes with the FCC's regulation of RF-exposure. The FCC's RF-exposure limits were not issued as part of the TCA and are instead "procedures implementing the National Environmental Policy Act of 1969." *See* 47 C.F.R. § 1.301, *etseq.* As CMP points out in their Reply Brief, the FCC has been regulating RF emissions since 1985, more than a decade before the TCA was even passed. In a similar vein, Plaintiffs assert that the federal cases cited above deal entirely with cell-phone regulation rather than radar systems. However, neither of the cases cited above rely on the TCA's express preemption, and instead turned on regulation applicable to all radio transmissions.

Plaintiffs' nuisance claim seeks to prevent the installation of the Radar System to prevent injuiy to the residents of Merrymeeting Bay, as well as the surrounding environment. (Compl. ¶¶ 147-161). However, CMP was required to get a license from the FCC to operate the radio transmitter at issue, the tower is within FCC jurisdiction, and thus the FCC's RF exposure limits apply to it. Inherent to regulating RF-emissions, the FCC engaged in a balancing of interests, considering impacts on public health and the ability of radio frequencies to reach consumers,

leading to the established safety standards. The level of RF-exposure in the towers at issue exists within the range determined safe by the FCC. For this Court to enjoin CMP from installing the Radar System, it would be required to substitute its assessment of potential RF-emission related harms in place of the "consensus view of the federal agencies responsible for matters relating to public safety and health", including the FCC. Likewise, Plaintiffs' nuisance claim is of the exact type already held preempted by federal courts. Were the Court to hold otherwise, it would create an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Thus, conflict preemption also bars Plaintiffs' state law nuisance action with relation to the Radar System. Therefore, CMP's motion to dismiss is granted in its entirety.

CONCLUSION

For the reasons stated above, the Court denies EHT's motion for leave to file an *amicus curiae* brief. Because Congress has delegated authority to the FAA and FCC to regulate the Lighting and Radar Systems, the Court finds Plaintiffs' nuisance claims subject to preemption. Accordingly, the Court grants CMP's motion to dismiss in its entirety.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

1/15/2021

/s/Justice Michaela Murphy

DATE

SUPERIOR COURT JUSTICE

Entered on the Docket: 1/15/2021
Copies sent via Mail Electronically ✓

STATE OF MAINE
SOUTHERN CUMBERLAND CTY, ss. DISTRICT COURT
CIVIL ACTION DISTRICT NO. IX
DOCKET NO. BCDWB-CV-2020-36
APPEAL NO. BCD-2021-43

FRIENDS OF MERRYMEETING BAY,
ET ALS.,

Appellants MOTION TO DISMISS

VS.

CENTRAL MAINE POWER,

Appellee

DECEMBER 29, 2020
PORTLAND, MAINE

BEFORE:

THE HONORABLE M. MICHAELA MURPHY

APPEARANCES:
(All present by video or telephone)
ON BEHALF OF THE APPELLANTS:
BRUCE M. MERRILL, ESQ.
DAVID LANSER, ESQ.
WILLIAM MOST, ESQ.

ON BEHALF OF THE APPELLEE:
GAVIN G. MCCARTHY, ESQ.
ALSO PRESENT:
SCOTT SELLS, ATTORNEY FOR ENVIRONMENTAL HEALTH TRUST

TRANSCRIBED BY:
eScribers, LLC
7227 North 16th Street, Suite #207
Phoenix, AZ 85020

(This matter came for hearing before The Honorable M. Michaela Murphy of the Southern Cumberland County District Court, Portland, Maine, on December 29, 2020, at 10:19 a.m.)

THE COURT: Good morning. Can everybody hear me all right?

MR. MERRILL: Morning.

MR. MCCARTHY: Yes.

THE COURT: All right. Good morning. If at any time you cannot hear anything I'm asking or anything anyone else is saying, please don't be shy about letting us know.

All right. There are a couple of matters pending before the Court. CMP has filed a motion to dismiss based upon preemption. There's also a motion for leave to file an amicus brief. And I think what I'd like to do -- I don't know if you folks have had a chance to talk about how you wish to proceed this morning. Have you talked to each other at all about that?

MR. MERRILL: We were talking about how two feet of snow got wiped away --

THE COURT: In 24 hours? Yeah.

MR. MERRILL: Right, Your Honor.

THE COURT: Okay. Well, let's -- I would -- I think I'd like to deal with the amicu -- amicus issue first, because I have questions about that before we get to the motion brought by CMP. So who's going to be arguing on behalf of the amicus?

MR. SELLS: Your Honor, this is Scott Sells, and I will be presenting the argument on behalf of amicus.

THE COURT: All right. Great. Go ahead, sir.

MR. SELLS: Thank you, Your Honor. Good morning. The Environmental Health Trust has moved for leave to file amicus curiae briefing and for an extension of time in this matter. We believe that, given the posture of the case and the issues that the parties have raised, that amicus briefing is necessary now. And it's both desirable and warranted here, where there are significant issues of public interest before the Court.

Mainly, first, the statewide and national implications of a ruling that certain federal agency guidelines and recommendations, perhaps even the regulations themselves, may preempt state tort law claims for nuisance, which has significant implications far beyond the towers at Merrymeeting Bay and this specific dispute. For example, there are broader legal, economic, and social implications of that particular outcome including the potential denial of relief to injured individuals and environment of harm resulting from actions taken in the context of federal regulation and guidance.

THE COURT: And it sounds to me that what you're actually asking the Court to do is to intervene in this case and not just to file an amicus brief. If you're asking the Court to consider evidence and that sort of thing, or other

considerations besides the legal issue that's been generated by the -- the motion brough by CMP. I mean, it -- assuming that the Court has jurisdiction as a trial court to allow amicus briefing, shouldn't I wait and just deal with the -- the legal issue that's been presented by CMP before I decide whether or not -- I mean, because I think you're essentially asking to intervene in the case and not just to be an amicus.

MR. SELLS: Well, we are not asking to intervene. We believe that just being an amicus in this case is appropriate because there are broader legal, economic, and social implications raised by the legal issues that the parties --

THE COURT: About preemption?

MR. SELLS: Pree -- both in the context of federal preemption of state tort law as well as the unique harms that are alleged on the part of the plaintiff.

THE COURT: Mr. Sells, I have to say that I -- I have certainly -- when I was a lawyer and as a judge, have seen cases where preemption works. And preemption, if it's -- if that's what the Court decides prevails here, always causes harm to people at the state level. And -- or at least, it often does. And it leaves claimants without a remedy if the federal government has taken the case over or has preempted the case. So why -- why -- why are the harms that you're alleging -- and I'm not questioning the -- the validity of what you're saying. I'm just saying, why should that matter

if that often happens, where -- where -- where the federal government preempts litigation?

MR. SELLS: Well, to be sure that when a preemption -- when the federal law does preempt state law, there is a harm that occurs to individuals that otherwise can't seek relief under state tort law.

THE COURT: Right.

MR. SELLS: The problem here is that -- and specifically in -- in connection with this case -- the preemption of state nuisance law would create a precedent that would extend both statewide and nationwide. It is a broader question than just the specific legal issue raised in the context of this specific dispute. So I think, at -- at the fundamental policy level, the Court may benefit from an additional, broader context concerning what are the legal, economic, and social implications of -- of a ruling of preemption here.

And that is specifically an area that would not duplicate the party's arguments. So we believe that the expertise that we could bring to bear and the arguments that we could make, not only would be non-duplicative, but would supplement the Court's understanding of, if in fact it is going to preempt state nuisance or state tort law, what -- what is the extent of the harm that could occur and how has that been dealt with in a broader context, for example, in other states and in -- in other areas that the State of Maine has looked at federal

preemption?
THE COURT: Okay.
MR. SELLS: So essentially, the areas that we are seeking to look at are -- are sufficiently distinct from the arguments the parties have made, both for and against this -- the -- the dismissal motion, and are areas that are uniquely suited to provide supplemental information to the Court on. Just to put a finer point on it, as the Court stated in the Voices for -- for Choices case, amicus must provide a distinct perspective and present specific information that goes beyond what the parties have briefed.
And we believe here that the State perspective is twofold. We can uniquely speak to the broader statewide and national implications that I spoke of, of denying relief to harmed individuals under state court law, including specifically nuisance claims; and two, we have the unique expertise to advise the Court in the technical areas of harm alleged: the light and radar emission health and environmental risks. And I would -- I would point out, again, and -- and -- and underscore, these are not issues that have been extensively briefed by the parties in their pleadings and that we have no desire to do so, in terms of duplication. We're not here to argue the merits of the case. We're really here to provide additional information for the Court's benefit.

And as demonstrated in our motion in response that we filed, the Environmental Health Trust easily meets the discretionary standard. Courts impose to grant leave for amicus filing. It's got a compelling interest in the case and its counsel on the issues to the Court is both desirable and relevant. That's the threshold we have to cross, and the Environmental Health Trust easily meets that standard.
In short, the Environmental Health Trust believes it can assist the Court by providing a complete and plenary presentation of difficult and highly complex legal and technical issues so that the Court can reach a more informed decision earlier in the case, rather than later, and without duplication of the party's effort. And as you alluded to a moment ago and -- and are probably aware, amicus briefing can be more of an art than science. In order for us to be of maximum benefit to the Court, amicus cannot duplicate a party's argument. But at the same time, we have to provide the Court with an enhanced and broader supplemental perspective. And I think that's key.
In a dispositive motion ruling, the Court can benefit from having more information rather than less. And this is easily accomplished here, where there is a significant landscape of broader matters of statewide and national public interest, implicated by the parties' pleadings that go well beyond the specific dispute, and the advocacy the parties have

submitted to the Court in that context.
As to the specific standard that must be met, the Environmental Health Trust's compelling interest is, simply put, to safeguard human health and the environment through state-of-the-art research, education, policy, and advocacy. We do not have -- if you'll excuse the expression, because I have a dog -- we do not have a dog in this fight. Our work is to understand and mitigate public health and environmental risks such as those presented in this case. This special interest, coupled with our national and global advocacy and education efforts in legal, technical, and policy forums, underscores the adequacy and relevance of our interests.
So to put a finer point on why amicus briefing is even desired here, we believe there are several reasons. As we -- as I indicated earlier, when a federal agency has preempted state law but provides no simple remedy, there is no way to enable, I believe, to agree with a party of interest. And this is a foundational element in stort [sic] claim -- in tort claims, whether you're in Maine, New Hampshire, Washington State, or anywhere else in the country.
This is an issue of general public interest, only obliquely addressed in the party's briefing. For example, what remedy, administrative or otherwise, does an aggrieved individual have if the state law claim of nuisance has been preempted under the circumstance? This is just simply not an

area that has been briefed in depth and is a clear implication of the motion to dismiss.
Second, the information underlying the dispute in this case serves as a basis for the unique and significant harm indirectly caused by federal agencies that are supposed to be act -- act -- regulating the activity in question. There is no relevant or meaningful administrative venue in the FAA or FCC for the harms alleged by individuals here and no redress for individuals for that environmental harm. Companies are therefore free to inflict with impunity, under the guise of regulatory -- inflict harm with impunity under the guise of regulatory compliance. This is another significant area of general public interest that has not been extensively briefed by either party.
Moreover, the harm here is alleged in the form of light and radio frequency, or active radar emissions, and the harmful health and environmental effects that occur or may occur. These harms are the subject of inquiry into difficult and complex technical issues. How does light, and what kind of light and intensity, causes harm? Are there specific harmful effe -- effects from the proposed active radar system? Again, although the parties have tangentially addressed these issues, they've not addressed them in any depth or developed the legislative facts the Court would take notice in a dismissal determination.

And as a recognized leader in state-of-the-art scientific research into the areas of the type of harm alleged, we can ensure a complete, and more importantly, up-to-date presentation of the issues before the Court, thus informing the Court of the unique biological harm being suffered without which there would be no nuisance claim.

Finally, a word about the D.C. Circuit case involving the FCC as a respondent on appeal. Defendant has raised this case in opposition and appears to extensively rely on it out of fear that perhaps, maybe, information from that case will be duplicated. We believe the relevance of this case has been grossly overstated and is easily distinguishable.

First, the D.C. Circuit case is to determine whether a federal agency, the FCC, acted arbitrarily and capriciously in not updating its regulations and, among other things, not complying with the Administrative Procedure Act or the National Environmental Protection [sic] Act. Neither of these statues are -- statutes are at issue in this case. The case is an administrative rulemaking matter on appeal. Oral arguments are scheduled for January 25th of next year. And none of the issues, none of the substantive or factual issues in that case are resolved.

Importantly, and speaking to defendant's apparent concern, the FCC is not the final arbiter of whether or not facts and science -- science that were presented to it in that

case are valid or not. The D.C. Circuit will decide whether the agency acted arbitrarily and capriciously by failing to take into account current science and facts that relate to the underlying reg -- regulations at issue in that case.

That is not the issue here. Here, it's whether FAA, Federal Aviation and Administration -- Administrative agency and FCC guidance and recommendations, or notices of determinations, preempts state nuisance tort law. That is a very different context, requiring very different information, and with respect to the unique harms alleged here, different science and legislative facts. The outcome and disposition of the D.C. Circuit case is, at best, speculation and has absolutely no bearing on whether the Environmental Health Trust has met its amicus burden here.

Further, because the issues and context are so different here, there is little potential for du -- duplication in this case, due to the underlying legal context, which is different. And the fact that no -- there is no specific actor being sued under common law.

In closing, providing a tort remedy is one of the most basic and traditional state functions. The idea behind federal preemption asserted in this case is not to replace state tort remedies with federal remedies, because they simply do not exist. It is to leave harmed victims with no recourse at all and no ability to be compensated while providing legal

immunity to the companies that do harm. What's really at stake here, the invalidation of state law by federal law has profound and broad significance of public health and environment, statewide and nationally. Amicus, therefore, maintains a strong interest in the proper resolution of this case and believes that our unique perspective will provide additional, specialized, invaluable insight to the issues before the Court, rather than merely duplicating the efforts of counsel for the parties.

Now procedurally, we have moved for an extension of time for briefing, so some minor delay is inevitable. We have noted in our briefing that the parties have already apparently agreed to delay the proceedings to stay discovery. And we believe that any further delay will not be material, given the dispositive nature of the motion. Simply put, an extra 45 days to allow for amicus briefing does not seem materially prejudicial to anyone and could possibly lead to a more informed decision by the Court. The benefit would seem to outweigh the detriment.

I would also note that the 30 -- 15-day timing and reply submission timing scheme appears acceptable to the defendants, provided the motion is granted.

For these reasons, the Court should grant the motion. There is simply no downside to the Court, at this stage of the proceedings, especially with the dispos -- dispositive motion

pending on a matter of general public interest.

I thank the Court for the opportunity to present our arguments. We'll be pleased to any -- answer any further questions.

THE COURT: Thank you, Mr. Sells. I don't have any other questions for you.

Who is going to be speaking in support of the motion?

Mr. Merrill, I -- I take it you're in support of the motion?

MR. MERRILL: I believe Mr. Most will be speaking, Your Honor.

THE COURT: Mr. Most. Okay, great.

MR. MOST: Yes, Your Honor. I'll make two very brief points, which is, I think -- number one, that EHT's expertise is useful here because of the -- the scope that CMP has brought into this case. So if you look at page 11 of CMP's motion to dismiss, you see that CMP talks broadly about the potential implications. They say, "radio stations could be ordered to stop broadcasting, cell phone towers could be moved, and technologies like the one at issue here could be prohibited". And so they bring these broad statements about what are the hypothetical impact of preemption or non-preemption under the FCC's regulatory structure. And considering that these are relatively hypothetical speculative statements, I think it's helpful to have the expertise of an

entity that has more expertise with the impact of FCC regulations to advise the Court. And so I think CMP has invited this kind of amicus by the scope of their motion to dismiss.

Point number two is that CMP included it in its motion to dismiss as an exhibit a full amicus brief by the Federal Aviation Admission -- Administration. That is Exhibit E to their motion to dismiss. And so I think there's an element of what's good for the goose is good for the gander here. If -- if CMP is inclined to rely on amicus by attachments to its motion to dismiss, I think it's fair to have amicus provide input on the other side as well.

And -- and finally, I agree with Mr. Sells that there's little downside to the extent that EHT's ref -- does not assist this Court in resolving issues. This Court, of course, can read it, and as far as it doesn't wish to -- and not rely on it if it doesn't wish to. Thank you, Your Honor.

THE COURT: Thank you, Mr. Most.

All right. Mr. McCarthy?

MR. MCCARTHY: Thank you, Your Honor. I'll be relatively brief. The last, maybe, five minutes of Mr. Sells' argument to me underscores exactly what we perceive problems here to be. This appears to be an effort to attack the FCC, especially, and maybe to some extent the FAA's substantive findings. And there's a 12(b)(6) motion. So the whole point,

in fact, of a preemption argument is that you can't attack those findings. So getting 20, 30 pages of briefing from EHT, maybe others, according to a footnote in their brief. Whate -- whatever other amicus come in on the other side of the ledger.

All fighting about issues that have been resolved by the federal agencies is unlikely to be of any real assistance to anyone. All that's going to happen is, instead of having one set of briefs, there's going to be two or three or four sets of briefs. And throughout both the opening amicus request, the reply, today's argument, we haven't really heard a single specific thing that EHT wants to say that the plaintiffs weren't able to say or haven't already said. So when we weigh this ephemeral benefit against the known and certain downsides -- delay, additional cost to the parties, additional burden of briefs to the Court -- I'd suggest that benefit does not weigh in favor of allowing this advocacy group to come in and file another set of briefs.

THE COURT: Well, to Mr. Sells' point that there is no remedy available in the federal system, I think he's saying that the Court needs to hear from them about the impact of preemption if it, in fact, means that in -- in -- in this case, that there has been no meaningful review by the federal agencies in question. So it -- it -- are you -- are you saying that that's really not before the Court? The only

question is whether the federal government has occupied this space?

MR. MCCARTHY: Well, I think it's fair game to -- I'm sorry, Your Honor, were you finished?

THE COURT: No, no, that's okay. Go ahead.

MR. MCCARTHY: I -- I think to some extent, it's fair game to consider the implications of preemption or not, just as part and parcel of trying to understand the limits of what the federal government has tried to do and the extent of their intent. I -- I wouldn't quarrel with the idea that you could consider that. I don't think it's sufficient --

THE COURT: But you agree that there's -- that there's no -- that there -- that in normal preemption case -- I think this is what Mr. Sells is sug -- suggesting. In a typical preemption case, there are some remedies that are still available, at least in the federal system, and that, in this case, there are no such remedies available, is what I think he's saying.

MR. MCCARTHY: Oh, I'd certainly quarrel with that. Now, I -- I think there are -- are some instances in which a federal regime provides alternative remedies. Arista is a -- a well-known example of this.

THE COURT: Right.

MR. MCCARTHY: They create specific remedie, and borrow things like (indiscernible) damages. There are many other

places, much more like the situation here, where the federal government sets the standard and preempts an alternative standard but doesn't preempt remedies, so if CMP, for example, were violating the FCC health standard, right?

THE COURT: Mm-hmm.

MR. MCCARTHY: For using some radar admission that was ten times the standard -- and one could otherwise meet the test of the common law nuisance claim -- one could bring that claim. So it's not that folks are without a remedy. It's that the federal government has stepped in to determine, with respect to radar emissions, the safe levels of radar emissions.

THE COURT: But where could they bring that claim, if -- if CMP exceeded those standards?

MR. MCCARTHY: They could bring that in state court, because the -- the occupation of the field is with respect to the standard --

THE COURT: Standard. Right.

MR. MCCARTHY: -- not with respect to look at claims.

THE COURT: Okay.

MR. MCCARTHY: And unless Your Honor has further questions, I'm --

THE COURT: I do not. No, I don't.

MR. MCCARTHY: I'll rest on that, then, Your Honor.

THE COURT: All right. Thank you.

All right. Well, then, let's move on, then, to the motion to dismiss.

Mr. McCarthy, go ahead.

And I assume, Mr. Merrill, you're going to be arguing this motion for the plaintiffs?

MR. MERRILL: Again, Your Honor, it will be Mr. Most.

THE COURT: Mr. Most, okay. Great. Okay. Sorry about that. All right.

Go ahead, Mr. McCarthy.

MR. MCCARTHY: No, no problem at all, Your Honor. And -- and with these, I always -- my view is, I want to answer any questions the Court has.

THE COURT: Good.

MR. MCCARTHY: I -- I think this has been pretty thoroughly briefed, and I'm happy to sort of review what was said in the briefs. But if Your Honor has questions, I would jump straight to those.

THE COURT: Well, why don't you go into a little more depth with respect to what you said about the fact that there could be state court claims that could be brought for nuisance, even if your motion is granted on this case.

MR. MCCARTHY: Sure. And -- and so with respect to the FCC, for example.

THE COURT: Right.

MR. MCCARTHY: Now what the FCC has done is it has

established the standard for what is a safe level of radar emissions, right? It is -- this is not a case where it has established a -- a federal law of nuisance, for example. So it's a very different sort of preemption analysis. And what would happen -- this is why I think of this more as obstacle preemption than field preemption. Although the First Circuit has been pretty clear -- at least, they don't treat these as --

THE COURT: Any different.

MR. MCCARTHY: Yeah. It -- it's all sort of gradations of the same analysis. But the -- the problem here, and the reason this becomes an obstacle, is the federal government has come out and said, here's what is safe and not safe with respect to radar emissions. And so if a state court or a state jury comes along and says I disagree with that and I think one half the level of the federal government -- or one quarter of the federal government or whatever it might be is unsafe and allows a state tort remedy on that basis, then what you have is this patchwork of 50 state laws setting all different levels of what is safe and not safe for radar emissions.

And if you are somebody who manufactures radar machinery, radar transmitters, or cell -- for a cell phone company that's dealing with these, now in Maine you have to not only comply with the FCC standard, which is a known public standard --

applies equally to all the states -- but you've got to figure out whether you might be subject to additional problems in a state like Maine where you comply with the FCC standard, but you might get sued for nuisance or a personal injury claim or whatever else a plaintiff's lawyer can come up with.

And then if Maine can do it, so can New Hampshire and California and New York. And some of those standards might be very low. Some of them might be very high. And in some ways you can run into a conflict. And at an absolute minimum, you're vastly increasing the challenges for nationwide companies in complying with the law. You vastly increase the costs. You increase the administrative burdens. And that's going to cause the federal government difficulty in enforcing these standards that it has set. And that's the whole point of uniformity: that the federal government gets to set one standard and then it knows that that's the playing field that everybody needs to play in.

THE COURT: And -- go ahead.

MR. MCCARTHY: Go ahead.

THE COURT: No, that's all right.

MR. MCCARTHY: So I -- I was going to turn to the FAA. I think the --

THE COURT: Yeah.

MR. MCCARTHY: -- FCC issues are actually relatively straightforward. I guess I -- I should just say one more

thing. We are relying on, not on the Telecommunications Act, but on the Federal Communications Act and same with the regulation, pursuant to (indiscernible) under that. And so really the only argument made in plaintiff's opposition brief was built around the notion that we were relying on the express preemption in the TCA, and that's just not what we're doing. So I think that's -- that's really the only argument to deal with on the FCC.

On the FAA side, let me start with sort of the -- before it gets to the legal analysis -- the practical reality of what this ruling would mean. And we touched on this in the introduction to the reply brief. But I think it really hones in on the -- the incredible problem that's been caused, not just for CMP, but for society. If we get ordered by a state court, or effectively by a jury, to take down these safety lights -- I think by an injunction. That's maybe the clearest example of this. We can enjoin. We have mandatory injunction to take down these lights and then a plane crashes into the tower. What remedy do those folks have? Are they without remedy because we were following a state court order? Are we liable anyway, even though we had no choice? We were ordered to do it. That kind of tangible and direct conflict, it underscores why there has to be FAA preemption here.

And then if you turn to the legal analysis, I'd suggest that gets you to the same point. I -- I think the principle

issue the parties have developed on this is the question of whether the FAA advisory, you know, has a determination, is advisory, or something else. And what I'd sug -- I think we characterize it differently. The plaintiffs act like this is some sort of just casual recommendation made in passing. Like, well, I think you should have lights. That -- that might be safer.

And as the Fifth Circuit said, in a case we've cited a couple of times, that far understates the import of these no-hazard determinations. They have significant implications, effectively setting the standard of care so that in that hypothetical that I raise, the injured plaintiff can otherwise say, CMP was not following this guidance. FAA told it what to do. They told it how to avoid plane crashes and they just didn't do it. And that's why I got injured or why I got killed or what have you.

So these have real weight. And just the mere fact that the FAA has chosen not to be able to bring an actual enforcement action to specifically require compliance, I would suggest, is not determinate.

THE COURT: Okay.

All right. Mr. Most?

MR. MOST: Thank you, Your Honor. I'd like to make a couple of brief points. Number one, it appears that CMP is trying to have it both ways with regard to -- to preemption.

I -- I wrote down what Mr. McCarthy said at the end of his amicus brief argument, which is he said, "the presumption is with respect to the standard, not with respect to the claims". And similarly, he also argues that, if CMP were to not follow the FAA's recommendation, there needs to be tort liability under state law in order to address those harms. So on one hand, they are arguing very clearly that state tort law, state law, is not completely preempted by these federal statutes.

On the other hand, they want to argue that it completely preempts plaintiffs' claims here. And I don't think they can have it both ways. And I don't see that the law provides for preemption only in one direction, to protect some plaintiffs and not others. And here, I think, it's -- it is certainly true that the FAA has made a recommendation with regard to these towers. We're not arguing it was a casual recommendation or that it -- it's completely irrelevant. But what it isn't is an order. It does not bind CMP. It's a recommendation that was, in part, generated by conversations between CMP and the FAA.

And choosing not to have these flashing lights does not mean that these towers are not protected from the -- as -- as potential hazards to air traffic. There are a range of other possible safety measures that some -- that have already been implemented -- others that could be implemented. And so it is incumbent in the analysis to figure out -- taking into account

the FAA recommendation, taking into account other possible safety measures, taking into account the safety measures that exist -- what's -- what's appropriate for these towers. And the fact that the FAA has rendered an opinion, made a recommendation, does not mean that it -- it ends the conversation. That's not the law.

Similarly, with regard to the FCC, the -- the core question is whether these towers are covered by the acts in question. And I think it's relevant to have the -- the big picture analysis, which is, even if there is preemption with regard to the radar transmitters, that does not dismiss this case. Because the lights -- everyone agrees the lights are not covered by the FCC's jurisdiction. So if this Court will have to distinguish between the preemption analysis with regard to the radar and the preemption analysis with regard to the lights, I think.

And so this -- this brings us back to the original point, which is that, unless there is very clear and complete preemption of the state law tort claims, to state law nuisance claims, these decisions by a private actor need to be made within the context of state law. And a recommendation by a federal agency is a recommendation for what they think is appropriate to be decided by the private entity in the context of state law. And if this Court were to order an injunction, it would not have, I think, the catastrophic impact that Mr.

McCarthy suggests. He suggests what is someone to do if a court orders the lights taken down and there's an accident?

Well, number one, we think it's really important that if the lights are taken down, that other safety measures that are appropriate to the circumstances be implemented to prevent any sort of accident, if necessary.

And number two, just a court order will not dispose of issues. I mean, if you think of an ADA case, if the Court orders a ramp be installed and someone trips over the ramp and hurts themselves, that doesn't leave them with no remedy simply because there's was a court order that required the ramp in the first place. And so we think that CMP should be taken at its word that these decisions are made against the backdrop -- or, in their words, the preservation of common law liability, which is in their motion to dismiss at page 18.

THE COURT: Okay. Thank you, Mr. Most.

Mr. McCarthy, anything you want to say in rebuttal?

MR. MCCARTHY: Just very briefly. Two or three things. There is at least one point of agreement here, You Honor, which is that FAA analysis and the FCC analysis are, in fact, separate. And I think both parties agree we need to both analyses --

THE COURT: Yep.

MR. MCCARTHY: -- separately, and one doesn't dispose of the other.

And then two points in response to what Mr. Most said. First, there's no conflict between the two arguments that we're making. In both cases, what CMP is required to do is comply with the federal law, and in neither case can a lower state standard be allowed for the exact same argument with respect to -- to each of the -- in effect, each of the different branch analyses. I -- I think, for example, if we put up 10,000 million lights way beyond what the FAA required so it's fully compliant with what the FAA ordered, then that might be a nuisance. There would be no conflict between bringing the level of lights down to what the FAA required, as long as it doesn't go below that level. But that's not what's happening here.

The request, the very basis of the nuisance claim is that we take down the lights that allow us to comply with the FAA standards, and that's where it becomes obstacle preemption. There's a conflict between what the federal government is requiring and what would have to be found to find in favor of the plaintiffs on the state law tort claim. And that's the same point that Mr. Most closed with.

THE COURT: Mm-hmm.

MR. MCCARTHY: (Indiscernible) response is the same to that last point. When we say there's a preservation of common law claims, we're very clear in the brief. We argued, in fact, with the underlined emphasis, it's for failures to

comply with the federal standard. So the plane that crashes into the tower because we didn't follow the guidance, that's, in fact, the enforcement mechanism. And nobody quarrels with that.

And then, very briefly, on the FCC, I think Mr. Most said that the real question is whether the radar transmitters are covered by the FCC. I don't think there really can be any question about that. I guess I agree that is the -- the question. Once they're covered, the regulations apply to them and set the standard. But the FCC -- the -- the FCA, I guess I should say, applies to all radar transmissions. And there's a cite to that effect in our brief.

THE COURT: Okay.

MR. MCCARTHY: Thank you, Your Honor.

THE COURT: Thank you.

All right. I have some more reading to do in this case. I'm going to get this out just as soon as I can. This has been very helpful to the Court, and I'll try to get something in the next few weeks. Thank you very much.

MR. MCCARTHY: Thank you, Your Honor.

(Proceedings concluded at 11:00 a.m.)

CERTIFICATION

I HEREBY CERTIFY, that the foregoing, pages 1 through 27, is a true transcript of a CD recorded on Tuesday, December 29, 2020, at the Southern Cumberland County District Court located at Portland, Maine, of the case entitled, FRIENDS OF MERRYMEETING BAY, ET AL. VS. CENTRAL MAINE POWER, to the best of my professional skills and abilities.

February 24, 2021

_____

Yiska Sarah Roth
Court-Approved Transcriber

STATE OF MAINE
SAGADAHOC COUNTY SUPERIOR COURT

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Plaintiffs,

v.

COMPLAINT FOR NUISANCE
(Jury Trial Demanded)

CENTRAL MAINE POWER COMPANY,

Defendant.

NOW COME the Plaintiffs to state as follows:

I. Introduction

1. For eight decades, two 195-foot tall towers supported up to two power lines across the Chops Passage of the Kennebec River at Merrymeeting Bay, Maine.

2. The towers were unlit and the power lines were unmarked. But because they were located in an area of low and declining air traffic, and well below the minimum safe altitude for aircraft (1,000 feet above the highest obstacle), there was never an air safety problem.

3. In 2019, Central Maine Power Company ("CMP") replaced those old towers with new towers that are modestly (23% or 45') taller.

4. In part for liability reasons, CMP placed orange, white, and yellow marking balls on a cable crossing the Chops Passage to make the power lines more visible to aviators.

5. Plaintiffs have no issue with this passive air safety measure.

6. But CMP went further. It installed multiple tower lights that each **flash sixty times a minute** visible over an area of **nearly four thousand square miles**.

7. CMP should never have done so, as the lights are forbidden by local zoning codes. For example, the City of Woolwich's code explicitly bans "flashing lights" in the Rural District its tower is located in.

8. No public hearings were held prior to installation of the lights, and CMP did not disclose the proposed lights on its Permit by Rule application to the Department of Environmental Protection (DEP) under Maine's Natural Resources Protection Act.

9. The flashing lights were not required by the Federal Aviation Administration ("FAA"). And the rate of flashing is double what the FAA has determined to be optimal. As a result, the lights have caused a variety of problems for Plaintiffs, all of whom are neighboring property owners and or who work in the viewshed.

10. The lights have made it difficult for Plaintiffs to sleep, impacted Plaintiffs' businesses, their ability to work and reduced the value and enjoyment of Plaintiffs' property and of their time on Merrymeeting Bay itself.

11. Furthermore, the light pollution causes adverse wildlife impacts undermining the purpose and values of conservation easements owned by Plaintiff Friends of Merrymeeting Bay (FOMB) and of FOMB's mission: "To preserve, protect and enhance the unique ecosystems of Merrymeeting Bay."

12. Plaintiffs engaged with CMP to try to find alternative, less impactful methods of achieving CMP's goals, but were rebuffed.

13. For these reasons and additional reasons described herein, the lights are not required for air safety, are barred by local ordinance, and constitute a nuisance under Maine law.

14. Plaintiffs now sue to end Defendants' nuisance.

II. Parties

15. Defendant **Central Maine Power Company** ("CMP") is a Maine business corporation, with charter number 19050014 D. CMP is a subsidiary of AVANGRID, and serves more than 620,000 electricity customers in an 11,000 square-mile service area in central and

southern Maine. Eighty-five percent owned by the Spanish energy giant company, Iberdrola SA, AVANGRID owns eight electricity, natural gas or combination utilities in Connecticut, Maine, Massachusetts, and New York and has a business presence in 24 states. CMP operates the towers and lighting system at issue in this case.

16. Plaintiff **Friends of Merrymeeting Bay** ("FOMB") is a Maine non-profit corporation (Title 13-B), with charter number 19750226ND. Founded in 1975, FOMB takes a holistic approach to protecting the Bay, combining research, education, advocacy, and land conservation. With approximately 450 members, one staff person, and 125 volunteers contributing over 3,000 hours of service annually, FOMB is the only conservation organization in the area implementing these diverse tactics to achieve biological and cultural protection of the Bay as a whole. FOMB has members who live near, own property near, and recreate on and near Merrymeeting Bay and the rivers that flow into the Bay. Among other activities, FOMB members navigate (power, sail, kayak and canoe), recreationally hunt and fish, commercially guide, hike, photograph, and observe aquatic life and wildlife in and around Merrymeeting Bay and its watershed. FOMB members receive economic value from Merrymeeting Bay and its environs through, among other activities, commercial fishing, guiding, farming, photography and timber harvesting. Many of FOMB's members are owners of property directly impacted by the Chops Point Towers. FOMB itself is the owner of multiple conservation easements directly impacted by the Chops Point Towers.

17. Plaintiff **Ed Friedman** is a resident of Bowdoinham, ME and Chairman of FOMB. He owns a piece of residential property in Bowdoinham that lies 1.6 miles from the eastern Chops Point tower and operates several home businesses from here. His property is in direct view of the towers.

18. Plaintiff **Colleen Moore** is a resident of Pleasant Point in Topsham, ME and member of FOMB. She owns residential property on the shore of the Bay in direct view of the towers.

19. Plaintiff **Kathleen McGee** is a resident of Bowdoinham, ME and a FOMB member. She owns a share of residential property on the shore of the Bay in direct view of the towers.

20. All individual plaintiffs have owned their properties well before the new towers were erected and lit.

III. JURISDICTION AND VENUE

21. The Maine Superior Court has jurisdiction over this civil action pursuant to Title 14 M.R.S. § 704-A.

22. Venue is properly in this County pursuant to Title 14 M.R.S. § 501 and because the action arose in this County, and one or more of the Plaintiffs reside in this County.

IV. STATEMENT OF FACTS

A. About Merrymeeting Bay

23. Formed by the confluence of six rivers, including the Kennebec and Androscoggin, Merrymeeting Bay is the largest freshwater estuary system north of Chesapeake Bay; it drains 38% of Maine's fresh water. Biologically it is considered tidal riverine (freshwater and tidal) and geologically an inland delta.

24. Merrymeeting Bay is linked to the Gulf of Maine and the Atlantic Ocean by the Lower Kennebec River.

25. The central Bay's connection to the Lower Kennebec River is via a 280-yard slot in the bedrock called the Chops.

26. The Chops divides the cities of Bath, Maine, and Woolwich, Maine.

27. Merrymeeting Bay is bordered by the towns and cities of Richmond, Brunswick, Bath, Topsham, Woolwich, Bowdoinham, Dresden, and Pittston.

28. The Bay is a resource of international significance, considered highest value habitat by USFWS and an area of ecological significance. It is the largest staging ground for migratory waterfowl in the northeast, it is the only estuary providing spawning and nursery habitat for all diadromous fish species in the Gulf of Maine, and it is home to a number of rare and endangered plant, and animal species including Parker's pipewort, stiff arrowhead, shortnose and Atlantic sturgeon, wild Atlantic salmon and a recovering bald eagle population.

29. Merrymeeting Bay supports runs of migratory fish, including the endangered wild Atlantic salmon and shortnose sturgeon. Some of the other species include Atlantic sturgeon, shad, alewives, American eel, striped bass and Rainbow smelt; a number of which are threatened, species of concern or species of greatest conservation need.

30. The Bay is classified as a Globally Important Bird Conservation Area by the American Bird Conservancy.

B. For at least eighty years, the Chops had two unlit towers without incident.

31. For at least eight decades, there were two 195-foot tall towers at the Chops.

32. The purpose of the towers was to convey electric powerlines across the Chops.

33. At some point, the towers were marked with alternating bands of red and white paint. But they had no lights and there were no marking balls on the powerlines.

34. The unlit towers existed at the time of the region's most intense air traffic. Air traffic escalated nationwide after World War II, with "local" vs. itinerant flights building to a peak in the late 1970's a few years after the first oil crisis. As fuel prices continued climbing, general aviation nationwide began declining.

35. Numbers of very small aircraft based at Merrymeeting Field reached a maximum of 38 around 1995. Currently there are only three or four very small aircraft at that field.

36. Air traffic in the area declined further after the Brunswick Naval Air Station closed and Merrymeeting Field was sold to a developer.

37. But the unlit towers and lines existed for at least eighty years without incident, even during the region's peak air traffic years.

38. Because the towers were unlit, lights did not disturb local property owners' use of their property or FOMB members use of the Bay. The night sky remained dark until the new towers were lit.

C. In 2018, CMP replaced the old Chops Point towers with new, somewhat taller ones. CMP outfitted the new towers with lights that shine over an area of at least 3,848 square miles, flashing day and night at 200% the FAA-determined optimal rate.

39. In 2018, Central Maine Power Company ("CMP") replaced the pre-existing towers with new, somewhat taller towers. The new towers are 23% taller than the old towers.

40. They have a greater superstructure in their upper reaches and thus easier to see, even when unlit.

41. Specifically, the new towers are at 47 feet site elevation (SE), are 240 and 244 feet above ground level (AGL), and are 287 and 291 feet above mean sea level.

42. Despite being only somewhat taller than the old towers, CMP has outfitted the new towers with drastically different aircraft notification devices.

43. They did so even though the region's air traffic is sparser now than at any point since World War II.

44. The new aircraft notification devices take two forms:

a. The powerline has three-foot-wide orange, white and yellow spheres every 200 feet; and

b. The towers are each outfitted with five lights that each flash at a rate of 60 flashes per minute ("FPM"), white during the day and red at night.

45. The 60 FPM flash rate is approximately double the optimal rate. According to the Federal Aviation Administration, the "optimal flash rate for the brighter lights to flash

simultaneously was determined to be between 27 and 33 flashes per minute (fpm). Flashing at slower speeds (under 27 fpm) did not provide the necessary conspicuity for pilots to clearly acquire the obstruction at night without the steady-burning lights, and flashing at faster speeds (over 33 fpm), the lights were not off long enough to be less of an attractant to migratory birds."[1]

46. The lights shine across an area of at least 3,848 square miles.[2]

Fig. 1: The new tower lights as visible from Browns Point on May 31, 2020.

[1] James W. Patterson, Jr., *Evaluation of New Obstruction Lighting Techniques to Reduce Avian Fatalities*, DOT/FAA/TC-TN12/9. U.S. Department of Transportation, Federal Aviation Administration Technical Note. (May 2012).
[2] The lights have been observed as far as Oxford, Maine, 35 miles away.

Fig. 2: The (red) lights of the new towers shine across Merrymeeting Bay, polluting the previously dark skies and when the Bay is calm or covered with ice, those surfaces, from the reflection. Photo taken by Ed Friedman on June 1, 2020.

E. The FAA recommended – but did not require – lighting the Chops Point towers.

47. On March 12, 2018, the Federal Aviation Administration ("FAA") issued Notices of Determination of No Hazard to Air Navigation for the towers.

48. The Notices stated that: "As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8 (MDual), & 12."

49. The idea of lighting the towers was suggested to the FAA by CMP.

50. On March 25, 2020, the FAA issued new Notices. The new Notices stated that as "a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system" and endorsed an Active Aircraft Detection Lighting System. (An Active Aircraft Detection Lighting System blankets a region in microwave radiation from radar, and uses that radar to determine when aircraft are present. If there are aircraft, it turns the lights on; if not, it turns the lights off.)

51. These notices were FAA *recommendations*, but they were not in any sense *requirements* or *legal orders*.

52. The advisory nature of the notices is due to the fact that the towers do not meet the criteria for mandatory lighting under FAA regulations.[3]

[3] 14 CFR § 77.17 specifies that an object is "an obstruction to air navigation" if it meets certain criteria. Objects under 499 feet AGL are only presumptively obstructions if within a certain distance of airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.19, 77.21, or 77.23."

Chapter 2.1 of FAA Advisory Circular 70/7460-1 indicates that:

> Any temporary or permanent structure, including all appurtenances, that exceeds an overall height of 200 feet (61 m) above ground level (AGL) or exceeds any obstruction standard contained in 14 CFR Part 77 *should* [not "shall" or "must"] be marked and/or lighted. *However, an FAA aeronautical study may reveal that the absence of marking and/or lighting will not impair aviation safety.* [Emphasis added.] Conversely, the object *may* [not "must"] present such an extraordinary hazard potential that higher standards may be recommended for increased conspicuity to ensure

53. CMP's expert agrees. On January 27, 2020, Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc. wrote an opinion letter. Pittman agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport."

F. Plaintiff FOMB Proposed Less Intrusive Options for the Chops Point Towers.

54. In a letter of December 24, 2019, FOMB proposed a less intrusive option that would still address air-safety concerns.

55. Specifically, FOMB proposed three safety elements: (1) marking the towers; (2) issuing a Notice to Airmen (NOTAM) of unlit towers and powerline crossing;[4] and (3) maintaining the unlit marking balls or additional unlit balls on the wires.[5]

---

aviation safety.

Here, Wiscasset (KIWI) is the closest qualifying airport to the Chop Point Towers. It is 5.1 miles away, and has a runway length of 3,397' (longer than the 3,200' minimum length to qualify). If the Chop Point towers were within 3 miles of KIWI, they would be considered an obstacle to air navigation at 200'. Since they are 5 miles from KIWI however, 100' is added for each additional mile up to a maximum of 499'. At 5 miles then, to meet the qualifying standard and be deemed an obstruction to air navigation, the towers need to be at least 400' AGL. At 240' AGL, the Chop Point towers are too short to be a presumptive obstruction.

[4] FAR 91.103 mandates that "each pilot in command shall, before beginning a flight, become familiar with all available information concerning that flight."
[5] Ex. 1.

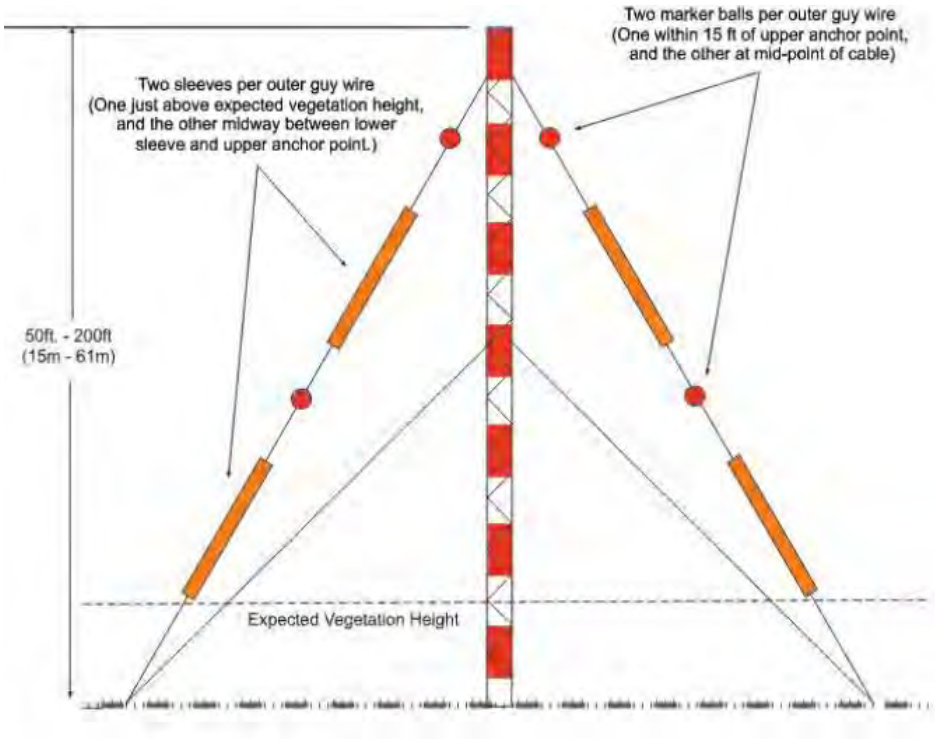


Fig. 3: A diagram of marking of a tower.[6]

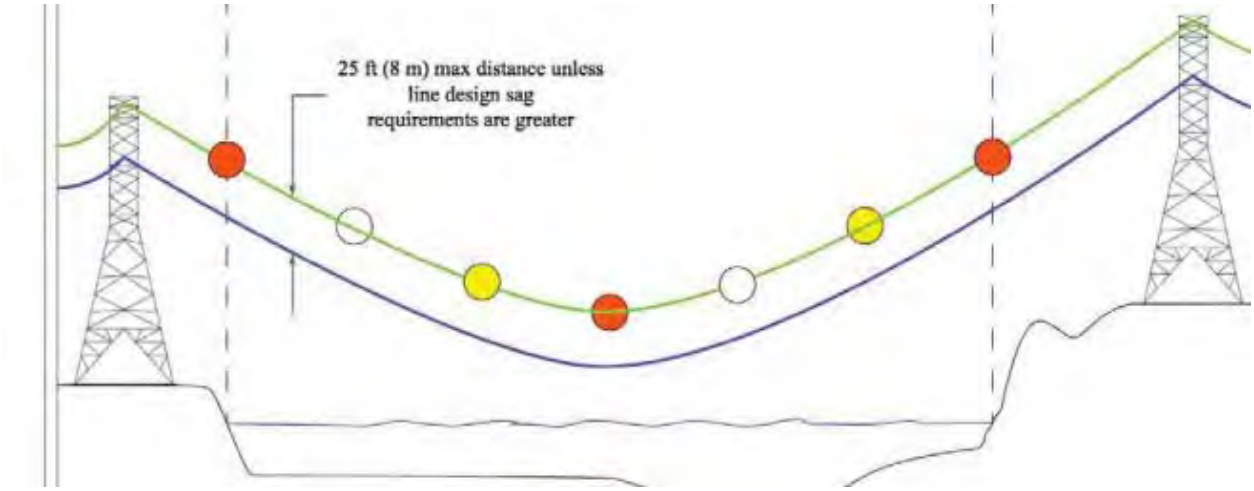


Fig. 4: A diagram of unlit marking balls.[7]

56. In April 2020, FOMB suggested another alternative: "If lights are necessary for air safety, FOMB proposes a Passive Aircraft Detection Lighting Systems (PADLS) in lieu of an active system."

[6] Federal Aviation Administration, Advisory Circular 70/7460-1L CHG 1, Appendix A (Dec. 4, 2015) at page A-15.
[7] Id. at page A-2

57. Unlike active systems, Passive Aircraft Detection Lighting Systems do not blanket an area with radar. Instead, using only receivers, they "exploit existing radio emissions, such as FM, TV and cellular telephony signals, trying to detect echoes which would indicate the potential presence of a flying target."[8]

58. Passive detection systems have been used to activate warning lights on electric-generation windmills, for example.[9]

59. A passive system would work at the Chops. According to Jörg Heckenbach of the Fraunhofer Institute for High Frequency Physics and Radar Techniques, who has worked with the PARASOL passive detection system. What would be required would be a (1) a site survey; (2) a short study; (3) modification to software; and (4) installation of the system. According to Mr. Heckenbach the "hardware is compatible and should be fine."

60. On July 6, 2020, FOMB suggested another alternative, a pilot-controlled lighting system:

> One alternative to an Active System would be a Pilot-Controlled Lighting System. Such a system would allow pilots to send a signal that activates tower lights. They would accomplish that by the simple process of keying the microphone button of the regular VHF communication transmitter in the approaching aircraft. No special airborne equipment or adapters would be required. Thus, if a pilot were unsure of her position relative to the towers, all she would need to do would be to press the button on her microphone a few times, and the lights would come on.
>
> We spoke to Mark Richardson, an expert at ADB Safegate, one of the world's leading suppliers of airport lighting solutions including pilot-controlled systems. He confirmed that such a system would be relatively simple and inexpensive to install. It would be orders of magnitude cheaper than the proposed Active System. For example, the ADB Safegate L-854 radio-control unit is listed for approximately $3,000[10] and could be installed by a Maine licensed electrician. The unit is simply an AC powered VHF receiver hooked up to the desired lighting. The easiest installation would be one box for each tower keyed to the same VHF radio frequency. No FCC license needed.

61. On July 17, 2020, CMP declined to adopt the pilot-controlled proposal.

[8] Oikonomou, Dimitrios & Nomikos, Panagiotis & Limnaios, George & Zikidis, Konstantinos. (2019). Passive Radars and their use in the Modern Battlefield. 9. 37-61.
[9] See https://www.dirkshof.de/fileadmin/Dateien/Passivradar_Infos/Parasol_06_2018_E.pdf
[10] https://adbsafegate.com/product-center/airfield/?prod=l-854-digital-radio-control

62. These five elements (marking with paint, unlit balls, a Notice to Airmen, and or a PADLS or pilot-controlled system) should be more than sufficient for air safety considering that the Chops Passage is not navigable airspace for most aircraft at the altitude of the towers.

63. Specifically, the minimum safe altitude for most aircraft over any congested area of a city, town, or settlement, is an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

64. Over open water or sparsely populated areas, an aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure. Since the waterway measures 790' wide at the Chops, a float plane flying up the middle at or below wire height would only have 400' on either side to shore. From the channel center to the closest Chop Pt School structure (a cabin) would not be 500', and so most planes cannot traverse the Chops Passage.

65. And for any aircraft except when necessary for takeoff or landing, no person may operate an aircraft below an altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

66. This was confirmed by the FAA, which generated a Traffic Pattern Report for the towers and determined that they were not in a "Traverseway."[11]

G. CMP rejected FOMB's alternatives on the false premise that CMP has "no choice."

67. CMP rejected FOMB's proposed alternatives on the theory that CMP had "no choice" but to install the lights.

68. CMP claimed the FAA had "compelled" the lights.

69. For example, in an email of February 13, 2020, CMP issued the following statement:

> **Can different lighting or no lighting be a solution?**
>
> Requests for modification to the current lighting on the towers, including the changing of the lighting system, or any deviation from the standards in the Advisory Circular must be submitted to the FAA. A request received after a determination is issued may

[11] Ex. 8.

> require a new study and could possibly result in a new determination including the need for additional lighting. Since it is the expert opinion of our consultants that **it is highly unlikely that if requested the FAA would eliminate the lighting requirement**, our consultants have advised CMP that an additional request to the FAA would only result in additional time delays -- delays that would impact the more immediate focus on, and planning for, the radar solution.

(emphasis added).

70. In a letter of April 13, 2020, CMP's Executive Chairman David Flanagan wrote that the lights were required by "an outstanding FAA decision, which has the force of law, 14 CFR Part 77, which is not merely advisory, but compels [CMP] to install and maintain warning lights on these towers."[12]

71. Mr. Flanagan opined that CMP therefore has "no choice but to comply," and concluded that "we simply cannot unilaterally defy a lawful Federal order."

72. CMP was wrong.

73. The Notices of No Hazard Determinations are "recommendations," not "orders." And they have no enforceable legal effect.

74. The FAA itself describes them as recommendations. In April 15, 2020 letter, the FAA wrote that Notices were issued "for a marking and lighting recommendation." (Emphasis added.)

75. This has been corroborated by federal courts: the "FAA's hazard determinations, by themselves, have 'no enforceable legal effect.'" *Town of Barnstable, Mass. v. FAA*, 659 F. 3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002) ("A hazard/no-hazard determination has "no enforceable legal effect."). *See also Air Line Pilots' Association International v. FAA*, 446 F.2d 236, 240 (5th Cir. 1971) (no hazard determinations ask encourage only "voluntary cooperation.")

76. And the FAA has confirmed this specifically with regard to the Chop Point towers. Richard Doucette, of the FAA's New England Office, wrote with regard to the towers:

[12] Ex. 2.

"Every determination issued is 'advisory.' It has no regulatory weight. . . .We issued an advisory opinion after CMP filed an airspace case. I do not know under what circumstances it would be mandatory, except if it was on airport property, where the FAA would have some real authority."[13]

77. Even after FOMB explained to CMP that the Notices were merely recommendations, and not "Federal orders,"[14] CMP declined to change course.[15]

78. Why wouldn't CMP change course after realizing it was wrong? One possibility is that FOMB's proposed cheaper alternatives would mean less profit for CMP. In an email of June 22, 2020, CMP confirmed that the "total cost of the project is estimated to be $10M and [the cost] will be shared among customers in Maine and the New England region."

79. And due to FERC and ISO New England rate-setting mechanisms, CMP and its shareholders typically receive approximately 14% annual returns on their equity investment.

80. So an expensive equity investment project like the one at issue here – even if unnecessary for safety – results in a profit for CMP's *shareholders*, at the expense of Maine and New England *rate payers*.

H. CMP's proposed radar system will void the FAA No Hazard Determinations.

81. CMP claimed that the lights are required by the FAA's No Hazard Determinations. That was not true.

82. But even if that were true, the No Hazard Determinations will soon be voided by CMP's actions.

83. Both the 2018 and 2020 No Hazard Determinations for the Chop Point towers indicate that "This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause

[13] Ex. 5
[14] Ex. 3 (Letter to CMP).
[15] Ex. 4 (Letter from CMP).

Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination."

84. But CMP's proposed Active Aircraft Detection Lighting would use X-band radar at 9.2-9.5 GHz, frequencies not covered by the Colo Void Clause Coalition rule.

85. Accordingly, CMP is poised to void the very document that they rely on to justify their use of lights and an active detection system.

H. <u>The towers are forbidden by local ordinance.</u>

86. One of the towers lies in the Town of Woolwich; the other lies in the Town of Bath.

87. Both Towns' ordinances forbid CMP's lighting system.

88. The easterly tower lies within the Town of Woolwich's Rural District.

89. According to the Town of Woolwich's Planning Ordinance, the Rural District "shall be mainly farm and forest areas."

90. According to Article XI § F of that ordinance the following are banned from a Rural District: any "moving signs or devises, including but not limited to promotional flags, pennants **and flashing lights**." (Emphasis added.)

91. CMP did not seek or obtain a variance from the Woolwich Planning Ordinance for the tower's flashing lights.

92. The western Chop Point tower sits within the City of Bath's R3 Low Density Residential District. Compare Figure 5 (overlay of zoning map with location of tower) with City of Bath Zoning Map Key.[16]

93. According to the City's planning code, "Low-intensity development of this district is allowed for residential and home-based businesses that are compatible with the physical capability of the land." City of Bath Land Use Code, Section 8.03 (A).

[16] Available online at https://evocloud-prod3-public.s3.us-east-2.amazonaws.com/26/media/10494.pdf

94. The western Chop Point tower also falls within a Natural Resource Preservation Overlay District. Compare Figure 5 (overlay of zoning map with location of tower) with City of Bath Zoning Map Key.[17]

95. The Natural Resource Preservation Overlay District is "established along natural corridors and boundary areas associated with water bodies, wetlands, significant wildlife habitat, and unique natural and environmentally sensitive features." City of Bath Land Use Code, Section 8.18 (A).

96. Its purpose is to allow only "limited residential development while protecting fragile shoreline ecological systems that, if developed, would adversely affect water quality, wildlife and aquatic habitat and biotic systems, or ecological relationships." *Id.*

97. Here, the western tower, with its 5 lights flashing a total of 300 times per minute, is compatible with neither Bath's R3 Low Density Residential District nor its Natural Resource Preservation Overlay District.

[17] Available online at https://evocloud-prod3-public.s3.us-east-2.amazonaws.com/26/media/10494.pdf

Figure 5: An overlay of the City of Bath Zoning Map on top of satellite imagery. The yellow pin is the western-most tower of the Chop Point towers.

H. The towers' lights harm Plaintiffs' property.

A. The Towers Harm Plaintiff FOMB's Conservation Easements

98. FOMB is the owner of several conservation easements on land in the vicinity of the Chops Point towers.

99. Two of these easements are contiguous and lie directly across the Bay from the towers. They are about a mile away, and have a direct line-of-sight to the towers. They include about 62 acres of upland, 4,000 feet of waterfront and over 100 acres of highest value tidal wetland full of bird life, rare plants and millions of young fish. There is one perennially active bald eagle nest at the point closest to the Chops. Another 66 acres of upland easement and 30 acres of tidal wetland are just about 2 miles away.

100. FOMB has led efforts to protect over 1,500 acres around the Bay that are owned in fee by other parties now, either state agencies or other NGO's.

101. One of these properties, in direct view of the towers, includes a parcel of about 125 acres of wooded upland and wetland on the mainland, about 61 acres of highest-value tidal wetland, and the entire 3-acre Brick Island complete with perennially active bald eagle nest. There are approximately 6,000 feet of waterfront. FOMB has over $100,000.00 invested in protecting this parcel.

Fig 6: Brick Island, one of the pieces of property protected by FOMB's efforts.

102. The towers' lights undermine the conservation values of those easements and fee properties by disrupting ecosystems and critically altering nighttime environments.

103. According to Christopher Kyba of the German Research Center for Geoscience, for nocturnal animals, "the introduction of artificial light probably represents the most drastic change human beings have made to their environment."

104. Glare from artificial lights can also impact wetland habitats that are home to amphibians such as frogs and toads, whose nighttime croaking is part of the breeding ritual. Artificial lights disrupt this nocturnal activity, interfering with reproduction and reducing populations.

105. Birds that migrate or hunt at night navigate by moonlight and starlight. Artificial light can alter their behavior, attracting them or causing them to wander off course.

106. Many insects are drawn to light, but artificial lights can create a fatal attraction and may be a primary driver of massive worldwide insect decline. (Owens 2018)[18]

[18] https://onlinelibrary.wiley.com/doi/epdf/10.1002/ece3.4557

107. Thus, for wildlife, the less artificial light, the better; "minimum intensity, maximum off-duration". *See Manville*, USFWS 2007.

108. The use of artificial lights is of particular impact to the area's population of Northern Long-eared Bat (*Myotis septentrionalis*). The Northern Long-eared Bat is listed as "Threatened wherever found" under the federal Endangered Species Act,[19] and due to its nocturnal nature could be affected by the project's high-intensity nighttime lights.

109. For the Northern Long-eared Bat, the U.S. Fish & Wildlife Service recommends seeking to "minimize light pollution by angling lights downward or via other light minimization measures."[20] The same applies to Maine's endangered Little Brown Bat and the rest of our eight bats all considered "species of greatest conservation need" by the Maine Department of Inland Fisheries & Wildlife.

110. The lighting also has an impact on Merrymeeting Bay's bald eagle population. Although the bald eagle is no longer protected under the Maine Endangered Species Act (MESA) and the Federal Endangered Species Act (ESA), it continues to be protected under the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (Eagle Act) and associated regulations. When listed under the MESA, one-quarter mile (1,320 ft.) regulatory Essential Habitat zones were created around all eagle nests. Here, there are at least four bald eagle nest sites in the immediate vicinity of the Chop Point towers, and at least eleven more in a somewhat broader area. The one-quarter mile protection zones persist as management guidelines under the Eagle Act. See Figure 7, below. Second only to Cobscook Bay, Merrymeeting Bay has been the next most successful area in the state for bald eagle recovery.

[19] https://ecos.fws.gov/ecp0/profile/speciesProfile.action?spcode=A0JE
[20] Key to the Northern Long-Eared Bat 4(d) Rule for Federal Actions that May Affect Northern Long-Eared Bats. Available online at https://www.fws.gov/Midwest/endangered/mammals/nleb/pdf/KeyFinal4dNLEB_FedAgencies17Feb2016.pdf

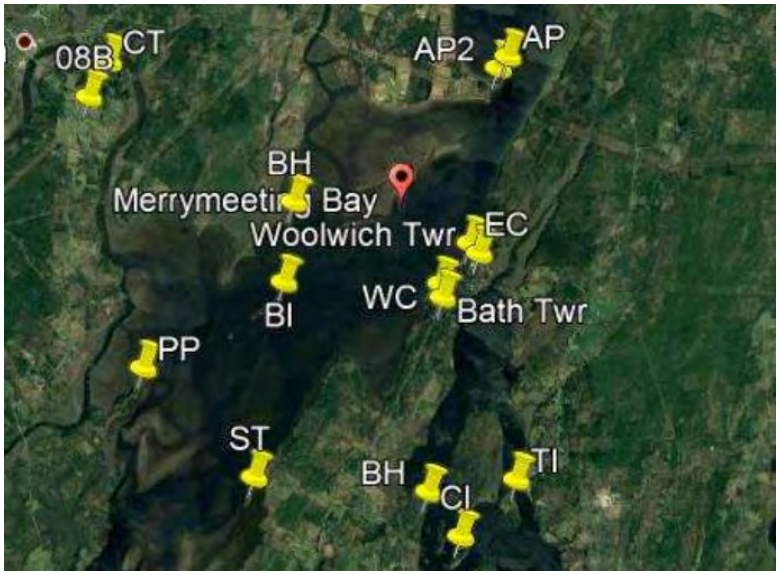


Figure 7: A map of surveyed bald eagle nests (yellow pins). The WC and EC pins are closest to the Chop Point towers.

111. These impacts, plus impacts to the insects, fish, and mammals that thrive in FOMB's conservation lands, undermine the purpose and value of FOMB's easements and other conservation lands as well as FOMB's mission and years of work.

B. The Towers Cause Harm to Ed Friedman's Use of His Property

112. Plaintiff Ed Friedman owns a piece of residential property on Abbagadasset Pt. in Bowdoinham that lies 1.6 miles from the eastern Chops Point tower.

113. He chose the property because of its location and view, which was unmarred by significant artificial light.

114. The CMP lights shine into Mr. Friedman's living room, dining room, kichen, office, porches, and bedroom.

115. The CMP lights have caused a decline in the resale value of Mr. Friedman's property.

116. Ed Friedman has more than 40 years as an instrument rated private pilot and 12 years as a commercial rotorcraft pilot with an active helicopter business in the Bay area.

117. Along with wildlife surveys and other environmental work, Friedman's helicopter business focuses on aerial photography and scenic flights.

118. The lights have negatively impacted the economic value of Mr. Friedman's helicopter business, by diminishing the rural nature of the area.

119. Friedman is a Maine Guide and also has operated a kayak business since 1985 offering guided tours and instruction. At times he has spent five days a week on the Bay with customers.

120. The lights have negatively impacted the economic value of Mr. Friedman's kayak business, by diminishing the rural nature of the area.

121. Friedman is disabled with lymphoplasmacytic lymphoma, an incurable type of non-Hodgkins lymphoma. His treating oncologist and osteopath both have recommended he minimize exposure to low-level radiofrequency radiation (RFR) to mitigate the progression of his lymphoma-related symptoms.

122. The proposed radar system would emit the kind of RFR Friedman's doctors have recommended he not be exposed to.

C. The Towers Cause Harm to Colleen Moore's Use of Her Property

123. Plaintiff Colleen Moore is a resident of Pleasant Point in Topsham, ME.

124. She owns residential property on the shore of the Bay in direct view of the towers.

125. Moore purchased her property in part due to its proximity to the water, as she is a world-class canoe racer.

126. The towers' lighting impairs her ability to practice her sport. When reflected off the water or in her peripheral vision, the blinking of the lights distract her from her focus on the water and her canoe stroke. That is because competitive canoe racing requires keeping close eye

on the environment to react to and take advantage of the environment, including waves, wind, etc. But the flashing of the lights impairs her ability to do that.

127. As a result, Moore is not able to practice at her property in the mornings.

128. The lights shine through into her, directly onto her deck, into her living room and home office, and into the dining room.

129. If Moore sits and looks at the lights from her deck or living room for a few minutes, she experiences some amount of nausea.

130. The lights have impaired Moore's ability to sleep in certain parts of her home.

131. At high tide, the light reflects off the water and increases the impact of the lights.

132. Moore experiences particular health sensitivity to RFR, and makes efforts to reduce exposure to RFR.

133. The lights have caused a decline in Moore's use and enjoyment of her property and also in the resale value of Moore's property.

D. The Towers Cause Harm to Kathleen McGee's Use of Her Property

134. Plaintiff Kathleen McGee owns, through an LLC, a share in shoreline property in Bowdoinham, ME.

135. McGee chose the property because of its location and view, which was unmarred by significant artificial light.

136. Her property is partly used for residential purposes, but she also has an apartment that she rents out.

137. The lights shine into the bedroom of her house, and into the living room and kitchen of the apartment she rents.

138. The lights have decreased the rental value of Ms. McGee's apartment.

139. The lights have caused a decline in McGee's use and enjoyment of her property and also in the resale value of her property.

I. The Active Aircraft Detection Lighting System's blanketing of a nearly 2,400 square miles with microwave radiation frequencies will exacerbate impacts on properties, people and wildlife in the area.

140. As described above, CMP has proposed to install an Active Aircraft Detection Lighting System on the Chops Point towers.

141. Despite the fact that CMP does not yet have permission from the FCC to operate the Active System, it is still moving forward with installation.

142. In a letter of May 11, 2020, CMP indicated that it is "expeditiously moving forward" with the installation of the Active Aircraft Detection Lighting System.

143. In an email of July 13, 2020, CMP wrote that "Beginning Wednesday, July 29, weather dependent, we will begin installing the radar system on the Woolwich-side lattice tower. Please anticipate some helicopter noise and some increased traffic on Chops Point Road. Given the anticipation for the radar system's installation, especially the presence of the helicopter, this activity is sure to draw attention. **For safety reasons, please do not go near the area**." (Emphasis added.)

144. The Active System, if operated, would blanket Merrymeeting Bay in X-band radar at radiofrequencies of 9.2-9.5 GHz.

145. The Active System would extend radar radiofrequency radiation to an area of 2,396 square miles surrounding the towers.[21]

146. The radar would then turn the lights on and off, depending on whether aircraft are detected approximately 3.5 miles from the towers present.

147. But while the Active System would ameliorate the light impacts of the towers, it would create a new impact potentially injurious to residents and the Bay's special environment.

[21] Ex. 7 (Viewshed Analysis) (Based on correspondence with DETECT, the radar system extends to a radius of 24 nautical miles, which covers a circle of 2396 square miles.)

148. Illustrative of this is a 2010 meta-analysis of peer-reviewed literature investigating possible effects of electromagnetic radiation (EMR) on humans and wildlife. Figure 2 from that report is replicated below:

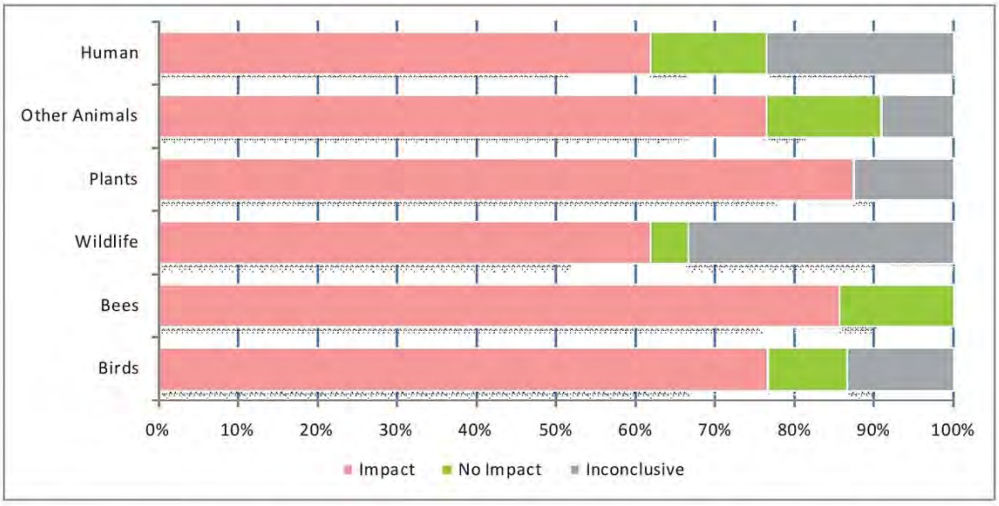


Fig. 2, Proportion of study results in various groups of organisms (n=919). The "Impact" (in red) indicates percentage of studies that reported harmful effect of EMR. (*Report on Possible Impacts of Communication Towers on Wildlife Including Birds and Bees, Ministry of Environment and Forest, Government of India, 2010*)

149. According to the U.S. Fish & Wildlife Service ("USFWS"), the Service is "growing concerned about potential impacts of tower radiation on resident and migrating birds and bats, listed species under our jurisdiction, and other potentially listed species under our jurisdiction, and other potentially impacted living resources including bees."[22]

150. The impacts identified by USFWS are particularly germane to the Bay's recovering bald eagle population: "A. Balmori (2003) provided USFWS preliminary research from Valladolid, Spain, showing strong negative correlations b/w levels of tower-emitted microwave radiation and bird breeding, nesting, and roosting in vicinity."[23]

151. Balmori's research published in 2005 showed productivity of bird nests within 200 meters of the RFR antenna to be approximately half of nests located beyond 300 meters

[22] Manville, Albert M., Senior Wildlife Biologist, USFWS, *U.S. Fish & Wildlife Service Concerns Over Potential Radiation Impacts of Cellular Potential Radiation Impacts of Cellular Communication Towers on Migratory Birds and Communication Towers on Migratory Birds and Other Wildlife Other Wildlife – Research Opportunities.* (May 10, 2007)
[23] *Id*.

from the stations, a significant reduction. He also found 12 nests (40%) in proximity to the antenna did not have chicks whereas only 1 nest (3.3%) beyond 300 meters was barren.

152. Sheridan, *et al.* in 2015 studied the effects of radar on avian populations and found that birds appeared to avoid stationary radar units and when faced with mobile radar units, these tended to elicit escape behavior in the birds.

153. Nicholls, *et al.* in 2009 found activity and foraging per unit of time significantly reduced in bats when exposed to EMR vs the control populations. They conducted this investigation hypothesizing that perhaps EMR transmitters could be deployed at wind farms to deter turbine mortality when bats hunted insects attracted to lights and or were caught up in blade eddies.

154. Similarly, the radar installation may have an impact on the base of the food chain. Thielens, *et al.* 2018, found insects show a maximum in absorbed radio frequency power at wavelengths that are comparable to their body size. They show a general increase in absorbed radio-frequency power above 6 GHz (until the frequencies where the wavelengths are comparable to their body size), which indicates that if the used power densities do not decrease, but shift (partly) to higher frequencies (*as with radar*, emphasis added), the absorption in the studied insects will increase as well. A shift of 10% of the incident power density to frequencies above 6 GHz would lead to an increase in absorbed power between 3–370%. This could lead to changes in insect behaviour, physiology, and morphology over time due to an increase in body temperatures, from dielectric heating.[24]

155. In 2011, the International Agency for Research on Cancer/World Health Organization (IARC/WHO) classified radiofrequency radiation (RFR) in frequencies from 30 KHz-300 GHz as a Group 2B possible human carcinogen.[25]

[24] Thielens, A., Bell, D., Mortimore, D.B. et al. Exposure of Insects to Radio-Frequency Electromagnetic Fields from 2 to 120 GHz. Sci Rep 8, 3924 (2018). https://doi.org/10.1038/s41598-018-22271-3
[25] https://www.iarc.fr/wp-content/uploads/2018/07/pr208_E.pdf

156. Since 2011 further research has been done in this field. A ten-year study by the National Institutes of Health's National Toxicology Program found "clear evidence" of heart tumors in male rats, "some evidence" of brain tumors in male rats, "some evidence" of adrenal tumors in male rats. The study also found significant increases in DNA damage to the frontal cortex of the brain in RFR exposed male mice, the blood cells of female mice, and the hippocampus of male rats.[26]

157. As described above, the active detection system proposed by CMP would utilize X-band radar at radiofrequencies of 9.2-9.5 GHz, squarely within what the WHO defined as a possible human carcinogen.

158. Plaintiffs are also concerned about the possible non-cancer impacts of the radar system's RFR. Lamech, 2014 found the most common RFR symptoms from RFR-emitting smart electric meters to be insomnia (48%), headaches (45%), tinnitus (33%), lethargy (32%), cognitive disturbance (30%), dysesthesias, including nerve pain, neuropathy, burning sensations, tremors, cold extremities, and poor circulation (20%), dizziness-loss of balance (19%), heart palpations (16%), and nausea (15%).

159. The relatively common suite of symptoms (and related ones) described by Lamech and many others, are indicative of adverse biological effects some suffer from microwave exposure. Because they were first observed and documented in developers of radar, they were diagnosis as radar sickness or "microwave illness." (Carpenter, 2015)[27] And, as Goldsmith noted in 1997[28]: "These findings suggest that RF exposures are potentially carcinogenic and have other health effects. Therefore, prudent avoidance of unneeded exposures is recommended as a precautionary measure."

160. There are also other problems with the proposed radar system. The FAA conducted a "Long Range Radar Report" with the Department of Defense and Department of

[26] https://ntp.niehs.nih.gov/whatwestudy/topics/cellphones/index.html
[27] https://pubmed.ncbi.nlm.nih.gov/26556835/
[28] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1469943/

Homeland Security, and determined that there would be an "[i]mpact highly likely to Air Defense and Homeland Security radars."[29]

161. Thus, if the nuisance lighting system is allowed to continue in operation, the proposed Active System will open up a new range of impacts on surrounding properties, residents and Merrymeeting Bay's unique wildlife and ecological resources.

V. Causes of Action

Cause One: Statutory Nuisance per M.R.S. 17, §2701
(All Plaintiffs Against Defendant)

162. 17 M.R.S. § 2701 provides that "Any person injured in his comfort, property or the enjoyment of his estate by a common and public or a private nuisance may maintain against the offender a civil action for his damages, unless otherwise specially provided."

163. Nuisances include the "erection, continuance or use of any building or place for the exercise of a trade, employment or manufacture that, by noxious exhalations, offensive smells or other annoyances, becomes injurious and dangerous to the health, comfort or property of individuals or of the public." 17 M.R.S. § 2802.

164. A building that is "offensive to the neighborhood" may be a nuisance. 17 M.R.S. § 2804.

165. Light impacts are explicitly contemplated by Maine statute as among the methods by which something may be a nuisance. *See* 17 M.R.S. § 2793 (lights are a nuisance when they "impair the vision of the driver of any motor vehicle upon said street or highway" or simulate "the flashing or rotating lights used on school buses, police, fire or highway vehicles, except safety signaling devices required by law.").

166. A successful nuisance suit can result in damages and costs, and also an order that "the nuisance [be] abated or removed at the expense of the defendant." 17 M.R.S. § 2702.

[29] Ex. 6.

167. Here, CMP has, through its unnecessary lighting system, created an annoyance injurious and dangerous to the health, comfort and property of individuals and the public.

Cause Two: Public Nuisance
(All Plaintiffs Against Defendant)

168. A public nuisance is actionable if "the defendant has violated or threatens to violate a public right and the plaintiff has suffered an injury different in kind from that sustained by the public generally." *Hanlin Group v. Intern. Minerals & Chemical Corp*., 759 F. Supp. 925, 935 (D. Me. 1990).

169. In determining whether a nuisance exists, courts look to: (a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. Restatement (Second) of Torts §821B (1979)

170. Here, the towers' lighting system separately and or inclusive of the in-process AADLS meets all three tests for a public nuisance.

171. First, it involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.

172. Second, it is proscribed by a statute, ordinance or administrative regulation. That is because the westerly Chop Point tower falls within the City of Bath's Natural Resource Preservation Overlay District. The Natural Resource Preservation Overlay District is "established along natural corridors and boundary areas associated with water bodies, wetlands, significant wildlife habitat, and unique natural and environmentally sensitive features."[30] Its purpose is to allow only "limited residential development while protecting fragile shoreline ecological systems that, if developed, would adversely affect water quality, wildlife and aquatic

[30] City of Bath Land Use Code, Section 8.18 (A).

habitat and biotic systems, or ecological relationships."[31] Here, the towers' lighting system is not "limited residential development," and so is proscribed by ordinance.

173. And in Woolwich, the easterly tower is proscribed by the Woolwich Planning Code which subjects development in the Rural District to the same restrictions as in the Resource Protection District namely: *C. Uses Permitted only by Special Exception Permits: After review and approval by the Planning Board on finding that:1. The proposed use is not harmful to natural resources or scenic values in, nor incompatible with use of, the surrounding area.2. The proposed use will not degrade the air or water or soil, and is not harmful to natural resources or scenic values in the area of proposed use.* Here, the towers' lighting system is not compatible with use of the surrounding area, and so is proscribed by ordinance.

174. On information and belief, there was no review and approval by the Woolwich Planning Board for a Special Exception Permit.

175. In Woolwich, no project application was even submitted to the Planning Board.

176. And third, the lighting system by itself (or inclusive of the in-process AADLS) is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

177. Plaintiffs separately and or as FOMB members are all persons and entities who have suffered injury different in kind from that sustained by the public generally. They are owners of specific properties and property rights impacted by the lights, and or users of Merrymeeting Bay

178. FOMB, in addition to its specific property rights, suffers particularized injury different in kind from that sustained by the public generally due to its charter to preserve, protect and improve the unique ecosystems of Merrymeeting Bay. *See Sierra Club v. Morton*, 405 U.S. 727 (1972).

[31] *Id*.

VI. Relief Requested

179. Plaintiffs request the following relief:

a. An injunction requiring CMP to deactivate the Chops Towers lighting system.

b. An injunction preventing CMP from installing its proposed Active Aircraft Detection Lighting System.

c. Damages in an amount to be determined at trial.

d. Costs

e. Any other relief this Court may determine to be just.

VII. Jury Demand

179. Plaintiffs hereby demand a Trial by Jury on all issues and claims so triable.

Respectfully Submitted,

/s/Bruce M. Merrill
Bruce Merrill (Me. Bar No. 007623)
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101-4613
Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice to Be Filed*
David Lanser, *Pro Hac Vice to Be Filed*
Law Offices of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

Friends of Merrymeeting Bay

P.O. Box 233, Richmond, ME 04357 www.fomb.org

12/24/19

Doug Herling, President, CEO
c/o Ken Farber, Senior Counsel
Central Maine Power
83 Edison Dr.
Augusta, ME 04336

Re. Chops Pt. Towers & Crossing, Merrymeeting Bay
Via E-mail to: kenneth.farber@avangrid.com

Doug,

As you no doubt have heard, the new CMP towers at the Chops crossing intrude dramatically on Merrymeeting Bay airspace and viewshed with their excessive and as it turns out, unneeded lighting. We understand too that an active aircraft detection lighting system is being considered as an alternative and this could worsen things further, blanketing the area with radar microwaves, often harmful to people and with evidence of adverse behavioral changes to birds, bats and other wildlife. For a densely populated area, this is a particularly bad idea. Friends of Merrymeeting Bay (FOMB) is adamantly opposed to such a system.

According to federal statute (14 CFR § 77.17 a. 2.), contrary to popular opinion, these towers even unlit, are not obstructions to air navigation. Fortunately, the simplest solution, turning the lights off, provides the most satisfactory outcome for all parties and at the least cost. We are requesting CMP extinguish the lights and issue a Notice to Airmen (NOTAM) of unlit towers and wire crossing at these coordinates, at least pending resolution of a FAA Marking and Lighting Study which we ask you to apply for. Given the update cycles of FAA paper charts and that these towers are charted, the NOTAM need should expire when the pertinent charts are updated (6 month cycle for VFR Sectionals). Our recommendation is current unlit marking balls be kept in place and only if necessary, additional unlit balls marking the lower wires be installed. Please see below for details.

Thank you,

Ed Friedman, Chair
Friends of Merrymeeting Bay

Contents

2. Merrymeeting Bay, Chops
3. Dark Skies
4. Area Aviation
5. FAA Obstruction, Marking & Lighting Advisory Circular
6. FAA Obstruction Standards
7. Alternatives
   7A. Active ADLS
   7B. Passive ADLS
   7C. Lights Off-NOTAM
8. Recommendation
9. Exhibits

1. Friends of Merrymeeting Bay (FOMB) is an environmental non-profit with a member-ship of approximately 450 households. Our mission is to preserve and protect the unique ecosystems of Merrymeeting Bay and we do this through research, advocacy, education and land conservation. We have been here since 1975 and because we are uniquely holistic in our approach, sometimes our activities extend throughout the Gulf of Maine and beyond. www.fomb.org I write this not only on behalf of FOMB but also from the perspective of more than 40 years as an instrument rated private pilot and 12 years as a commercial rotorcraft pilot with an active helicopter business in the Bay area.

2. Merrymeeting Bay is an estuarine freshwater tidal riverine inland delta at the confluence of six rivers including two of Maine's largest, the Kennebec and Androscoggin. Our watershed includes nearly 40% of the state and part of NH and drains via the Chops and Kennebec River about 17 miles to the ocean. The upper Bay runs from the north end of Swan Island to Abbagadasset Pt., the middle Bay from Abbagadasset Pt. to the Chops and the lower Bay from the Chops to Thorne Head. Merrymeeting Bay is listed as an Important Bird Area by the American Bird Conservancy. It is the largest U.S. staging area for migratory waterfowl north of Chesapeake Bay and the second most successful recovery area for bald eagles in the state after Cobscook Bay. The Bay is globally unique and significant not just because of its geography, hydrography and varied bird life but for its populations of rare plants inhabiting the inter-tidal and 12 species of diadromous fish using the Bay for spawning and nursery habitat. It is the only body of water providing this habitat for all the migratory fish species in the Gulf of Maine. There are approximately eight bat species here, a plethora of songbirds and a seasonally consistent population of seals in the vicinity of the Chops crossing.
   http://www.friendsofmerrymeetingbay.org/fombnew/pages/about_bay/about_bay.htm

3. Dark Skies. Particularly for our proximity to population centers, Merrymeeting Bay has until erection of the new MPRP towers at Abbagadasset Pt. and the Abbagadasset River, been blessed with a wonderfully dark, peaceful and quiet night sky. Addition of the FAA approved catenary crossing lighting scheme at the Chops has ratcheted up the disturbance beyond belief. Virtually everyone around the Bay considers our airspace violated by the new night lights and adverse effects on wildlife even with blinking rather than steady lights can be profound. For wildlife, the less artificial light, the better; "minimum intensity, maximum off-duration". **(Ex. 1, Manville, USFWS 2007, PDF pg. 11)**

   A wide variety of increasing problems and dissatisfaction with light pollution of the night skies has spawned an International Dark Skies movement. https://www.darksky.org/ . Artificial lights disrupt ecosystems critically altering nighttime environments. According to research scientist Christopher Kyba, for nocturnal animals, "the introduction of

artificial light probably represents the most drastic change human beings have made to their environment."

"Predators use light to hunt, and prey species use darkness as cover," Kyba explains "Near cities, cloudy skies are now hundreds, or even thousands of times brighter than they were 200 years ago. We are only beginning to learn what a drastic effect this has had on nocturnal ecology." https://www.darksky.org/light-pollution/wildlife/

Glare from artificial lights can also impact wetland habitats that are home to amphibians such as frogs and toads, whose nighttime croaking is part of the breeding ritual. Artificial lights disrupt this nocturnal activity, interfering with reproduction and reducing populations.

Birds that migrate or hunt at night navigate by moonlight and starlight. Artificial light can cause them to wander off course and toward the dangerous nighttime landscapes of cities. Every year millions of birds die colliding with needlessly illuminated buildings and towers. Migratory birds depend on cues from properly timed seasonal schedules. Artificial lights can cause them to migrate too early or too late and miss ideal climate conditions for nesting, foraging and other behaviors.

Many insects are drawn to light, but artificial lights can create a fatal attraction and may be a primary driver of massive worldwide insect decline. (Owens 2018) https://onlinelibrary.wiley.com/doi/epdf/10.1002/ece3.4557 Declining insect populations negatively impact all species that rely on insects for food or pollination. Some predators exploit this attraction to their advantage, affecting food webs in unanticipated ways.

Thielens, et al 2018, found insects show a maximum in absorbed radio frequency power at wavelengths that are comparable to their body size. They show a general increase in absorbed radio-frequency power above 6 GHz (until the frequencies where the wavelengths are comparable to their body size), which indicates that if the used power densities do not decrease, but shift (partly) to higher frequencies (*as with radar, emphasis added*), the absorption in the studied insects will increase as well. A shift of 10% of the incident power density to frequencies above 6 GHz would lead to an increase in absorbed power between 3–370%. This could lead to changes in insect behaviour, physiology, and morphology over time due to an increase in body temperatures, from dielectric heating. https://www.nature.com/articles/s41598-018-22271-3 In a dramatic example of how aphids appear responding to radar 14 miles away, Dr. John Nash Ott has this short clip: https://www.youtube.com/watch?v=VKEnAPt4KEQ

4. Area Aviation. The old towers had been on site, (unlit) for more than 80 years according to CMP as quoted in The Times Record on 7/23/19. The Abbbagadasset Pt. and River towers were also unlit until the MPRP project. During this historic period, prior to escalating fuel prices following the 1973 oil crisis, area air traffic was substantially greater than in recent years, particularly with the Brunswick Naval Air Station closure and sale of Merrymeeting field to a developer. Merrymeeting Field (08B) in Bowdoinham began operations in 1945, Wiscasset (KIWI) in 1961 and Brunswick (now KBXM) in 1935 with alternating civil and military use over the years. Merrymeeting, now a private short field with turf runway open to the public is 2.6 nautical miles (NM) from the Chops, Wiscasset 5.1 NM and Brunswick 6.8 NM.

5. FAA Obstruction, Marking and Lighting Advisory Circular. **(Ex. 2, PDF pg. 35)** This 8/17/18 edition of the Advisory Circular (AC) sets forth standards for marking and lighting *obstructions that have been deemed to be* a hazard to air navigation. The FAA

recommends the guidelines and standards in this AC for determining the proper way to light and mark obstructions affecting *navigable airspace*.

> **Navigable airspace means airspace** at and above the *minimum flight altitudes* prescribed by or under this chapter, including airspace needed for safe takeoff and landing. **(**49 U.S. Code § 40102. Definitions**)**
>
> **§ 91.119 Minimum safe altitudes**: General
>
> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
>
> (a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
>
> (b) Over *congested areas*. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft. (*The FAA does not define "congested area." "Rather than publish a definition so pilots can know how to shape their aeronautical behavior, the FAA purposefully doesn't—it comes up with its definition on a case-by-case basis. The FAA says it does that so it can balance the pilot's interests with the need to protect persons and property. In enforcement actions, the FAA has successfully declared that a congested area includes a group of people on an airport ramp, sunbathers on a beach, a small subdivision covering less than a quarter mile, and traffic on an Interstate highway."* *https://pilot-protection-services.aopa.org/news/2016/january/15/congested-area*)
>
> **(c)** Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.
>
> (d) Helicopters, powered parachutes, and weight-shift-control aircraft. If the operation is conducted without hazard to persons or property on the surface -
>
> (1) A helicopter may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section, provided each person operating the helicopter complies with any routes or altitudes specifically prescribed for helicopters by the FAA; and
>
> (2) A powered parachute or weight-shift aircraft may be operated at less than the minimums prescribed in paragraph (c) of this section.

This AC does not constitute a regulation and, in general, is not mandatory*. However, a sponsor proposing any type of construction or alteration of a structure that* ***may*** *affect the National Airspace System (NAS) is required under the provisions of Title 14 Code of Federal Regulations to notify the FAA by completing the Notice of Proposed Construction or Alteration form (FAA Form 7460-1).* These guidelines *may* become mandatory as part of the FAA's determination **(Ex. 3 & 4, PDF pgs. 135, 141)** and *should* (not shall) *be followed on a case-by-case basis, as required.* (Emphasis added).

We interpret this to mean for structures that qualify as obstructions affecting navigable airspace, notification to the FAA via Form 7460-1 is required to ascertain whether or not they *may* be a hazard to air navigation vis a vis marking and lighting, but in general lighting and marking requirements are recommendations, not requirements. An FAA determination of a qualifying obstruction (see 6.) could become mandatory if it is an obstruction *and* if deemed to be an air navigation hazard. But, there is quite a bit of flexibility in those determinations and their "case by case" details. The prerequisite is whether or not a structure meets the obstruction standard. If a structure has, correctly or incorrectly already been subject to an FAA determination under 7460-1, it probably is necessary for a re-filing of 7460-1 to change that status if only to revise notifications to airmen via navigation charts. (4. *Why do I need to request a marking and lighting change? To remain in compliance with Title 14 CFR Part 77 and enable the FAA to ensure the change is captured in the Digital Obstacle File and made available to the flying community*.
https://oeaaa.faa.gov/oeaaa/external/searchAction.jsp?action=malFAQs).

§ 77.29 Evaluating aeronautical effect notes at (b), If you withdraw the proposed construction or alteration or revise it so that it is no longer identified as an obstruction, or if no further aeronautical study is necessary, the FAA may terminate the study

6. FAA Obstruction Standards. (14 CFR § 77.17). Any structure 499' above ground level (AGL) is considered an obstruction. The oft cited 200' threshold for obstacle lighting and marking comes from number (a) 2. of this section but its qualifiers regarding proximity to qualifying airports and subsequent conditions have in the instant case been overlooked.

> (a) An existing object, including a mobile object, is, and a future object would be an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:
>
> **(2)** A height that is 200 feet AGL, or above the established airport elevation, whichever is higher, within 3 nautical miles of the established reference point (*center point*) of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional nautical mile from the airport up to a maximum of 499 feet.

At 5.1 miles and a runway length of 3,397', Wiscasset (KIWI) is the closest qualifying airport to the Chops. **(Ex. 5, PDF pg. 147)** If the Chops towers were within 3 miles of KIWI, they would be considered an obstacle to air navigation at 200'. Since they are 5 miles from KIWI however, 100' is added for each additional mile up to a maximum of 499'. ***At 5 miles then, to meet the qualifying standard and be possibly deemed an obstruction to air navigation, the towers need to be at least 400' AGL. At 240' AGL, they simply are too short.*** And, *even if* the Advisory Circular standards were mandatory, these towers would not reach the minimum height to qualify as possible obstructions.

The unlit towers themselves do not appear, by definition, obstructions to air navigation. For their distance from KIWI, the closest qualifying airport, they fall substantially below what would be the 400' AGL threshold. Including actual transmission or catenary crossing lines in this evaluation, which is why the towers are present and which are less obviously visible, we look at minimum safe altitudes for air navigation under visual flight rules (VFR) and these depend on a case by case evaluation of whether the area is "congested" or not. If this area is considered congested which it no doubt would be when Chop Pt. School has students, campers or possibly just staff present, then minimum safe altitude is 1,000' over the highest obstacle which would be the 240' tower or 1,240 AGL. The same thing applies on West Chop Pt. because of the subdivision.

Even if the catenary lines were considered to be in an "uncongested area" according to **§ 91.119,** 500' above the surface would be the required minimum safe altitude unless over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure. Since the waterway measures 790' wide at the Chops **(Ex. 6, PDF pg. 149)**, a float plane flying up the middle would only have 400' on either side to shore and from the channel center to the closest Chop Pt School structure (a cabin) would still not be 500'. Offset to the west an aircraft could attain the necessary setback from Chop Pt. School but would come too close to the tower on West Chop Pt. and if not careful, some of the homes there. For fixed wing aircraft, a flight through the Chops below 500' AGL would not be in navigable airspace.

The only aircraft exempted from the minimum safe altitude requirements are helicopters, powered parachutes and weight-shift controlled aircraft. ("Flying Neighborly" has been a program of HAI, Helicopter Association International since 1982. Their recommendation is when avoidance is not possible, pilots flying VFR flights over noise-sensitive areas should make every effort to fly at not less than 2,000 feet above the surface, weather permitting, even though flight at a lower level may be consistent with the provisions of FAR 91.79, Minimum Safe Altitudes."
https://www.portlandoregon.gov/transportation/article/701922 The Fly Neighborly Guide is one most helicopter pilots are familiar with and of course every licensed pilot knows to check charts and NOTAMS before flying into an unknown area where towers may be present. Pilots are also taught when confronted with transmission towers, to fly over them rather than risk hitting an unseen fine wire between them.

7. Alternatives. All of which probably require the filing of Form 7460-1 with the FAA.

7A. Active Aircraft Detection Lighting Systems (AADLS). Recognizing the Dark Sky issues discussed in Section 3 above, revised FAA Obstruction, Marking & Lighting Advisories now offer ADLS as an alternative to recommended lighting guidelines. Unfortunately, these systems, as approved by the FAA, use *active* radar to distinguish aircraft in the vicinity structures, whether wind farms or transmission towers.

Pros: Full-time lighting of structures is avoided.

Cons: High costs, particularly at scales less than for large multi-structure scale deployments like wind farms. Adverse health and behavioral effects to people and wildlife. In 2011, the International Agency for Research on Cancer/World Health Organization (IARC/WHO) classified radiofrequency radiation (RFR) in frequencies from 30 KHz-300 GHz as a Group 2B possible human carcinogen.
https://www.iarc.fr/wp-content/uploads/2018/07/pr208_E.pdf RFR has been shown to cause carcinogenic and non-carcinogenic effects. Having worked on environmental issues for 50 years, I consider RFR proliferation to be the most important toxics issue of our time if only because of its ubiquitous nature. Others, like Bandara & Carpenter, (2018) **(Ex. 7, PDF pg. 151)** also believe the planetary aspect of exposure warrants immediate further attention.

The IARC cancer classification includes all sources of RFR. The exposure from mobile phone base stations, Wi-Fi access points, smart phones and meters, laptops, radar and tablets can be long-term, sometimes around the clock, both at home, work and at school. For children this risk may be accentuated because of a cumulative effect during a long lifetime use. Developing and immature cells can also be more sensitive to exposure to RF radiation.

Since 2011 further research has been done in this field and the "gold standard" 10 year-$30 million National Toxicology Program (NTP is part of the National Institutes of Health) stands out, finding "*clear evidence*" of heart tumors in male rats, "*some evidence*" of brain tumors in male rats , "*some evidence*" of adrenal tumors in male rats. The study also found significant increases in DNA damage the frontal cortex of the brain in RFR exposed male mice, the blood cells of female mice, and the hippocampus of male rats.
https://ntp.niehs.nih.gov/whatwestudy/topics/cellphones/index.html?utm_source=direct&utm_medium=prod&utm_campaign=ntpgolinks&utm_term=cellphone

Since the NTP study and independent confirmation in a similar study by the Ramazzini Institute in Italy https://www.ncbi.nlm.nih.gov/pubmed/29530389 , many scientists have been calling for a reevaluation of the WHO classification, (Miller, et al 2019 https://www.frontiersin.org/articles/10.3389/fpubh.2019.00223/full) to Group 2A-probable or Group 1-known human carcinogen. (Belpomme, et al., 2018 https://ecfsapi.fcc.gov/file/12103008105187/nonionizing%20radiation%20international%20perspective%20Belpomme%20Hardell%20Carpenter%202018.pdf)

Cancers can have long latency periods, often 30 years before detection. In contrast, non-cancer effects from RFR exposure can occur very rapidly from minutes to days with very debilitating effects. As an AADLS is considered at the Chops, it is critical to understand proximity to radar is where electromagnetic sensitivity first became commonly known. Microwave generating equipment first became prevalent during World War II with the development of radar. Soviet bloc countries reported that individuals exposed to microwaves frequently developed headaches, fatigue, loss of appetite, sleepiness, difficulty in concentration, poor memory, emotional instability, and labile cardiovascular function, and established stringent exposure standards.

For a variety of reasons these reports were discounted in Western countries, where the prevailing belief was that there could be no adverse health effects of electromagnetic fields (EMFs) that were not mediated by tissue heating. The reported Soviet effects were at lower intensities than those that cause heating. However, there were several accidental exposures of radar operators in Western countries that resulted in persistent symptoms similar to those described above.

The Soviets irradiated the US Embassy in Moscow with microwaves during the period 1953-1975, and while no convincing evidence of elevated cancer rates was reported, there were reports of "microwave illness". Officials passed these complaints off as being due to anxiety, not effects of the microwave exposure. There is increasing evidence that the "microwave syndrome" or "electro-hypersensitivity" (EHS) is a real disease that is caused by exposure to EMFs, especially those in the microwave range.

The reported incidence of the syndrome is increasing along with increasing exposure to EMFs from electricity, WiFi, mobile phones and towers, smart meters and many other wireless devices. Why some individuals are more sensitive is unclear. While most individuals who report having EHS do not have a specific history of an acute exposure, excessive exposure to EMFs, even for a brief period of time, can induce the syndrome. **(Ex. 8, Carpenter 2015, PDF pg. 155)**.

Adverse effects of RFR are not limited to people but effect wildlife as well. Testimony by The Environmental Heath Trust (www.ehtrust.org) regarding proposed expansion of cell coverage in Teton National Park does an excellent job at providing many top-quality references to wildlife effects. **(Ex. 9, Davis, 2018, PDF pg. 162)**. Research specific to radar effects on bats includes Nicholls, (2009)

https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0006246&type=printable and on birds Sheridan (2015) https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2728&context=icwdm_usdanwrc

As bad as the tower lights are, an Active ADLS is far worse because of the health risks and again, no active deterrent is needed. Exposure to electromagnetic fields is considered high risk by major insurers like Loyd's of London. In request for clarification on this policy language: *General Insurance Exclusions: 31) directly or indirectly arising out of, resulting from or contributed to by electromagnetic fields, electromagnetic radiation, electromagnetism, radio waves or noise*., this response was received on Feb. 18, 2015 from CFC Underwriting LTD, London, UK agent for Lloyd's: "'The Electromagnetic Fields Exclusion (Exclusion 32) is **a General Insurance Exclusion and is applied across the market as standard. The purpose of the exclusion is to exclude cover for illnesses caused by continuous long-term non-ionising radiation exposure i.e. through mobile phone usage."** https://nowhere.news/index.php/2018/10/27/lloyds-refuses-liability-coverage-for-emf-radiation-exposure-mobile-phones/ FOMB is vehemently opposed to AADLS.

7B. Passive Aircraft Detection Lighting Systems (PADLS). Passive radar detection using only receivers, takes opportunistic advantage of commercial broadcasting in the vicinity to discern aircraft, noting the differences using multiple receives, in when those broadcast signals are penetrated by the target and then determining location. (Griffiths, 2017) https://in.bgu.ac.il/en/engn/ece/radar/Radar2017/Documents/Prof.%20Hugh%20Griffiths%20-%20Passive%20Radar%20-%20From%20Inception%20to%20Maturity.pdf (Limnaios, 2019) https://www.researchgate.net/publication/332119662_Passive_Radars_and_their_use_in_the_Modern_Battlefield ; (Hensoldt, 2019) https://www.hensoldt.net/fileadmin/hensoldt/Solutions/Air/Surveillance_Reconnaissance/0570_18_TwInvis_Passive_Radar_datasheet_E_preview.pdf

Pros: No emissions, no electro-magnetic pollution, lower cost than AADLS, flexible in deployment, excellent at tracking low flying small aircraft, no FCC licensing issues. (Dirkshof, 2018) https://www.dirkshof.de/fileadmin/Dateien/Passivradar_Infos/Parasol_06_2018_E.pdf

Cons: Thus far, the only commercially available PADLS is called PARASOL, designed by Fraunhofer and manufactured in conjunction with Dirkshof, a wind farm firm in Germany. https://www.fhr.fraunhofer.de/en/press-media/press-releases/PARASOL-receives-accreditation-from-german-air-traffic-control.html It has been approved by German Air Traffic Control for ADLS throughout the country where Germans have protested strongly about red nighttime warning lights (required for towers over 300m) and electromagnetic radiation from AADLS. In email correspondence with Fraunhofer about the Chops project as a possible demonstration site, they did some research and found North American commercial broadcasting occurs at somewhat different modulations than in Europe and so their technology is not transferable out of the box. Fraunhofer is interested in researching our markets but is concentrating closer to home at the moment.

While PADLS's are acceptable to FOMB, like lights or AADLS, they are not needed.

7C. Lights off - Notice to Airmen (NOTAM). https://www.faa.gov/documentLibrary/media/Order/7930.2S_Notices_to_Airmen_(NOTAM).pdf

Pros: A NOTAM for unlit towers at Chops crossing can be actuated with a simple phone call to 1-877-487-6867. This is sort of the opposite of CMP's "Flip a switch and we're there" advertisements. Modern updates to the NOTAM system can be read about here: https://www.faa.gov/about/initiatives/notam/. Lights off are better for wildlife, residents, dark skies, zero cost [once FAA process is complete) and because of smart grid, lights remain easily functional for emergency use on request [i.e. For SAR in immediate area], Turning the lights off provides excellent PR for CMP and because it's the simplest and cheapest solution to a problem that actually exists (vs. TRC's "off the shelf solution" to a problem that did not exist), it truly creates a win/win for all parties.

Con: Turning the lights off is considered an alteration and in accordance with 14 CFR Part 77.9, if you propose "any of the following types of construction or alteration, you must file a 7460-1 notice with the FAA at least 45 days prior to beginning construction or alteration that exceeds an imaginary surface extending outward and upward at any of the following slopes:…OR any construction or alteration exceeding 200 feet above ground level, regardless of location." It is unclear to me if this is considered synonymous with or the initiation of a Marking & Lighting Study request suggested by Dave Maddox who signed off on the original Determination of No Hazard to Air Navigation. In a phone call, Dave also emphasized to me that the FAA was flexible in working with the "sponsor" (CMP) and that neighborhood input can play a role in their decision

8. Recommendation:

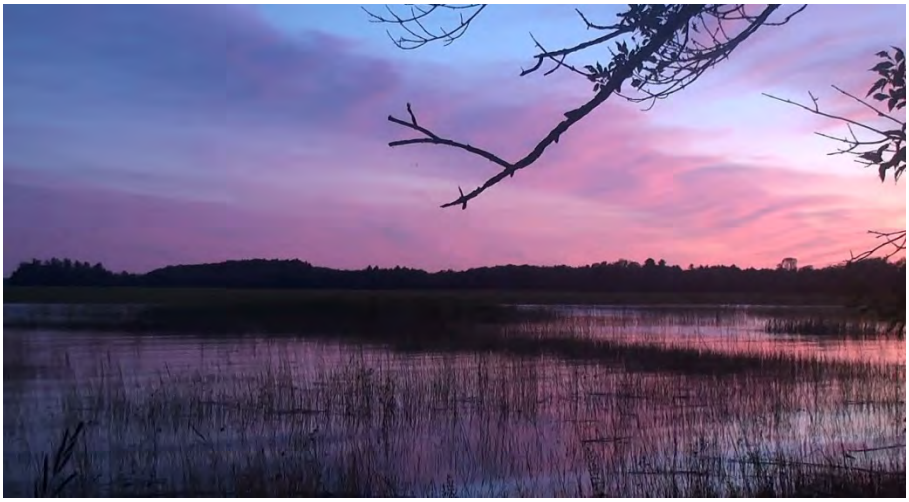
a. Call in interim NOTAM for unlit towers at Chops at least pending Marking and Lighting Study and or acceptance of alteration proposal.
b. Please turn lights off within 14 days.

.

Basis for alteration-

1. Guidelines are recommendations unless they *may* become mandatory on a case by case basis based on determination
2. Towers not obstacles by virtue of height and distance from KIWI
3. Catenary wires not obstacles to fixed wing aircraft by virtue of minimum safe altitudes and proximity to structures and people.
4. Virtually no air traffic, 80 year history no lights at catenary crossing
5. Nobody flies that low at night
6. Community opposed to lights
7. Significant wildlife corridor area-adverse impacts of lights
8. Active ADLS-harmful EMR emissions

Exhibits



No lights

New Dusk (actually red)

New Night (actually bright red)

CENTRAL MAINE POWER

David T. Flanagan
Executive Chairman CMP

April 13, 2020

Ed Friedman
Via E-mail

Dear Ed:

Now that our back to back storms are behind us, I am anxious to get back to you. Please be assured I have read your letter and done my best to become very familiar with the project, its history, and efforts by CMP to improve the power reliability to the 8,000 residents of the area while mitigating the impacts of the transmission tower lights.

The fundamental issue is very straightforward. Contrary to your conclusion, there is, in fact, an outstanding FAA decision, which has the force of law, 14 CFR Part 77, which is not merely advisory, but compels us to install and maintain warning lights on these towers. It's further my understanding that the FOMB challenged this determination and made its own request to the FAA on February 21 to rescind this requirement, but this request was denied by the FAA on March 12.

CMP is acting in accordance with a lawful safety requirement imposed by an agency of the federal government and we have no choice but to comply unless and until the decision of the FAA is changed. Far from failing to exercise good citizenship as you suggest, following a lawful, mandatory agency decision made in the interest of public safety, while finding solutions to mitigate the impacts on the local community, is exactly the definition of responsible corporate citizenship.

Ed, we simply cannot unilaterally defy a lawful Federal order. But we are doing everything we can to mitigate the amount and duration of light in the area, including taking the extra step of installing lights that are only activated when an aircraft is in the vicinity. If, as you assert, the number of aircraft in the area and at the triggering altitude is extremely low, then the lights should only activate very rarely and very briefly.

Finally, as you delve into the business of utility capital expenditures, I want to assure you that these extra measures and extra costs that CMP is taking on are the result of our desire to accommodate the community to the greatest degree possible under the law. CMP has a long-term capital investment plan focused on improving system reliability for the state, while

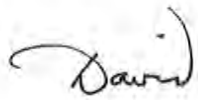
83 Edison Drive; Augusta, ME 04336
Telephone 207-629-2007
www.cmpco.com, email: david.flanagan@cmpco.com

AVANGRID

strengthening the grid for the region. But we cannot and will not knowingly violate a legal order issued by a federal agency with jurisdiction.

I appreciate your understanding.

Sincerely,



David T. Flanagan
Executive Chairman

Cc
Eloise Vitelli
Denise Tepler
Sean Paulhus
Seth Berry
Allison Hepler
Barry Hobbins

Law Office of William Most

201 St. Charles Ave., Ste. 114, # 101 ♦ New Orleans, LA 70170

(504) 509-5023 williammost@gmail.com

David T. Flanagan
Executive Chairman
Central Maine Power
83 Edison Drive
Augusta, ME 04336
Via email to david.flanagan@cmpco.com

April 29, 2020

Re: Whether CMP is Under a "Federal Order" to Light the Chop Point Towers

Dear Mr. Flanagan,

I represent Friends of Merrymeeting Bay ("FOMB") regarding its concerns about the Chop Point Towers. I was very glad to read your April 13, 2020 letter to Mr. Friedman for two reasons. First, because I appreciate your openness to dialogue about FOMB's concerns, which I hope we can continue. And second, because your letter identified a fundamental issue that we can resolve very quickly.

That issue is that you believe there is a "an outstanding FAA decision, which has the force of law, 14 CFR Part 77, which is not merely advisory, but compels [CMP] to install and maintain warning lights on these towers." You explain that you have "no choice but to comply" because you are following a "lawful Federal order."

FOMB, of course, has no wish for CMP to violate any Federal order. Fortunately, that is not the situation here. There are two things that you might be referring to as a "Federal order": the first being 14 CFR Part 77, and the second FAA's Notice of No Hazard Determinations. Neither of them, however, is an order compelling CMP to install lighting.

A. According to CMP's expert Clyde Pittman, 14 CFR Part 77 does not compel lighting.

14 CFR Part 77 does not mandate lighting of the Chop Point Towers. Under that section of the federal regulations, the Chops Point Towers would have to be at least 400' AGL to count as an automatic obstruction, and thus automatically require lighting and marking. At 240' AGL, the Chop Point towers are far below that threshold.

And your expert agrees. CMP hired Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc. to issue an opinion about the Chop Point Towers. In his opinion letter of January 27, 2020, he concluded that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport." (Emphasis added.)

B. The Notice of No Hazard Determinations are "recommendations," not orders – and have "no enforceable legal effect."

The other "order" you might be referring to is the pair of No Hazard Determinations issued by the FAA for the Chop Point Towers. Those notices suggest that the No Hazard Determinations are conditioned on the structures being "marked/lighted in accordance with FAA Advisory circular 70/7460-1."

But these are merely recommendations, not orders. How do we know this? The FAA itself describes them as recommendations. In its April 15, 2020 letter, the FAA says that a discretionary review is not appropriate *because* the Determination of No Hazard is issued "for a marking and lighting recommendation." (Emphasis added; letter enclosed.)

This has been corroborated by federal courts: the "FAA's hazard determinations, by themselves, have 'no enforceable legal effect.'" *Town of Barnstable, Mass. v. FAA*, 659 F. 3d 28, 31 (D.C. Cir. 2011), *citing BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002) ("A hazard/no-hazard determination has "no enforceable legal effect."). See also *Air Line Pilots' Association International v. FAA*, 446 F.2d 236, 240 (5th Cir. 1971) (no hazard determinations ask encourage only "voluntary cooperation.")

The FAA has confirmed this with regard to the Chop Point Towers. Richard Doucette, of the FAA's New England Office, wrote with regard to the Towers: "Every determination issued is 'advisory.' It has no regulatory weight. . . .We issued an advisory opinion after CMP filed an airspace case. I do not know under what circumstances it would be mandatory, except if it was on airport property, where the FAA would have some real authority."

C. Conclusion

If CMP really believed that that it was subject to a "Federal order" with "no choice but to comply," it is very understandable that it would have moved forward with the lighting system.

However, now that you understand that the FAA has merely made a *recommendation* with "no enforceable legal effect," we expect that you will reconsider FOMB's request.

Specifically, rather than a med-dual lighting system and an Active Aircraft Detection Lighting System, they propose a Notice to Airmen (NOTAM) of unlit towers and wire crossing at these coordinates, plus the maintenance of the current unlit marking balls or additional unlit balls marking the lower wires if necessary. If lights are necessary for air safety, FOMB proposes a Passive Aircraft Detection Lighting Systems (PADLS) in lieu of an active system.

When would be a good time for FOMB to meet with your team to discuss possible options for the Chop Point Towers?

Very truly yours,

William Most

Cc: Ed Friedman, Chair, Friends of Merrymeeting Bay
eloise.vitelli@legislature.maine.gov;
denise.tepler@legislature.maine.gov;
sean.paulhus@legislature.maine.gov;

seth.berry@legislature.maine.gov;
allison.hepler@legislature.maine.gov;
barry.hobbins@maine.gov

Kenneth Farber
Senior Counsel

May 11, 2020

Law Office of William Most
201 St. Charles Ave. Suite 114, # 101
New Orleans, Louisiana 70170

Dear Mr. Most:

Thank you for your April 29, 2020 letter on behalf of the Friends of Merrymeeting Bay. Based on our review as well as conversations between our office and officials at the Federal Aviation Administration, we have concluded that the Company is acting both reasonably and responsibly. We heard the community concerns with the current lighting. In response, we sought and received FAA approval of the aircraft detection lighting system and are expeditiously moving forward with its installation. This course of action should eliminate the community impacts of the current lighting, protect aviators, and help ensure safe and reliable service to our customers.

CMP made the decision to pursue the radar system option to address the community concerns. In making that decision we sought input from aviation technical experts as well as advice from a prominent Washington D.C. law firm with an extensive aviation practice. We did so because our Company is expert in providing electric utility services. We are not, however, aviation experts. Based on our experts' collective input, our internal understanding and the feedback from the FAA, we are certain that our course of action has been the safest, most appropriate decision. Your client's longstanding suggestion to eliminate the lighting altogether and ignore the FAA's March 25, 2020 Determination of No Hazard to Navigation Letter that is conditioned on including the radar system would not be a responsible or reasonable course of action.

Respectfully, we believe your letter downplays the significance of the FAA Determination Letter and is not accurate regarding the guidance Mr. Pittman provided to CMP regarding the implications of the Determination Letter. While you note that Mr. Pittman stated that the tower did not meet the requirements of 14 CFR 77 that automatically required lighting, you did not note that the letter also said that "because the FAA Determination letter specifically includes an obstruction lighting specification, it is the FAA policy that the lighting is mandatory." His position is consistent with the language in the FAA Advisory Circular that states:

> Application: The FAA recommends the guidelines and standards in this AC for determining the proper way to light and mark obstructions affecting navigable airspace. This AC does not constitute a regulation and, in general, is not mandatory. However, a sponsor proposing any type of construction or alteration of a structure that may affect the National Airspace System (NAS) is required under the provisions of Title 14 Code of Federal Regulations to notify the FAA

162 Canco Road, Portland, Maine 04101
Telephone 207.629.1295
www.avangrid.com, kenneth.farber@avangrid.com

> by completing the Notice of Proposed Construction or Alteration form (FAA Form 7460-1). These guidelines may become mandatory as part of the FAA's determination and should be followed on a case-by-case basis, as required. (emphasis added).

Mr. Pittman's understanding is consistent with the feedback CMP received from Capitol Airspace Group, an expert that CMP retained to provide another set of eyes on the issue. Also, in January when the Company was considering going back to the FAA in response to the community feedback, each of the consultants separately advised the Company that the FAA would require some form of lighting. We were also advised by the aviation attorneys that on technical issues such as the one we were facing, it would be prudent to rely on the recommendations of our aviation technical experts, which we did.

Let me address your comments regarding the FAA's March 25, 2020, Determination of No Hazard letter to CMP. That determination was specifically conditioned on the structures being marked / lighted with a med-dual system. The letter also authorized the use of the proposed Aircraft Detection Lighting System. In your letter, you quoted a portion of the case law that found "the FAA determination has no enforceable legal effect." However, that statement is out of context as it doesn't include the rest of the paragraph, which reads:

> Once issued, a hazard/no-hazard determination has no enforceable legal effect. The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation. Nevertheless, the ruling has substantial practical impact. The Federal Communications Commission, for example, considers the FAA's classification in granting permits for the construction of broadcast towers. 47 C.F.R. s 17.4 (1978). The ruling may also affect the ability of a sponsor proposing construction to acquire insurance or to secure financing. Primarily, however, the determination promotes air safety through "moral suasion" by encouraging the voluntary cooperation of sponsors of potentially hazardous structures. Air Line Pilots' Association International v. FAA, 446 F.2d 236, 240 (5th Cir. 1971).

So while the FAA might not have enforcement authority, the FAA's determination carries great weight and significance in other regulatory and business settings as well as in personal injury litigation. The FAA's determination, establishes the standard of care to be followed consistent with the FAA's statutory obligations to provide for aviation safety. Abdullah v. American Airlines, Inc. 181 F.3d. 363 367, (3rd Cir. 1999). (Federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation.) Moreover, if there were a personal injury claim as a result of an accident, under Maine law, the failure to follow the FAA's directive would likely be used by a plaintiff's attorney to demonstrate evidence of negligence. *Castine Energy Const., Inc. v. T.T. Dunphy, Inc.,* 2004 ME 129, ¶ 9, 861 A.2d 671. It would be irresponsible for CMP to disregard the FAA's safety determination. Such an action would subject the Company to substantially greater liability risks if there were an accident and frankly creates more likelihood that an accident could occur, which CMP firmly wants to avoid.

After the Company received the Determination Letter conditioned on the lighting, your client commented that CMP should have requested that no lighting be required for the

new Chop Point towers, and that the Company could still make that request. I understand that it has been your client's opinion that, based on the specific facts, the FAA would likely grant such a request. In response, we want to assure you that we had fully run this aspect to ground here at CMP. Therefore, the legal team followed up with the FAA directly to understand the status and options around reconsideration. In speaking with the FAA specialist who handled the application from the Friends of Merrymeeting Bay as well as CMP's application, it was made clear that the FAA would not have issued a Determination of No Hazard letter for an application that did not include lighting, given the facts of this matter. In addition, the CMP attorney also spoke with the applicable supervisor who was familiar with the applications as he had reviewed them. He confirmed that lighting is necessary and a request for no lighting would not have been acceptable given the height of the towers and their locations. I hope this puts to rest your client's thought that CMP should have requested no lighting and that the request would have been granted.

Finally, your letter recommends that if lighting is necessary, CMP should use a Passive Aircraft Detection Lighting System ("PADLS"). We have been advised by our expert that at this point, the FAA would not allow a system like that to mitigate obstruction lighting. As he explained, PADLs pose technical/operational challenges that make them an unacceptable alternative. First, for the system to ensure safety, all aircraft must have compliant transponder systems. Second, to be effective, the PADL must be located in a region where multiple radars already exist to supply 100% detection within the region. The issue in the United States is that not only are there no areas in existence where detection of low flying aircraft are near 100%, but also that there are thousands upon thousands of aircraft with no transponder system onboard. This is simply not a viable alternative.

As we have previously commented to your client, CMP has acted appropriately and in the best interests of the community in pursuing the radar system to address the concerns raised by the residents. Of course, Friends of Merrymeeting Bay are always free to submit its own recommendation to the FAA. This time we would welcome receiving a copy of any communications you may wish to have with them. Thank you for your consideration.

Sincerely,

Kenneth W. Farber

Kenneth Farber
Senior Counsel
Avangrid Service Company on Behalf of Central Maine Power

Cc: Ed Friedman, Chair, Friends of Merrymeeting Bay
eloise.vitelli@legislature.maine.gov;
denise.tepler@legislature.maine.gov;
sean.paulhus@legislature.maine.gov;
seth.berry@legislature.maine.gov;
allison.hepler@legislature.maine.gov;
barry.hobbins@maine.gov

Gmail

William Most <williammost@gmail.com>

FW: Question/Comment about Order 5050.4B

William Most <williammost@gmail.com> Sat, Apr 18, 2020 at 11:33 AM
To: William Most <williammost@gmail.com>

From: Doucette, Richard (FAA) [mailto:richard.doucette@faa.gov]
Sent: Monday, March 02, 2020 11:38 AM
To: Ed Friedman
Subject: RE: Question/Comment about Order 5050.4B

That “may” after “guidelines” is key. Even the word “guidelines” indicates it is not mandatory. I do not know under what circumstances it would be mandatory, except if it was on airport property, where the FAA would have some real authority.

The trigger for filing for an airspace determination is whether the structures is 200ft or more above ground. If its less than 200ft tall then there is no requirement to file, and likely no obstruction lights…unless the power company has its own “guidelines”.

Richard P. Doucette

Federal Aviation Administration

1200 District Avenue

Burlington MA 01803

781-238-7613

From: Ed Friedman <edfomb@comcast.net>
Sent: Monday, March 02, 2020 11:26 AM
To: Doucette, Richard (FAA) <richard.doucette@faa.gov>
Subject: RE: Question/Comment about Order 5050.4B

Thanks, the below is what makes it confusing.

From the AC

3. **Application.**

   The FAA recommends the guidelines and standards in this AC for determining the proper way to light and mark obstructions affecting navigable airspace. This AC does not constitute a regulation and, in general, is not mandatory. However, a sponsor proposing any type of construction or alteration of a structure that may affect the National Airspace System (NAS) is required under the provisions of Title 14 Code of Federal Regulations to notify the FAA by completing the Notice of Proposed Construction or Alteration form (FAA Form 7460-1). **These guidelines may become mandatory as part of the FAA's determination and should be followed on a case-by- case basis, as required.**

From the Determination of No Hazard-

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory

circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(MDual),&

12.

From: Doucette, Richard (FAA) [mailto:richard.doucette@faa.gov]
Sent: Monday, March 02, 2020 8:33 AM
To: Ed Friedman
Subject: RE: Question/Comment about Order 5050.4B

Airspace determinations made by the FAA are recommendations/advisory. Airspace determinations are not permits/approvals.

Richard P. Doucette

Federal Aviation Administration

1200 District Avenue

Burlington MA 01803

781-238-7613

From: Ed Friedman <edfomb@comcast.net>
Sent: Sunday, March 01, 2020 8:14 PM
To: Doucette, Richard (FAA) <richard.doucette@faa.gov>; Lamprecht, Michael (FAA) <Michael.Lamprecht@faa.gov>
Subject: RE: Question/Comment about Order 5050.4B

To clarify, you are saying the attached have no regulatory weight even once issued? I read your response below as that the environmental review side of your house issued an advisory opinion [We issued an advisory opinion after CMP filed an airspace case.] but from your immediate response just below, perhaps you were

referring to the attached determinations and no environmental opinion was requested or issued? The “We” in brackets above being the FAA, not your part of it?

Thanks,

Ed

From: Doucette, Richard (FAA) [mailto:richard.doucette@faa.gov]
Sent: Sunday, March 01, 2020 6:52 PM
To: Ed Friedman; Lamprecht, Michael (FAA)
Subject: Re: Question/Comment about Order 5050.4B

Every determination issued is "advisory". It has no regulatory weight.
It does not meet the NEPA definition of a federal action.
The

From: Ed Friedman <edfomb@comcast.net>
Sent: Friday, February 28, 2020 11:07:50 PM
To: Doucette, Richard (FAA) <richard.doucette@faa.gov>; Lamprecht, Michael (FAA) <Michael.Lamprecht@faa.gov>
Subject: RE: Question/Comment about Order 5050.4B

Thank you for your response. Can you please provide me a copy of the advisory opinion you mention below, assuming it is different than the Notices of No Hazard Determination I sent you?

Thanks,

Ed

From: Doucette, Richard (FAA) [mailto:richard.doucette@faa.gov]
Sent: Friday, February 28, 2020 9:24 PM
To: Ed Friedman; Lamprecht, Michael (FAA)
Subject: Re: Question/Comment about Order 5050.4B

Mr Friedman

FAA airspace determinations are advisory only, and they are not handled by this division of the FAA. Your concerns RE actions taken by CMP must be raised with them. If CMP has proposed lower structures, the FAA office may have advised differently. I cannot say, as this office does not manage airspace issues outside the boundary of an airport.

The FAA took no federal action under NEPA. We issued no permits or approvals. We issued an advisory opinion after CMP filed an airspace case. Airspace determinations are not federal actions subject to NEPA

We do not conduct NEPA review of other agencies actions. Our environmental orders provide guidance to the FAA on how we conduct NEPA for our federal actions. These orders are not relevant here. Your best, perhaps only, recourse is to direct your concerns to CMP. If they are not responsive then I would seek assistance from you state/federal elected representatives.

Richard Doucette
FAA New England

From: Ed Friedman <edfomb@comcast.net>
Sent: Friday, February 28, 2020 5:59:53 PM
To: Lamprecht, Michael (FAA) <Michael.Lamprecht@faa.gov>
Cc: Doucette, Richard (FAA) <richard.doucette@faa.gov>; Ed Friedman <edfomb@comcast.net>
Subject: Question/Comment about Order 5050.4B

Michael & Richard,

Thanks for getting back to me.

I have been working on the NEPA initial CATEX checklist to facilitate some level of review by your office. There are many areas of concern on the checklist. This is not an airport project but "off airport" projects are certainly subject to obstruction review and permitting by the FAA. I had sent you the Notices of No Hazard Determination issued by the Obstruction Division provided marking and lighting was done according to the sponsor's application. These were exhibits in the large letter we wrote to CMP, the sponsor, and are attached here separately. The sponsor had unfortunately never gone to the Obstruction Division with a lesser proposal and the Obstruction staff told me they do not take into consideration any environmental effects in their evaluations.

Here is where it starts getting confusing:

Specific FAA actions subject to NEPA review include, but are not limited to, grants, loans, contracts, leases, construction and installation actions, ***procedural actions****, research activities, rulemaking and* ***regulatory actions****, certifications, licensing, permits,* ***plans requiring approval****,*

and legislation proposed by the FAA. ***See FAA Order 1050.1F*** *for more detail on actions subject to NEPA.*

While the Notices of Determination certainly appear to be at minimum procedural issues-sponsors are supposed to check in with the FAA when an obstruction is 200' AGL or higher, and while the Marking and Lighting Circular https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_70_7460-1L_-_Obstuction_Marking_and_Lighting_-_Change_2.pdf at first glance appears to be advisory in nature and only applicable to structures deemed to be hazards to air navigation- [Someone of course needs to make that determination].

1.Purpose. This Advisory Circular (AC) sets forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation. The change number and date of the change material are located at the top of the page. Advisory Circular 70/7460-1L is effective September 6, 2018.

It also appears that Agency determinations can become mandatory-

6. Application. The FAA **recommends** the guidelines and standards in this AC for determining the proper way to light and mark obstructions affecting navigable airspace. **This AC does not constitute a regulation and, in general, is not mandatory.** However, a sponsor proposing any type of construction or alteration of a structure **that may affect** the National Airspace System (NAS) **is required** under the provisions of Title 14 Code of Federal Regulations to notify the FAA by completing the Notice of Proposed Construction or Alteration form (FAA Form 7460-1). These guidelines **may become mandatory as part of the FAA's determination** and should be followed on a case-by case basis, as required.

From 1050.1F

1-9. Applicability and Scope. The provisions of this Order and the CEQ Regulations apply to actions directly undertaken by the FAA and to actions undertaken by a non-Federal entity where the FAA has authority to condition a permit, license or approval. ***The requirements in this Order apply, but are not limited, to*** *the following actions: grants, loans, contracts, leases, construction and installation actions, procedural actions, research activities, rulemaking and regulatory actions, certifications, licensing, permits, plans submitted to the FAA by state or local agencies for approval, and legislation proposed by the FAA.* ***Exceptions to these requirements are listed in Paragraph 2-1.2.***

2-1.2. Federal Aviation Administration Actions Not Subject to National Environmental Policy Act Review*.*

a. General. Actions are not subject to NEPA review if applicable Federal law expressly prohibits or makes compliance with NEPA impossible.

b. Advisory Actions. Some Federal actions are of an advisory nature. Actions of this type are not considered major Federal actions under NEPA, and NEPA review is therefore not required. *If it is known or anticipated that some subsequent Federal action would be subject to NEPA, the FAA must so indicate in the advisory action.* ***Examples of advisory actions include****:*

(1) Determinations under 14 CFR part 77, Safe, Efficient Use, and Preservation of the Navigable Airspace*;*

(2) Determinations under 14 CFR part 157, Notice of Construction, Alteration, Activation, and Deactivation of Airports, which applies to civil or joint-use airports, helipads, and heliports; and

(3) Designation of alert areas and warning areas under FAA Order 7400.2, Procedures for Handling Airspace Matters.

c. Judicial or Administrative Civil Enforcement Actions

If I'm interpreting this correctly, while the recommended advisory actions found in the AC may become mandatory, it does not change the fact NEPA review is not required. **The question remains, given a substantive environmental impact, as demonstrated on the FAA NEPA checklist, can a NEPA review if requested, be done?**

From the Notice of Determination:

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(MDual),&

12.

We note the Notice does not evaluate the air navigation hazard without the marking and lighting system because the FAA was not asked to do so. There is also the following language in the Notice which may or may not be “boiler plate” and directed at met or communication towers since unless a radar system is installed here I’m not sure why the FCC would be involved:

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the

structure is subject to their licensing authority.

So, given the total lack of due process in creating this environmental disaster, FOMB asks that your office use its discretion to initiate an environmental review of the Chops crossing project. I will work a bit more on the FAA NEPA checklist over the weekend and email it to you early next week in order to better inform your decision. In part I’m awaiting some input from a colleague at Maine’s Department of Inland Fisheries and Wildlife [IF&W] who is endangered species coordinator for the state. This project could not be in a more sensitive location both for environmental and social impacts.

Just the other day we were successful in initiating a marking and lighting aeronautical study and assigned this number, but again, environmental impacts will not be considered by the Obstructions Division. Your filing is assigned Aeronautical Study Number(s) (ASN): 2020-ANE-1230-OE, 2020-ANE-1231-OE

Thanks,

Ed

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

From: Lamprecht, Michael (FAA) [mailto:Michael.Lamprecht@faa.gov]

Sent: Friday, February 28, 2020 10:18 AM

To: Ed Friedman

Cc: Doucette, Richard (FAA)

Subject: RE: Message from www.faa.gov: Question/Comment about Order 5050.4B

Ed,

At this point it does not appear to have been an airport project but I am still waiting on further information. If there was no FAA involvement in the decision we would not have any environmental decision documents on the project. I will let you know what else I hear.

Thank you for your patience.

Michael

Michael Lamprecht

Environmental Protection Specialist

Federal Aviation Administration

800 Independence Avenue SW

Washington, D.C. 20591

(202) 267-6496

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

From: Ed Friedman <edfomb@comcast.net>

Sent: Thursday, February 27, 2020 1:44 AM

To: Lamprecht, Michael (FAA) <Michael.Lamprecht@faa.gov>

Cc: Doucette, Richard (FAA) <richard.doucette@faa.gov>

Subject: RE: Message from www.faa.gov: Question/Comment about Order 5050.4B

Michael, et al.,

Please see our attached letter to CMP from this past December. A response, annotated by me and a short video clip are front and center on our FOMB website. In short, CMP had a powerline crossing over the Kennebec at Merrymeeting Bay for 80 years supported by 200'AGL lattice towers on either side. Neither towers nor wires were ever marked through years of much more aviation than in the past couple of decades. Last year they replaced the towers with new ones 40' higher and for the first time they were lit and done so in accordance with stock FAA guidelines for catenary crossings- three levels of strobing LED's white in day and red at night. So long to our dark night. The powerlines were marked with colored spheres which is a good thing. Everyone around the unique Bay is extremely upset at the lighting which was done with absolutely no public input and was not included in plans that went to either town]Bath or Woolwich] the towers are located in. Neither were lighting plans included to the state DEP in CMP's application for a Natural Resource Protection Act permit for activities with 75' of the water.

For many of us, the FAA lighting alternative of an active radar aircraft detection lighting system is unacceptable because of harm to people and wildlife from microwave radiation. These towers are off-airport and 5 miles from the closest airport with runway exceeding the threshold length for considering whether nearby structures create obstructions to air navigation or not. Please see the attached. These towers would need to be 400' AGL, not 240' AGL to be considered obstructions given their 5 mile distance from Wiscasset [KIWI]. There is virtually no air traffic in the vicinity at this low altitude and it seems lighting and radar efforts are needless off the shelf "solutions" looking for a problem that does not exist yet creating serious new ones.

Thanks,

Ed

207-666-3372

www.friendsofmerrymeetingbay.org

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

From: Lamprecht, Michael (FAA) [mailto:Michael.Lamprecht@faa.gov]

Sent: Wednesday, February 26, 2020 7:15 AM

To: edfomb@comcast.net

Cc: Doucette, Richard (FAA)

Subject: RE: Message from www.faa.gov: Question/Comment about Order 5050.4B

Mr. Friedman,

I checked with the Regional Environmental Protection Specialist and he has not heard of this project. Is this for a power line? Is it on the airport? I am guessing that you are talking of Merrymeeting Field Airport. Could you please submit more information on this?

Thank you.

Michael

Michael Lamprecht

Environmental Protection Specialist

Federal Aviation Administration

800 Independence Avenue SW

Washington, D.C. 20591

(202) 267-6496

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

From: edfomb@comcast.net <edfomb@comcast.net>

Sent: Friday, February 21, 2020 5:12 PM

To: Lamprecht, Michael (FAA) <Michael.Lamprecht@faa.gov>

Subject: Message from www.faa.gov: Question/Comment about Order 5050.4B

This email was sent through the Federal Aviation Administration's public website. You have been contacted via an email link on the following page: www.faa.gov/airports/resources/publications/orders/environmental_5050_4/

Message:

Michael,

Please let me know how to file a request for NEPA review of a catenary crossing project here in Maine, assuming a review has not been done. To our knowledge no review was ever done to determine whether CATEX, EA or EIS apply. The project, 2018 ANE 1642 and 1643-OE is in place and lighting is an unmitigated and totally unneeded disaster for many reasons. Neither is ADLS an acceptable alternative because of proximity to population and wildlife sensitive to microwaves.

Thank you.

Ed Friedman, Chair

Friends of Merrymeeting Bay

3 attachments

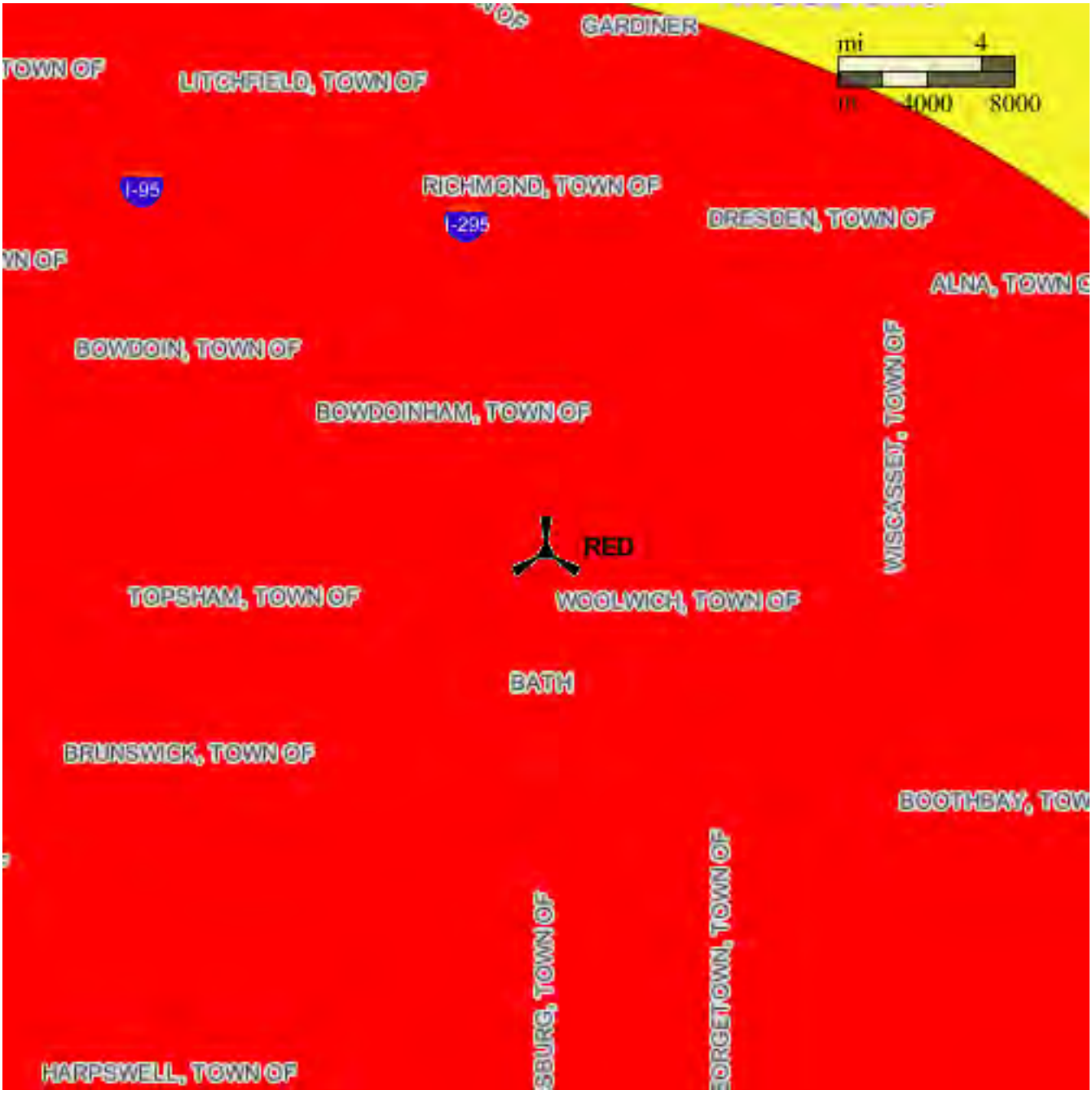
FAA NEPA Checklist arp-SOP-510-catex Filling In.docx
271K

FCC NEPA_Factsheet_111816.pdf
409K

Chazell_NEPA NRC Major Determination Capstone Paper_FINAL 2014.pdf
434K

Federal Aviation Administration
DOD and DHS Long Range Radar Report
ASN: 2020-ANE-1540-OE
SYSTEM OEAAA
Mon Mar 09 12:44:21 EDT 2020

Latitude:	43-58-59.59N	SE:	47
Longitude:	69-49-41.33W	AGL:	244
Case information in NAD 83 datum.		AMSL:	291



Map Legend	
Green:	No anticipated impact to Air Defense and Homeland Security radars. Aeronautical study required.
Yellow:	Impact likely to Air Defense and Homeland Security radars. Aeronautical study required.
Red:	Impact highly likely to Air Defense and Homeland Security radars. Aeronautical study required.

2817, Highway 77 Panama City, Florida 32405 USA Tel 850.763.7200
2550 5th Ave. Suite 510 San Diego, CA USA 92103 Tel 619.795.3714
Afon House, Worthing Rd, Horsham, West Sussex RH12 1TL UK Tel 44 (0) 1403.788.315
Web www.detect-inc.com www.dronewatcher.com

Aircraft Birdstrike Avoidance Radars | Avian Radar Systems | Aircraft Detection Lighting Systems | Bird Control Radar Systems | Airspace & Marine Security Networks | Drone Detection & Defense Systems | Ground-Based Sense-and-Avoid Radars

Chops Point ADLS FAA Submission information:

Radar sensor is the following: X Band Radar (9.2 - 9.5 GHz).
Peak Power 188 Watts
PRR/PRI/or PRF 1020/2041Hz depending on pulselength.
PW 100ns 8uS and 40 or 66uS) 18.8w or 14.1w depending on pulselength.
Ave Power in watts or DBM Not above 28.2W Worst Case
Antenna Gain LPA-A25 32dBi
Antenna pointing azimuth 360 degrees rotating

WGS 84 Datum
Latitude: 43.983219
Longitude: -69.828147
Site Elevation (AMSL - feet): 47 ft
Total Structure Height (To the top of the antenna, AMSL - feet): 291 ft

CENTRAL MAINE POWER

February 19th, 2020

This letter is certifies that the proposed installation of the ADLS for the Chops Point Project at CMP will meet the requirements of the current version AC 70/7460-1 Obstruction Marking and Lighting, and will be in accordance with the most recent Technical Note issued for this system.

CMP certifies that the proposed ADLS for the Chops Point Project will be continuously monitored in accordance with the current version of AC 70-7460-1 Obstruction Marking and Lighting, and the Technical Note issued for the system. We will ensure this responsibility is specifically transferred to any subsequent owners of the project.

Yours Sincerely,

Jenna Muzzy
Manager – Lines Projects
83 Edison Drive
Augusta, Maine 04336
207.629.2029
Jenna.muzzy@cmpco.com

2817, Highway 77 Panama City, Florida 32405 USA Tel 850.763.7200
2550 5th Ave. Suite 510 San Diego, CA USA 92103 Tel 619.795.3714
Afon House, Worthing Rd, Horsham, West Sussex RH12 1TL UK Tel 44 (0) 1403.788.315
Web www.detect-inc.com www.dronewatcher.com

Aircraft Birdstrike Avoidance Radars | Avian Radar Systems | Aircraft Detection Lighting Systems | Bird Control Radar Systems | Airspace & Marine Security Networks | Drone Detection & Defense Systems | Ground-Based Sense-and-Avoid Radars

2/11/2020

ADLS Certification Vendor Statement

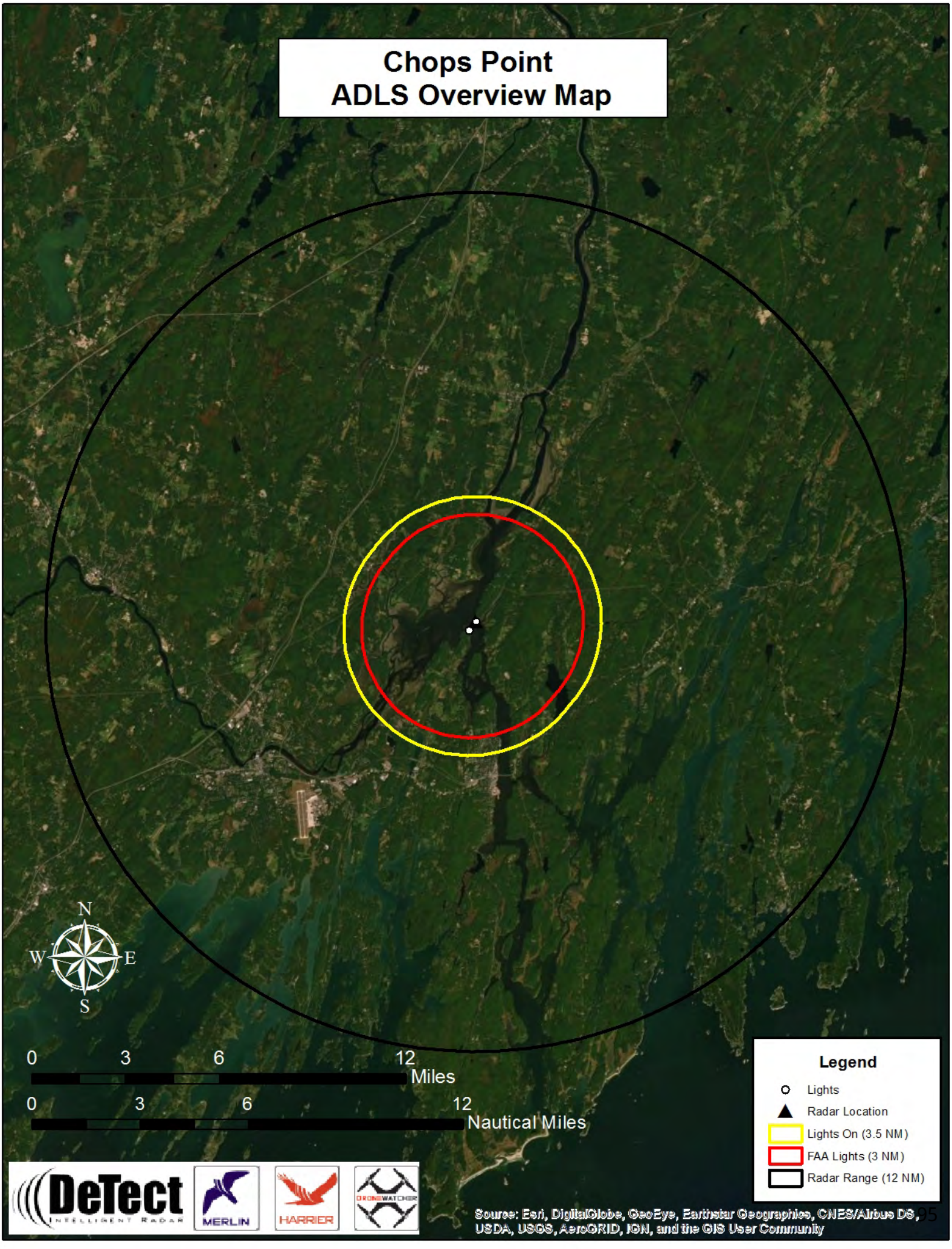
Obstruction Evaluation Group

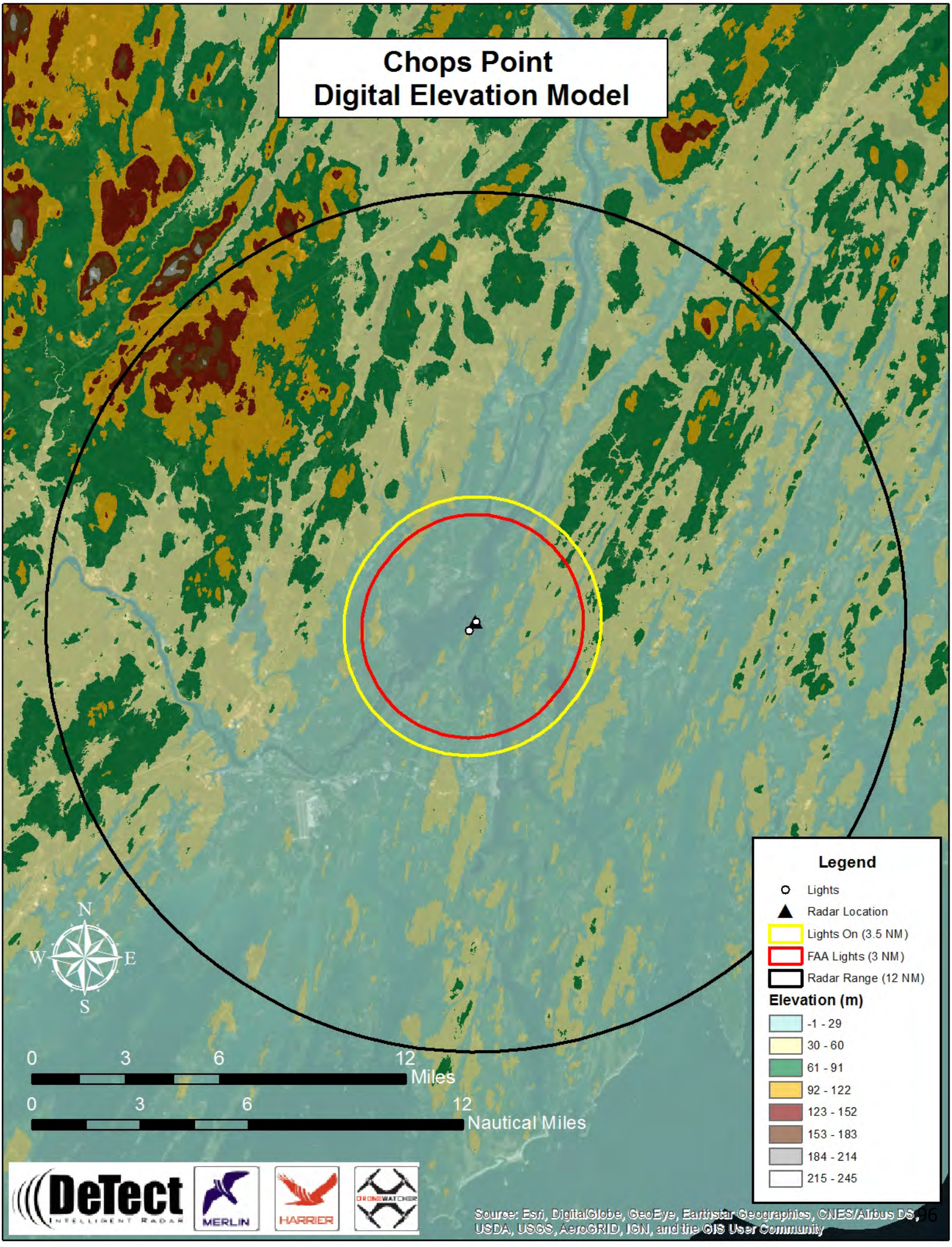
DeTect has performed radar coverage modeling for the Chops Point Aircraft Detection Lighting System (ADLS) and has determined the proposed installation of the ADLS for the project will meet the requirements of the current version of AC 70/7460-1L Obstruction Marking and Lighting, and will be in accordance with the most recent Technical Note issued for the applicable system. DeTect has modeled one radar location for the site. This radar location provides adequate airspace coverage to activate lights and viewshed maps are provided as part of the submission. Please reach out to DeTect, Inc. if you have any questions about the documents that were submitted.

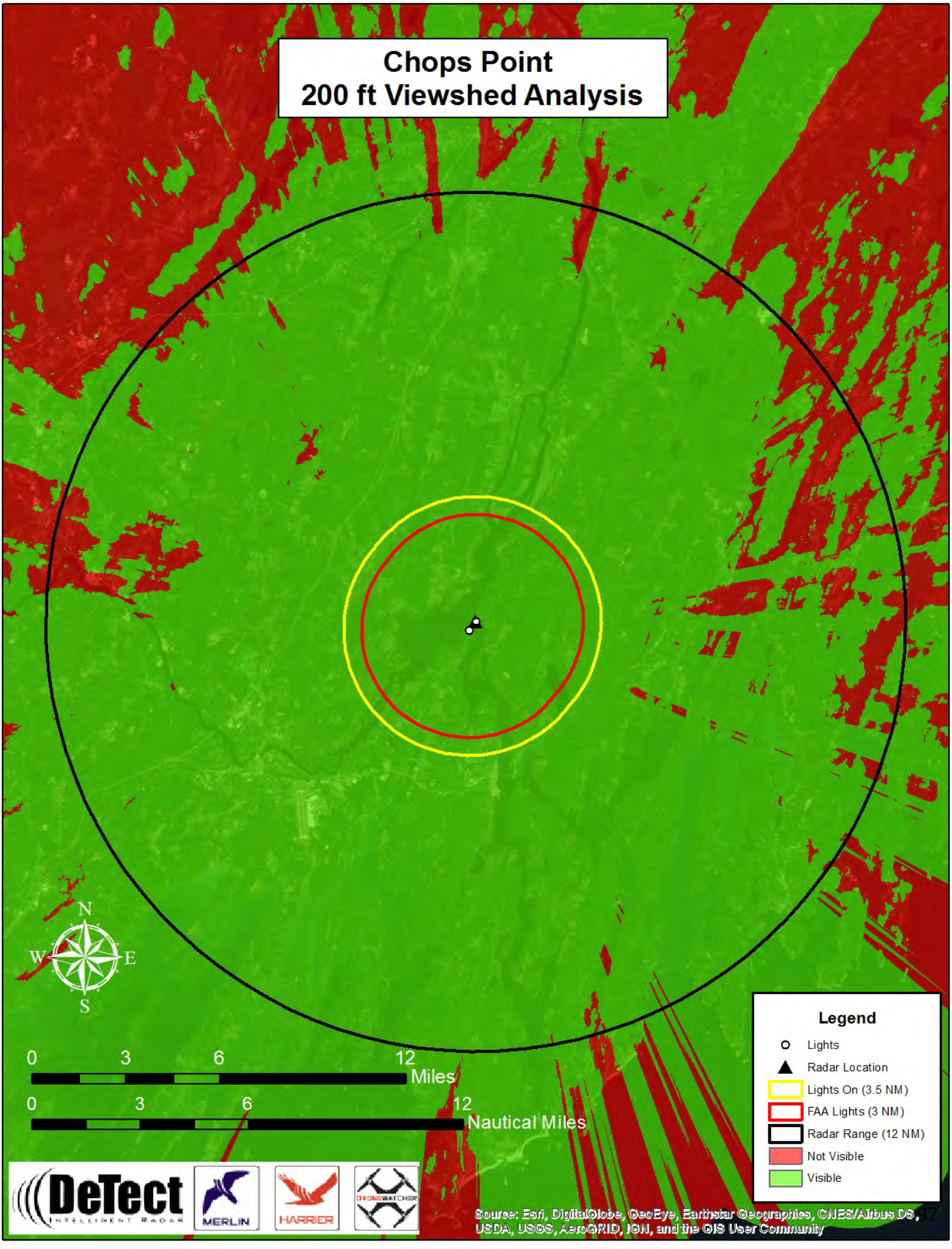
Sincerely,

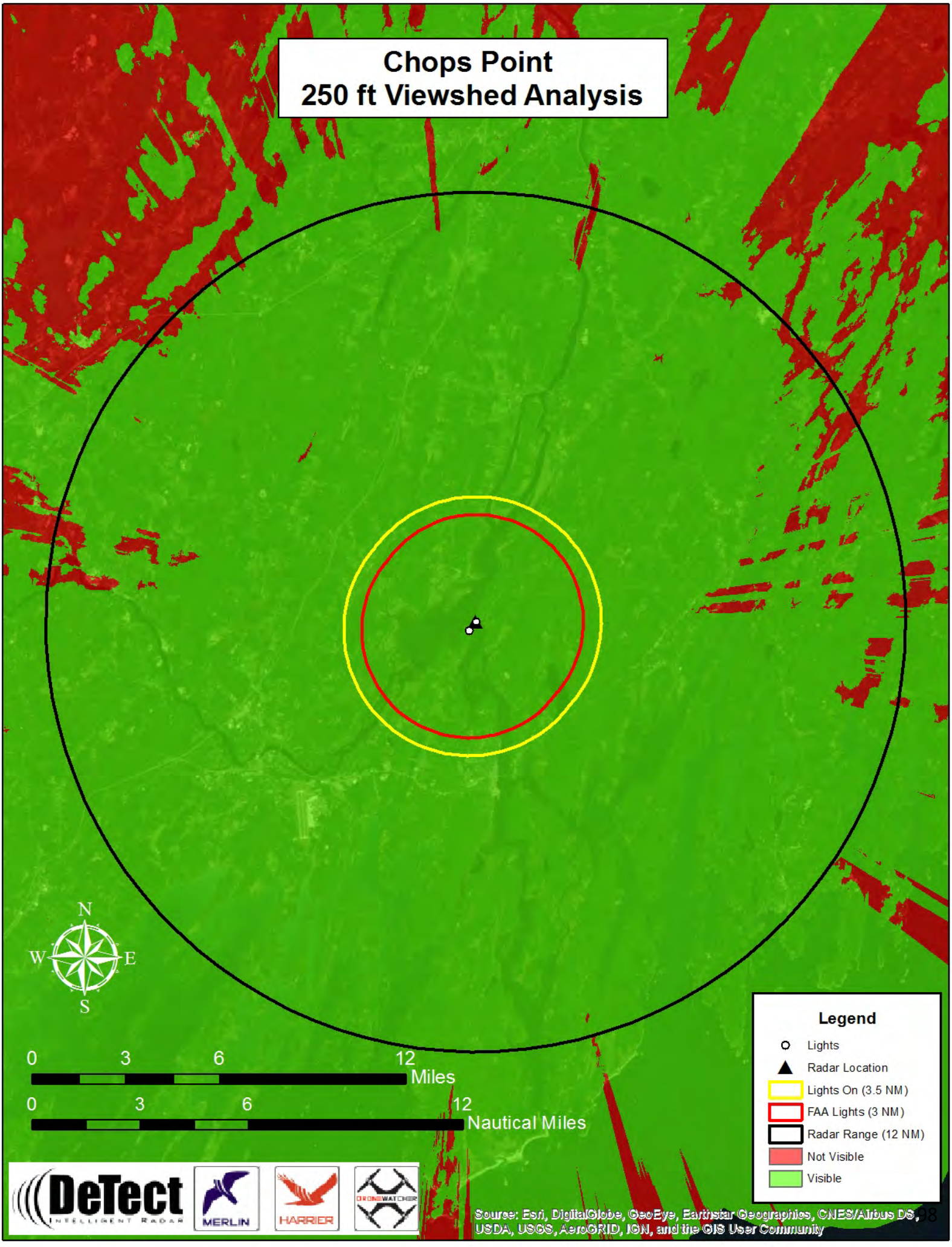
DeTect, Inc.

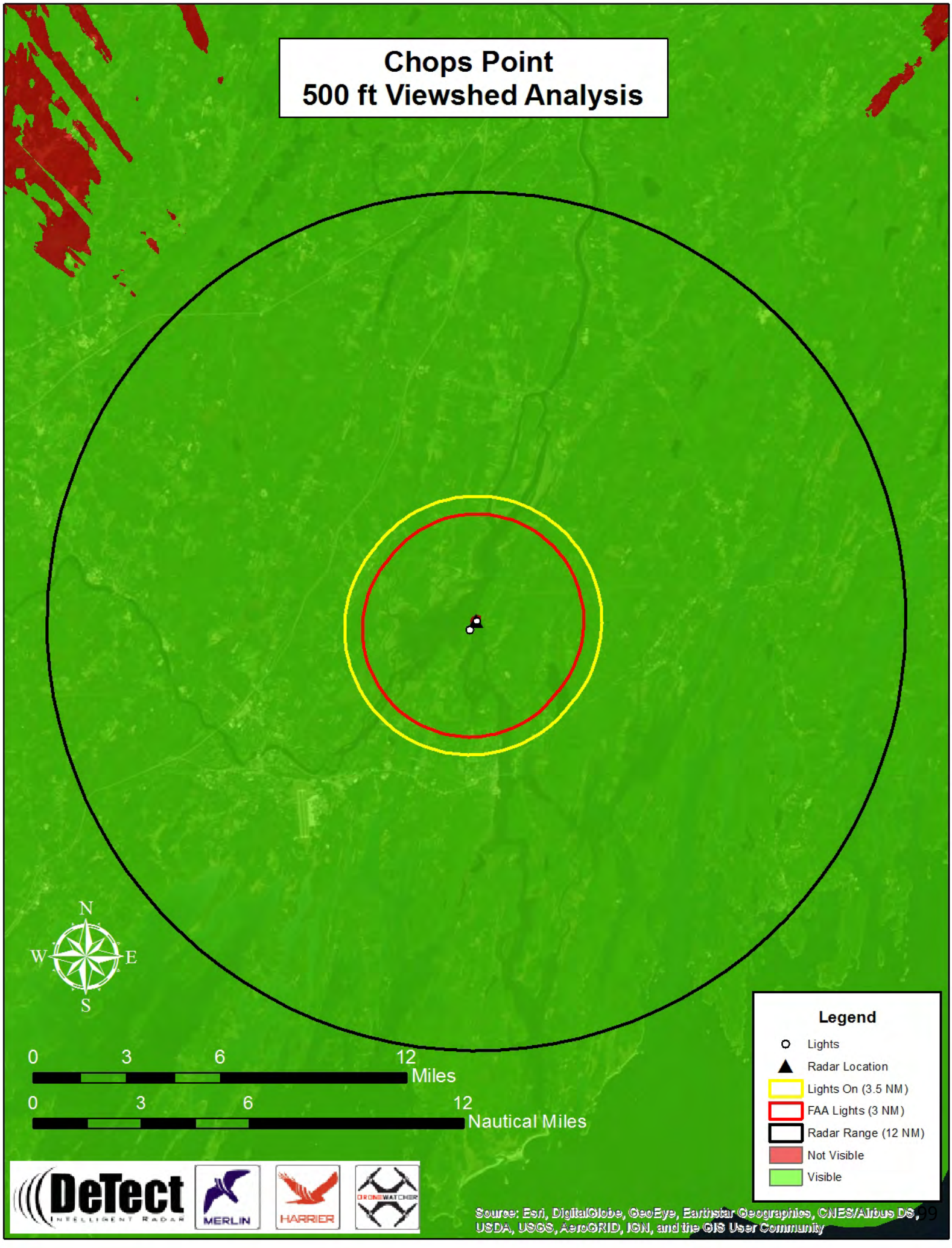
Jesse Lewis
General Manager, DeTect Americas
Jesse.lewis@detect-inc.com
850.763.7200

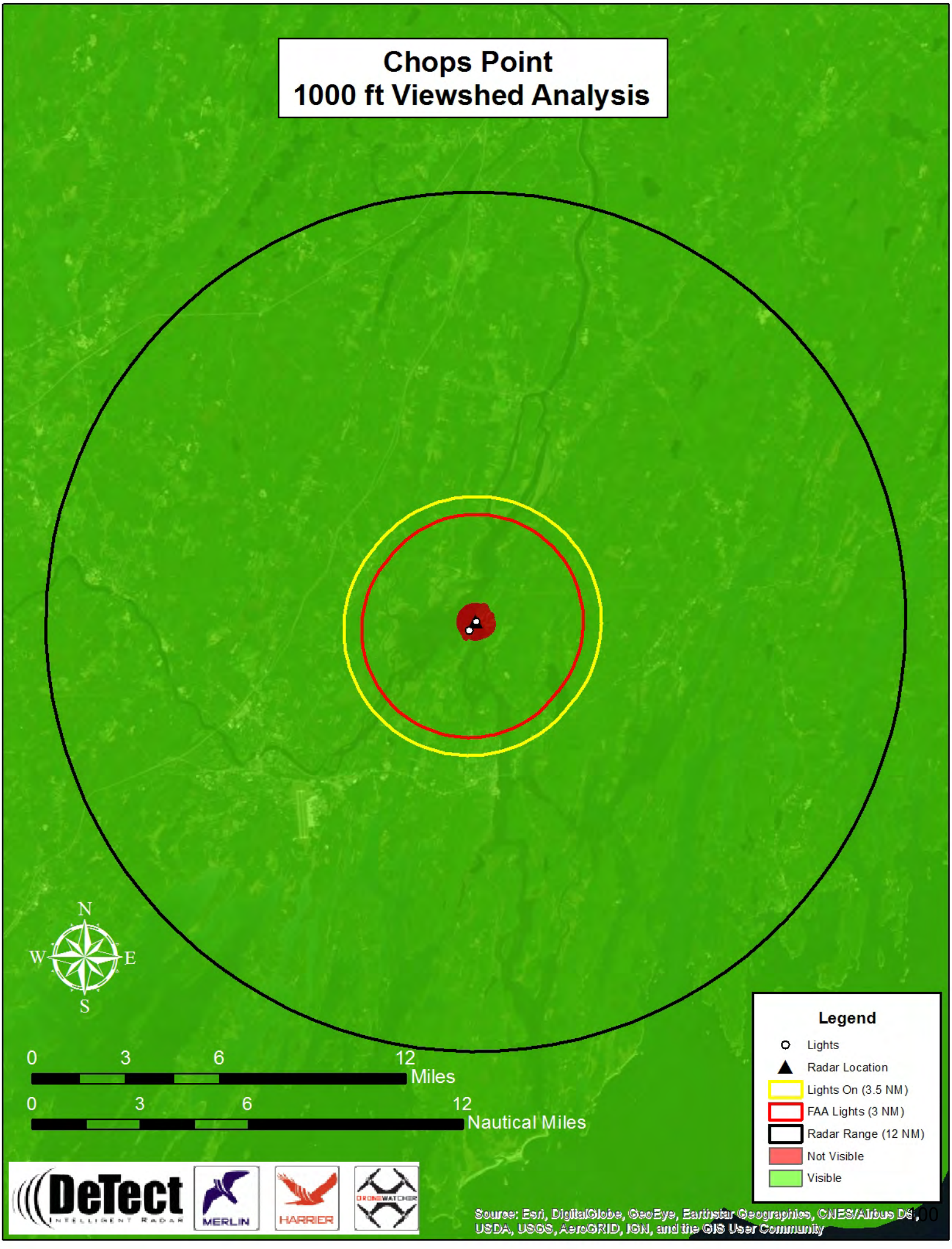

Chops Point
ADLS Overview Map
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community


Chops Point
Digital Elevation Model
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
Elevation (m)
-1 - 29
30 - 60
61 - 91
92 - 122
123 - 152
153 - 183
184 - 214
215 - 245
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community


Chops Point
200 ft Viewshed Analysis
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
Not Visible
Visible
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community


Chops Point
250 ft Viewshed Analysis
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
Not Visible
Visible
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community


Chops Point
500 ft Viewshed Analysis
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
Not Visible
Visible
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community


Chops Point
1000 ft Viewshed Analysis
N
W
E
S
0
3
6
12
Miles
0
3
6
12
Nautical Miles
Legend
Lights
Radar Location
Lights On (3.5 NM)
FAA Lights (3 NM)
Radar Range (12 NM)
Not Visible
Visible
DeTect
INTELLIGENT RADAR
MERLIN
HARRIER
DRONEWATCHER
Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community

Federal Aviation Administration
Traffic Pattern Report
ASN: 2016-ANE-708-OE
Generated By Earl Newalu on Wed May 18 09:44:10 EDT 2016

Traffic Pattern Evaluation

Latitude:	43-58-46.15N	SE:	47
Longitude:	69-49-56.07W	AGL:	240
Traverse Way:	No Traverseway	Additional Height:	0
Case Information & Traffic Pattern results use NAD 83 datum		AMSL:	287

Traffic Pattern Interaction Results:

2 Traffic Pattern(s) Interactions were found

Traffic Pattern Interaction # 1:

Site Type:	Airport
Traffic Pattern Name:	Climb Area "D" Left "D" Left
Penetration in feet:	-124
Airport ID:	08B
Runway ID:	14/32
Runway End ID:	14

Traffic Pattern Interaction # 2:

Site Type:	Airport
Traffic Pattern Name:	Climb Area "D" Left "D" Left_Ultimate
Penetration in feet:	-128
Airport ID:	U_08B
Runway ID:	14/32
Runway End ID:	14

Law Office of William Most

201 St. Charles Ave., Ste. 114, # 101 ♦ New Orleans, LA 70170

(504) 509-5023 williammost@gmail.com

Manager, Airspace Policy & Regulation
800 Independence Ave., SW, Room 423
Washington, DC, 20591
Via U.S. Mail, Facsimile: (202) 267-9328, and Email: OEPetitions@faa.gov

April 14, 2020

Re: Aeronautical Study No. 2020-ANE-1540-OE, Prior Study No. 2018-ANE-1643-OE and Aeronautical Study No. 2018-ANE-1642-OE, Prior Study No. 2016-ANE-708-OE Terminated Studies: No: 2020-ANE-1230 & 1231-OE

To Whom It May Concern,

This letter is sent on behalf of Friends of Merrymeeting Bay ("FOMB") to request a discretionary review of the March 25, 2020 Determinations of No Hazard to Air Navigation concerning two structures (together, the "Chop Point Towers"):

Structure:	Lighting Study Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	244 feet above ground level (AGL)
	291 feet above mean sea level (AMSL)

Structure:	Lighting Study Tower Section 77 & 207
Location:	Bath, ME
Latitude:	43-58-46.15N NAD 83
Longitude:	69-49-56.07W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

FOMB agrees that the towers do not present a hazard to air navigation. FOMB proposes, however, that less-intrusive marking and notification measures would achieve sufficient air navigation safety.

Specifically, rather than a med-dual lighting system and an Active Aircraft Detection Lighting System, FOMB proposes No Hazard determinations conditional on issuance of a Notice to Airmen (NOTAM) of unlit towers and wire crossing at these coordinates, plus the maintenance of the current unlit marking balls or additional unlit balls marking the lower wires if necessary. If lights are necessary for air safety, FOMB proposes a Passive Aircraft Detection Lighting Systems (PADLS) in lieu of an active system.

I. Factual Background

A. About the Friends of Merrymeeting Bay

Founded in 1975, the Friends of Merrymeeting Bay (FOMB) takes a holistic approach to protecting the Bay, combining research, education, advocacy, and land conservation. With

approximately 450members, one staff person, and 125 volunteers contributing over 3,000 hours of service annually, FOMB is the only conservation organization in the area implementing these diverse tactics to achieve biological and cultural protection of the Bay as a whole. Its mission is to "preserve, protect, and improve the unique ecosystems of Merrymeeting Bay."

B. About the Chop Point Towers at Merrymeeting Bay

Formed by the confluence of six rivers, including the Kennebec and Androscoggin, Merrymeeting Bay is the largest freshwater estuary system north of Chesapeake Bay; it drains 38% of Maine's fresh water. The Bay is a resource of international significance: it is the largest staging ground for migratory waterfowl in the northeast, it is the only estuary providing spawning and nursery habitat for all diadromous fish species in the Gulf of Maine, and it is home to a number of rare and endangered plant, and animal species including Parker's pipewort, stiff arrowhead, shortnosed sturgeon, Atlantic salmon and a recovering bald eagle population. It is classified as an Important Bird Conservation Area by the American Bird Conservancy.

For many decades, there were two 195-foot towers and unmarked powerline crossing of the Kennebec River at Chop Point on Merrymeeting Bay. The unlit and unmarked towers existed for at least eighty years without incident. Prior to escalating fuel prices following the 1973 oil crisis, area air traffic, while still very light, was substantially greater than the current day, particularly after the Brunswick Naval Air Station (now KBXM) closure and sale of Merrymeeting Field (08B) to a developer.

.

Recently, Central Maine Power Company ("CMP") installed taller towers. The towers are at 47 feet site elevation (SE), are 240-244 feet above ground level (AGL), and are 287-291 feet above mean sea level.

On March 12, 2018, the Federal Aviation Administration ("FAA") issued Determinations of No Hazard to Air Navigation for the towers. The determinations noted that:

> As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8 (MDual), & 12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

On March 25, 2020, the FAA issued new Determinations of No Hazard to Air Navigation. The new determinations noted that as "a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system." The determinations also approved an Aircraft Detection Lighting System.

II. Statement of Aeronautical Basis: Lighting is Not Required by FAA Regulations

FAA regulations do not require lighting the Chop Point Towers.

14 CFR § 77.17 specifies that an object is "an obstruction to air navigation" if it meets certain criteria. Objects under 499 feet AGL are only presumptively obstructions if within a certain distance of airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.19, 77.21, or 77.23."

Chapter 2.1 of FAA Advisory Circular 70/7460-1 indicates that:

> Any temporary or permanent structure, including all appurtenances, that exceeds an overall height of 200 feet (61 m) above ground level (AGL) or exceeds any obstruction standard contained in 14 CFR Part 77 should be marked and/or lighted. *However, an FAA aeronautical study may reveal that the absence of marking and/or lighting will not impair aviation safety.* [Emphasis added.] Conversely, the object may present such an extraordinary hazard potential that higher standards may be recommended for increased conspicuity to ensure aviation safety.

Here, Wiscasset (KIWI) is the closest qualifying airport to the Chop Point Towers. It is 5.1 miles away, and has a runway length of 3,397'. If the Chop Point towers were within 3 miles of KIWI, they would be considered an obstacle to air navigation at 200'. Since they are 5 miles from KIWI however, 100' is added for each additional mile up to a maximum of 499'. At 5 miles then, to meet the qualifying standard and be deemed an obstruction to air navigation, the towers need to be at least 400' AGL. At 240' AGL, the Chop Point towers are too short to be an presumptive obstruction.

CMP's consultant agrees. On January 27, 2020, Clyde Pittman, Director of Engineering of Federal Airways & Airspace, Inc. wrote an opinion letter. Pittman agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport."

III. New Information for Discretionary Review

It is our understanding that the concerns of local citizens, as organized through Friends of Merrymeeting Bay, have not yet been provided to this office in a method acceptable for consideration. Accordingly, those concerns constitute new information to this office. In the attached letter and exhibits, Friends of Merrymeeting Bay raises a range of concerns regarding the lighting of the Chop Point Towers and the proposed active detection system. They raise concerns including but not limited to:

- Impact of artificial lights on local wildlife;
- Impact of artificial lights on scenic and real estate values;
- Impacts from radar system installation on human, wildlife and environmental health;
- Absence of air navigation hazard:
- How proximity to structures violates Minimum Safe Altitude rules;
- Distances from proximal congested areas;

- Marking and lighting history of original towers;
- Absence of public hearings, information sessions, comment periods, or notification of changes;
- Absence of air traffic.

Furthermore, the FAA's original 2018 No Hazard determinations for the towers indicated that "Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination." But CMP's proposed Active Aircraft Detection Lighting would use X band radar at 9.2-9.5 GHz, a frequency not covered by the Colo Void Clause Coalition rule.

Accordingly, FOMB asks that the FAA conduct discretionary review of the No Hazard Determinations, specifically to consider whether less-intrusive measures might achieve a sufficient level of air navigation safety. FOMB asks the FAA consider whether the issuance of a Notice to Airmen (NOTAM) of unlit towers and wire crossing, plus some set of marking balls, would be sufficient for safety. If lights are necessary, FOMB asks the FAA consider whether a Passive Aircraft Detection Lighting Systems (PADLS) in lieu of an active system would be sufficient for air navigation safety. In that case, FOMB asks that the FAA reissue the No Hazard Determinations, with less intrusive measures as conditions of determination.

Please contact me at (504) 509-5023 if there is anything I can do to aid in this process.

Very truly yours,

William Most

Enc: FOMB 12/24/19 CMP Letter/Analysis (via email)

Cc: Ed Friedman, Chair, FOMB

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2018-ANE-1642-OE
Prior Study No.
2016-ANE-708-OE

Issued Date: 03/12/2018

Benjamin Shepard
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Tower Sections 77 & 207
Location:	Bath, ME
Latitude:	43-58-46.15N NAD 83
Longitude:	69-49-56.07W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information.
This determination expires on 09/12/2019 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-4525, or david.maddox@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2018-ANE-1642-OE.

Signature Control No: 357417091-359354168 (DNE)
David Maddox
Specialist

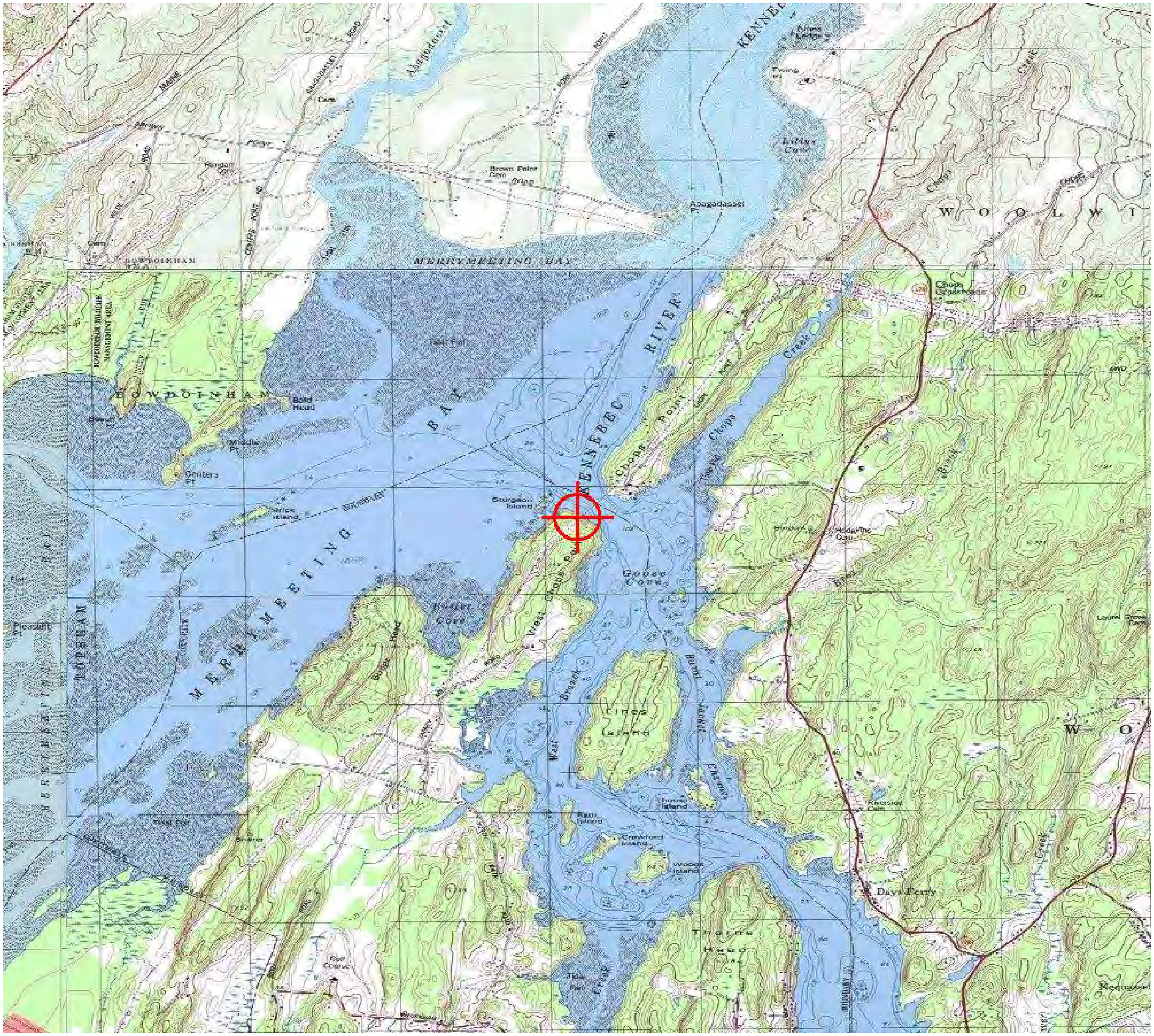
Attachment(s)
Additional Information
Case Description
Map(s)

cc: FCC

In addition to the above marking and lighting condition, use of marker spheres is approved.

Replace existing electrical transmission tower immediately adjacent to existing tower with new tower, 240'

TOPO Map for ASN 2018-ANE-1642-OE



Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2020-ANE-1539-OE
Prior Study No.
2018-ANE-1642-OE

Issued Date: 03/25/2020

Jenna Muzzy
Central Maine Power Company
83 Edison Drive
August, ME 04336

**** MARKING & LIGHTING RECOMMENDATION ****

The Federal Aviation Administration has completed an evaluation of your request concerning:

Structure:	Lighting Study Tower Section 77 & 207
Location:	Bath, ME
Latitude:	43-58-46.15N NAD 83
Longitude:	69-49-56.07W
Heights:	47 feet site elevation (SE) 240 feet above ground level (AGL) 287 feet above mean sea level (AMSL)

Based on this evaluation, we have no objection to the change provided the structure is marked/lighted in accordance with FAA Advisory Circular 70/7460-1, L Change 2 , Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

Action will be taken to ensure aeronautical charts and records are updated to reflect the marking/lighting changes which exist at this time.

Your request for consideration to utilize an Aircraft Detection Lighting System to operate the recommended lighting is approved provided that the equipment meets established technical standards.

If this structure is subject to the authority of the Federal Communications Commission a copy of this letter will be forwarded to them and application should be made for permission to change the marking/lighting as requested.

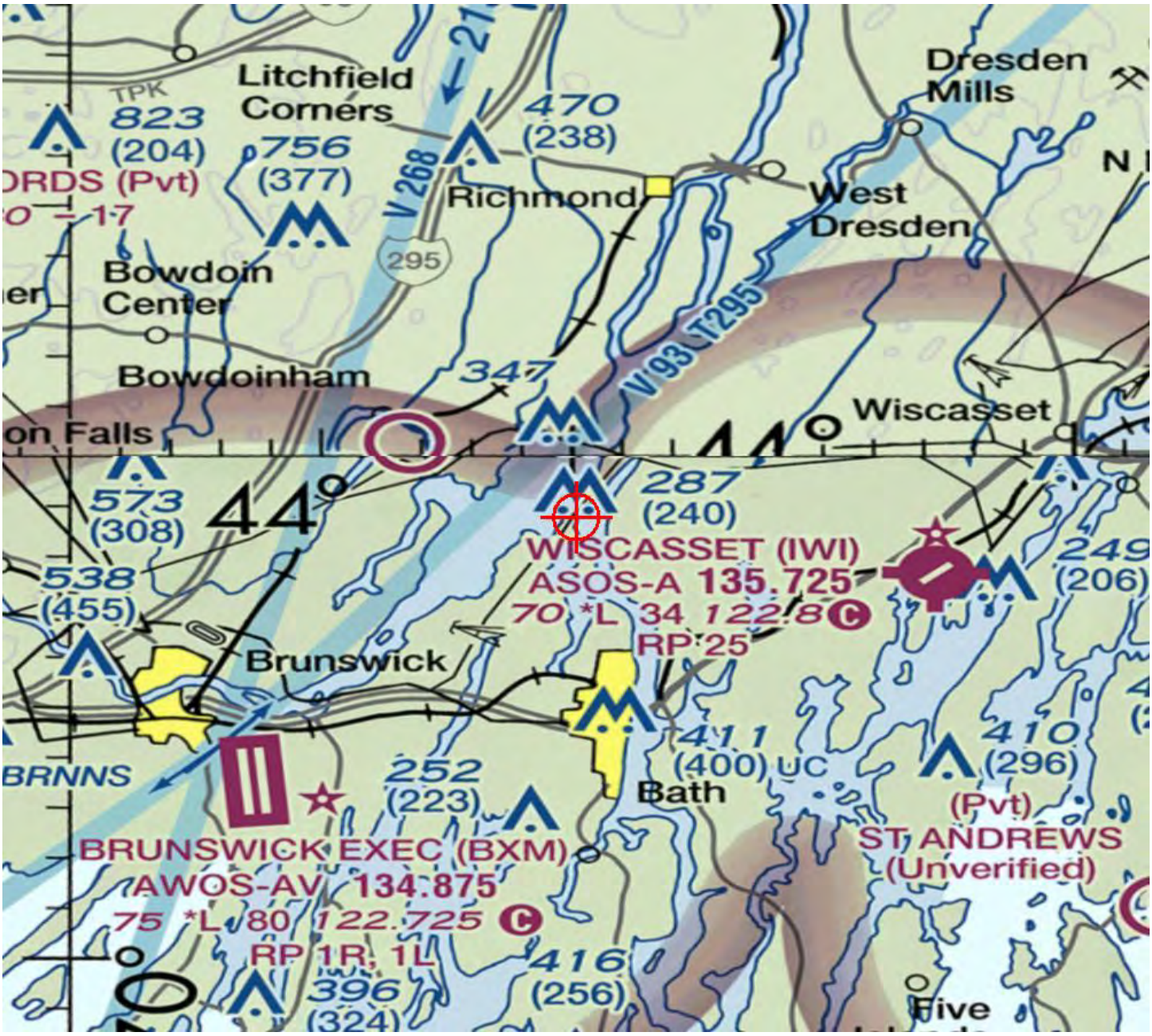
This evaluation concerns the effect of the marking/lighting changes on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

If we can be of further assistance, please contact our office at (202) 267-0105, or j.garver@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2020-ANE-1539-OE.

Signature Control No: 432927653-434554175 (MAL)
Jay Garver
Specialist

Attachment(s)
Map(s)

cc: FCC


Litchfield Corners
Dresden Mills
West Dresden
Richmond
Bowdoin Center
Bowdoinham
Wiscasset
Brunswick
Bath
WISCASSET (IWI)
ASOS-A 135.725
BRUNSWICK EXEC (BXM)
AWOS-AV 134.875
ST ANDREWS
(Unverified)
(Pvt)
V 268
V 93 T295
295
44°
823 (204)
756 (377)
470 (238)
347
573 (308)
287 (240)
538 (455)
249 (206)
252 (223)
411 (400) UC
410 (296)
396 (324)
416 (256)

Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2018-ANE-1643-OE
Prior Study No.
2016-ANE-707-OE

Issued Date: 03/12/2018

Benjamin Shepard
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	240 feet above ground level (AGL)
	287 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

See attachment for additional condition(s) or information.
This determination expires on 09/12/2019 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.
(b) extended, revised, or terminated by the issuing office.

(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-4525, or david.maddox@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2018-ANE-1643-OE.

Signature Control No: 357417092-359408333 (DNE)
David Maddox
Specialist

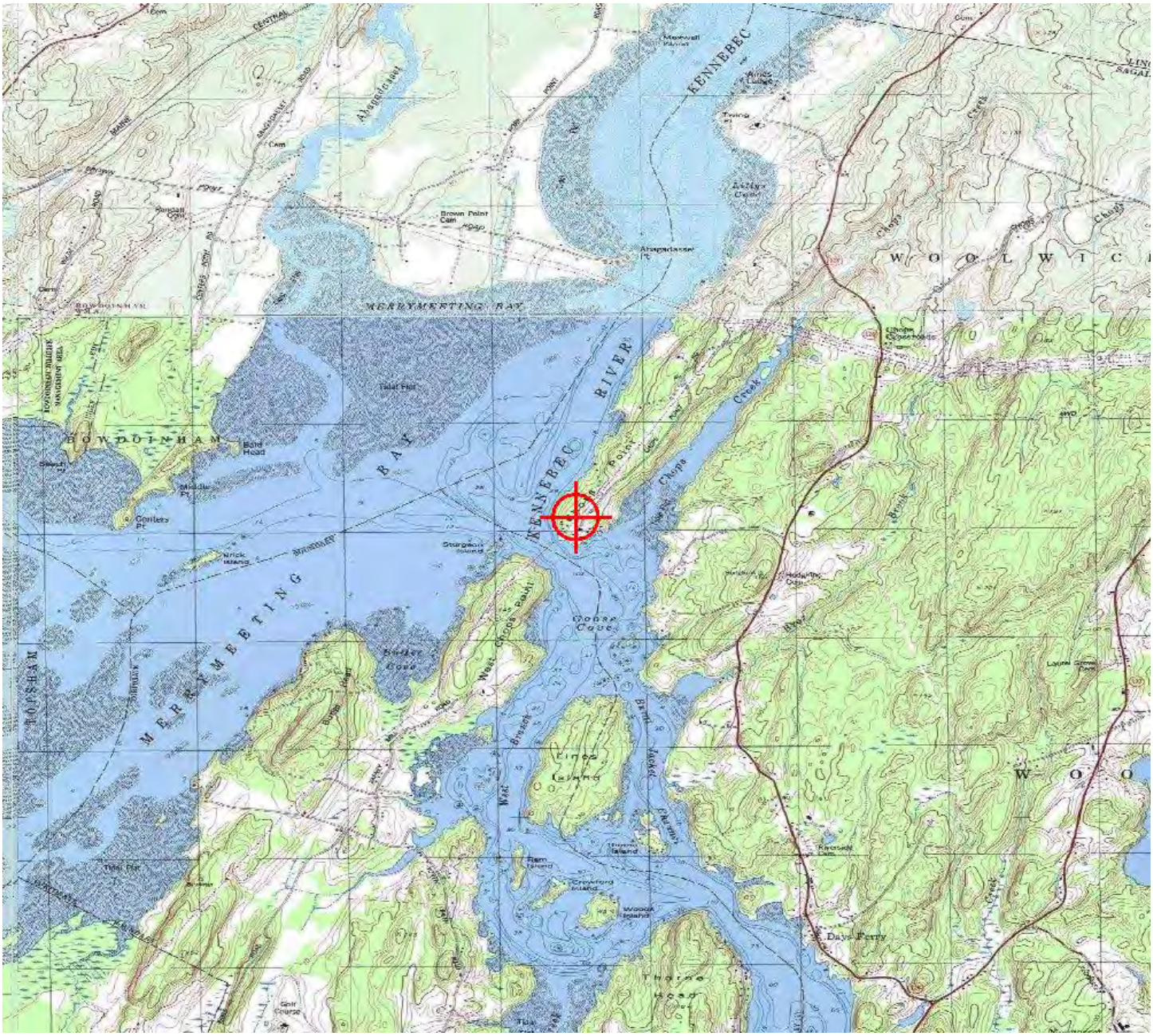
Attachment(s)
Additional Information
Case Description
Map(s)

cc: FCC

In addition to marking and lighting condition above, Spherical markers approved.

Replace existing electrical transmission tower, adjacent to the existing tower with a new lattice tower 240' tall.

TOPO Map for ASN 2018-ANE-1643-OE



Mail Processing Center
Federal Aviation Administration
Southwest Regional Office
Obstruction Evaluation Group
10101 Hillwood Parkway
Fort Worth, TX 76177

Aeronautical Study No.
2020-ANE-1540-OE
Prior Study No.
2018-ANE-1643-OE

Issued Date: 03/25/2020

Jenna Muzzy
Central Maine Power Company
83 Edison Drive
August, ME 04336

**** DETERMINATION OF NO HAZARD TO AIR NAVIGATION ****

The Federal Aviation Administration has conducted an aeronautical study under the provisions of 49 U.S.C., Section 44718 and if applicable Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure:	Lighting Study Tower Section 77 & 277
Location:	Woolwich, ME
Latitude:	43-58-59.59N NAD 83
Longitude:	69-49-41.33W
Heights:	47 feet site elevation (SE)
	244 feet above ground level (AGL)
	291 feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

As a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system.

Any failure or malfunction that lasts more than thirty (30) minutes and affects a top light or flashing obstruction light, regardless of its position, should be reported immediately to (877) 487-6867 so a Notice to Airmen (NOTAM) can be issued. As soon as the normal operation is restored, notify the same number.

It is required that FAA Form 7460-2, Notice of Actual Construction or Alteration, be e-filed any time the project is abandoned or:

_____ At least 10 days prior to start of construction (7460-2, Part 1)
__X__ Within 5 days after the construction reaches its greatest height (7460-2, Part 2)

Your request for consideration to utilize an Aircraft Detection Lighting System to operate the recommended lighting is approved provided that the equipment meets established technical standards.

This determination expires on 09/25/2021 unless:

(a) the construction is started (not necessarily completed) and FAA Form 7460-2, Notice of Actual Construction or Alteration, is received by this office.

(b) extended, revised, or terminated by the issuing office.
(c) the construction is subject to the licensing authority of the Federal Communications Commission (FCC) and an application for a construction permit has been filed, as required by the FCC, within 6 months of the date of this determination. In such case, the determination expires on the date prescribed by the FCC for completion of construction, or the date the FCC denies the application.

NOTE: REQUEST FOR EXTENSION OF THE EFFECTIVE PERIOD OF THIS DETERMINATION MUST BE E-FILED AT LEAST 15 DAYS PRIOR TO THE EXPIRATION DATE. AFTER RE-EVALUATION OF CURRENT OPERATIONS IN THE AREA OF THE STRUCTURE TO DETERMINE THAT NO SIGNIFICANT AERONAUTICAL CHANGES HAVE OCCURRED, YOUR DETERMINATION MAY BE ELIGIBLE FOR ONE EXTENSION OF THE EFFECTIVE PERIOD.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power, except those frequencies specified in the Colo Void Clause Coalition; Antenna System Co-Location; Voluntary Best Practices, effective 21 Nov 2007, will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.This determination includes all previously filed frequencies and power for this structure.

If construction or alteration is dismantled or destroyed, you must submit notice to the FAA within 5 days after the construction or alteration is dismantled or destroyed.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission (FCC) because the structure is subject to their licensing authority.

If we can be of further assistance, please contact our office at (202) 267-0105, or j.garver@faa.gov. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2020-ANE-1540-OE.

Signature Control No: 432927659-434549431 (DNE)
Jay Garver
Specialist

Attachment(s)
Frequency Data
Map(s)

cc: FCC

Frequency Data for ASN 2020-ANE-1540-OE

LOW FREQUENCY	HIGH FREQUENCY	FREQUENCY UNIT	ERP	ERP UNIT
9.2	9.5	GHz	181618	W


Litchfield Corners
Dresden Mills
Richmond
West Dresden
Bowdoin Center
Bowdoinham
Wiscasset
Brunswick
Bath
WISCASSET (IWI)
ASOS-A 135.725
70 *L 34 122.8
RP 25
BRUNSWICK EXEC (BXM)
AWOS-AV 134.875
75 *L 80 122.725
RP 1R, 1L
ST ANDREWS
(Unverified)
(Pvt)
V 268
V 93 T295
295
44°
823 (204)
756 (377)
470 (238)
347
287 (240)
573 (308)
538 (455)
249 (206)
252 (223)
396
416 (256)
411 (400) UC
410 (296)

Please Type or Print on This Form

Form Approved OMB No.2120-0001
Expiration Date: 9/30/2010

U.S. Department of Transportation
Federal Aviation Administration

Failure To Provide All Requested Information May Delay Processing of Your Notice

Notice of Proposed Construction or Alteration

FOR FAA USE ONLY
Aeronautical Study Number

1. Sponsor *(person, company, etc. proposing this action):*
Attn. of: Benjamin Shepard (benjamin.shepard@cmpco.com)
Name: Central Maine Power Company
Address: 83 Edison Drive
City: Augusta State: ME Zip: 04336
Telephone: 207-623-7382 Fax: 207-629-4944

2. Sponsor's Representative *(if other than #1):*
Attn. of: Mark Christopher (mchristopher@trcsolutions.com)
Name: TRC Engineers, LLC
Address: 14 Gabriel Dr
City: Augusta State: ME Zip: 04330
Telephone: 207-620-3844 Fax: 207-621-8226

3. Notice of: [X] New Construction [ ] Alteration [ ] Existing

4. Duration: [X] Permanent [ ] Temporary (____ months, ____ days)

5. Work Schedule: Beginning June 2018 End June 2019

6. Type: [ ] Antenna Tower [ ] Crane [ ] Building [X] Power Line
[ ] Landfill [ ] Water Tank [ ] Other

7. Marking/Painting and/or Lighting Preferred:
[ ] Red Lights and Paint
[ ] White - Medium Intensity
[ ] White - High Intensity
[X] Dual - Red and Medium Intensity White
[ ] Dual - Red and high Intensity White
[ ] Other

8. FCC Antenna Structure Registration Number *(if applicable)*:
N/A

9. Latitude: 43 ° 58 ' 46 , 15 "

10. Longitude: 69 ° 49 ' 56 , 07 "

11. Datum: [X] NAD 83 [ ] NAD 27 [ ] Other

12. Nearest: City: Bath State ME

13. Nearest *Public-use* *(not private-use)* or Military Airport or Heliport:
Brunswick Executive Airport BXM

14. Distance from #13. to Structure: 7.30 miles

15. Direction from #13. to Structure: northeast

16. Site Elevation ***(AMSL)***: 46 ft.

17. Total Structure Height ***(AGL)***: 240 ft.

18. Overall Height ***(#16 + #17) (AMSL)***: 287 ft.

19. Previous FAA Aeronautical Study Number *(if applicable)*:
2016-ANE-708-OE -OE

20. Description of Location: *(Attach a USGS 7.5 minute Quadrangle Map with the precise site marked and any certified survey)*

The transmisison tower will be located on West Chops Road, Bath, ME

21. Complete Description of Proposal:

Central Maine Power Company proposes to replace an existing lattice tower electrical transmission structure along the Kennebec River. The tower is 220 feet tall, double circuit structure that supports the 34.5 kV (Section 77) and 115 kV (Section 207) lines. The proposed replacement tower to support both circuits will be 240 feet tall and will be located next to the existing tower, which will subsequently be removed.

Lighting on the tower will include five L-866/L-885 lights installed at three levels on the tower. One light at the top of the tower, two lights at the elevation of the lowest conductor sag, and two lights midway between the top & lower lights. This corresponds to lights 70 feet & 140 feet below the top of the tower. The mid & lower level lights will be installed on opposing sides of the tower to allow 360 degree visibility. The lights will be installed on the southeast & northwest sides of the tower. The lighting material & installation will be per the Unimar LED Medium Intensity Catenary Lighting System. Lighting will be monitored by a light failure notification system to insure function and minimize unplanned outages.

A total of 8 marker balls 36" diameter will be placed on two shield wires, (upper set of conductors). They will be of alternating colors of orange, white, & yellow.

CMP does not propose to paint the tower.

Frequency/Power (kW)	

Notice is required by 14 Code of Federal Regulations, part 77 pursuant to 49 U.S.C., Section 44718. Persons who knowingly and willingly violate the notice requirements of part 77 are subject to a civil penalty of $1,000 per day until the notice is received, pursuant to 49 U.S.C., Section 46301(a)

I hereby certify that all of the above statements made by me are true, complete, and correct to the best of my knowledge. In addition, I agree to mark and/or light the structure in accordance with established marking & lighting standards as necessary.

Date	Typed or Printed Name and Title of Person Filing Notice	Signature
2/19/2018	Mark W. Christopher, Project Manager	

CENTRAL MAINE POWER

Kennebec River Crossing

Location Map

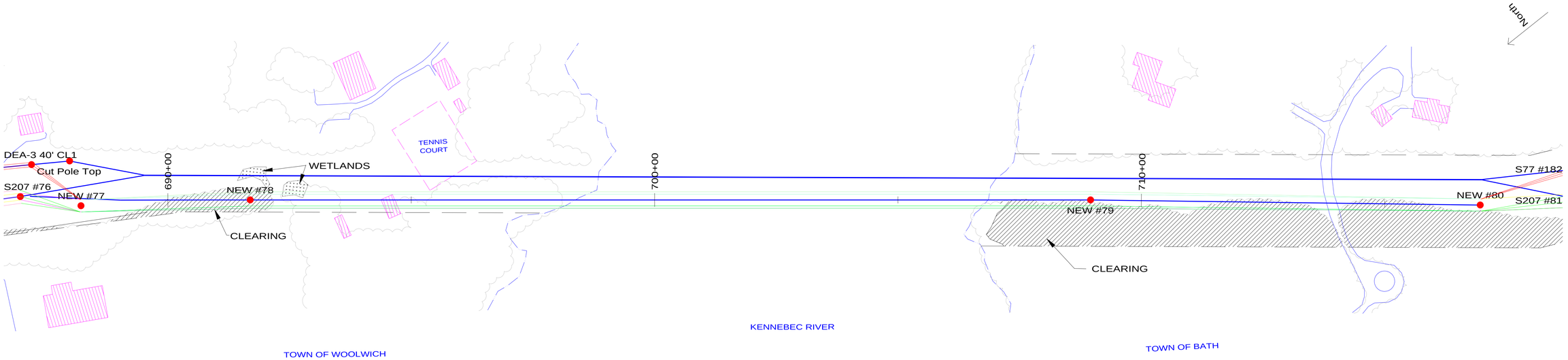
Created: 3/24/2016

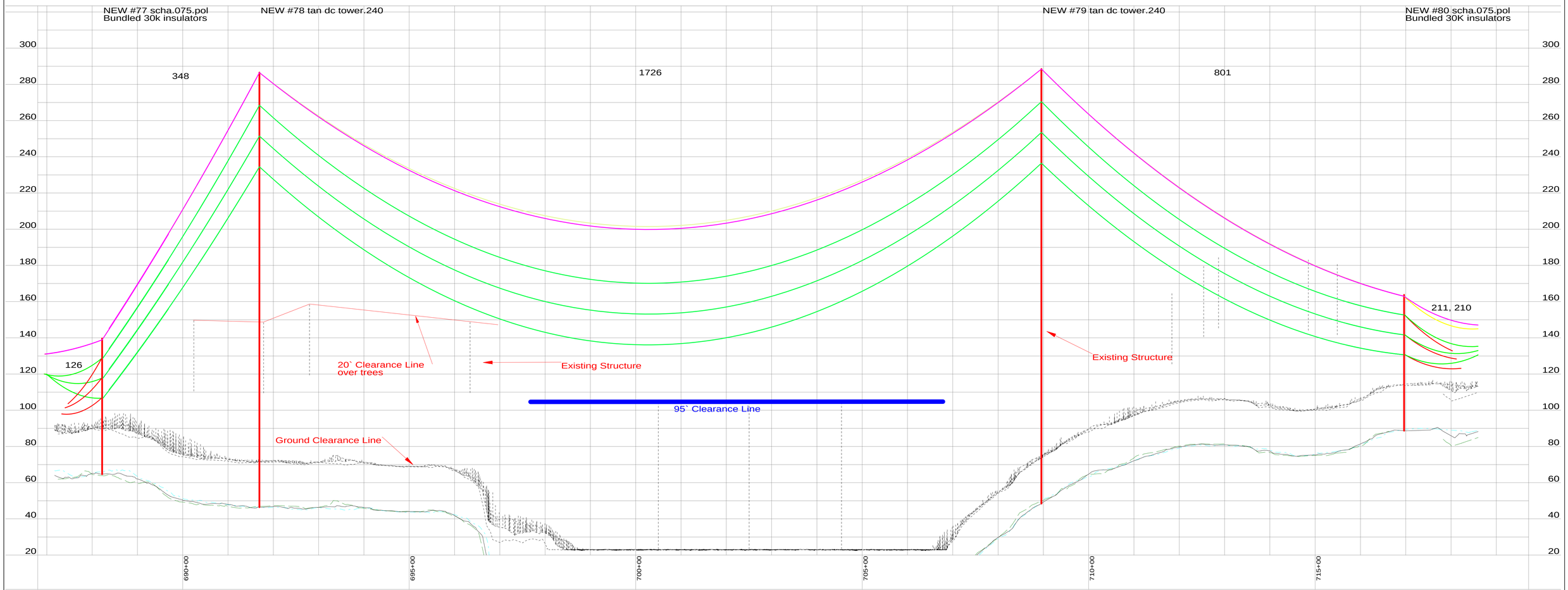
TRC

14 Gabriel Drive
Augusta, ME 04330

\\anpesri1\gis\PROJECTS\AUGUSTA\CMP\233503-Kennebec River Crossing\CMP_Kennebec_Crossing_Location_Map_8x11.mxd

PLS-CADD Drawing





100.0 ft. Horiz. Scale

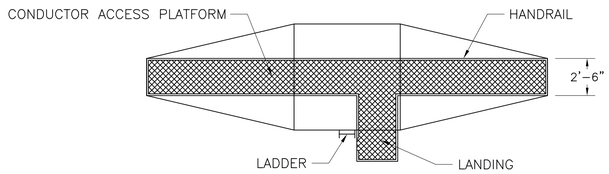
25.0 ft. Vert. Scale

TRC

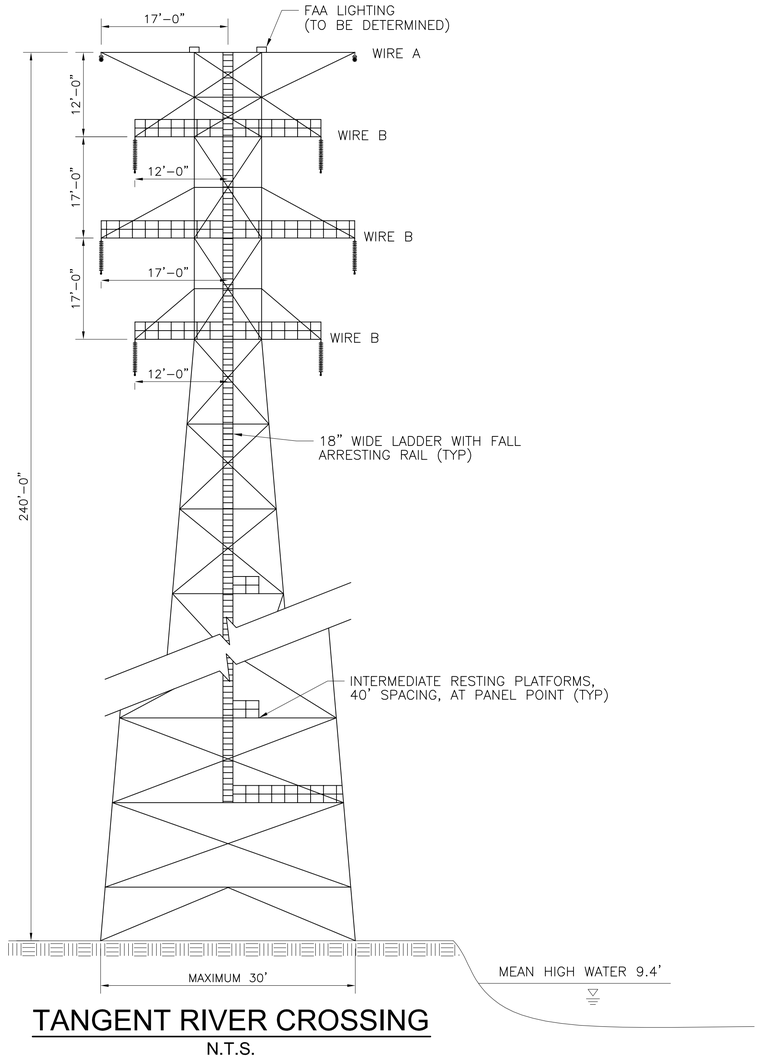
REV.	DATE	DESCRIPTION	BY	APP
B	1/08/16	IFR - ISSUE FOR 30% REVIEW	CRP	
C	3/16/16	ISSUED FOR PERMIT	CRP	

DESIGNED CRP	DATE 1/08/2016	SCALE AS NOTED	REVISION B	
CHECKED EGS	DATE 1/08/2016	DRAWING NO. 233503-SK01		
APPROVED MEB	DATE 1/08/2016			

SECTIONS 207/77 - KENNEBEC RIVER CROSSING



SECTION A-A
CONDUCTOR ACCESS PLATFORM



TANGENT RIVER CROSSING
N.T.S.

WIRE DESIGNATION			
WIRE	TYPE	DIA (INCHES)	WEIGHT LBS/FT
A	AFL DNO-8230 36 FIBER OPGW	0.913	0.91
B	795 "DRAKE" ACSR	1.108	1.1

STRUCTURE LOCATIONS			
STR #	NORTHING	EASTING	GROUND
78	15978781.15	1422520.66	46.5
79	15977432.62	1421442.68	48.5

NOTES

1) COORDINATE SYSTEM: UTM 19 NORTH US SURVEY FOOT.

TRC 249 Western Avenue
Augusta, ME 04330

PROJECT NO: 233503

REV	DESCRIPTION	DATE	DES	CHK	APP
A	IFR – ISSUE FOR REVIEW	3/X/16	CRP	MEB	CRP

CRP/TRC DESIGNED
KLB/TRC DRAWN
MEB/TRC CHECKED
CRP/TRC APPROVED
REVIEW 1
REVIEW 2

KENNEBEC RIVER TOWER REPLACEMENT
DOUBLE CIRCUIT TOWER OUTLINE
FAA PERMIT DRAWING

03/03/2016 DATE
AS NOTED SCALE

TRC 233503–SK08–SH01 REV. A

KENNEBEC RIVER CROSSING

DCN 01 MATERIAL LIST CHANGES

10/26/2017

Material to Add to Material List

Unimar Part #	Description	Qty
DCLS1-008-M	Catenary Master Controller & Dual Flashead	2
DCLS1-008-S	Catenary Slave System & Dual Flashhead	6
DCLS-SYS-8-8	Catenary Installation Kit	2
5810-042	Beacon Bracket, Hot Rolled Steel, 7 ga, Rev.A	10
DCP18K	DCP18K, Kit, 2 clamp sets, Galv, 1-1/2"-5"	10
18001-006	Photocell Spec Calibrated for strobes	2
9802-018	16/4 SOOW Cable	40
9802-008	18/8 Cable, Rev. B Top beacon run	2050

Material to Remove from Material List

Item	Description	Qty
TRC-651	MARKER LIGHT, LED, MEDIUM INTENSITY WHITE/RED AC SYSTEM	2
TRC-652	MARKER LIGHT, LED, LOW INTENSITY DUAL RED AC SYSTEM	2
TRC-676	CU CONDUCTOR WIRE, 14/3 SOLID, 1000V, ICEA CLASS S-73-532, SHIELDED	1000
TRC-705	OBSTRUCTION LIGHTING CONTROLLER	2
TRC-713	PHOTO CELL	2

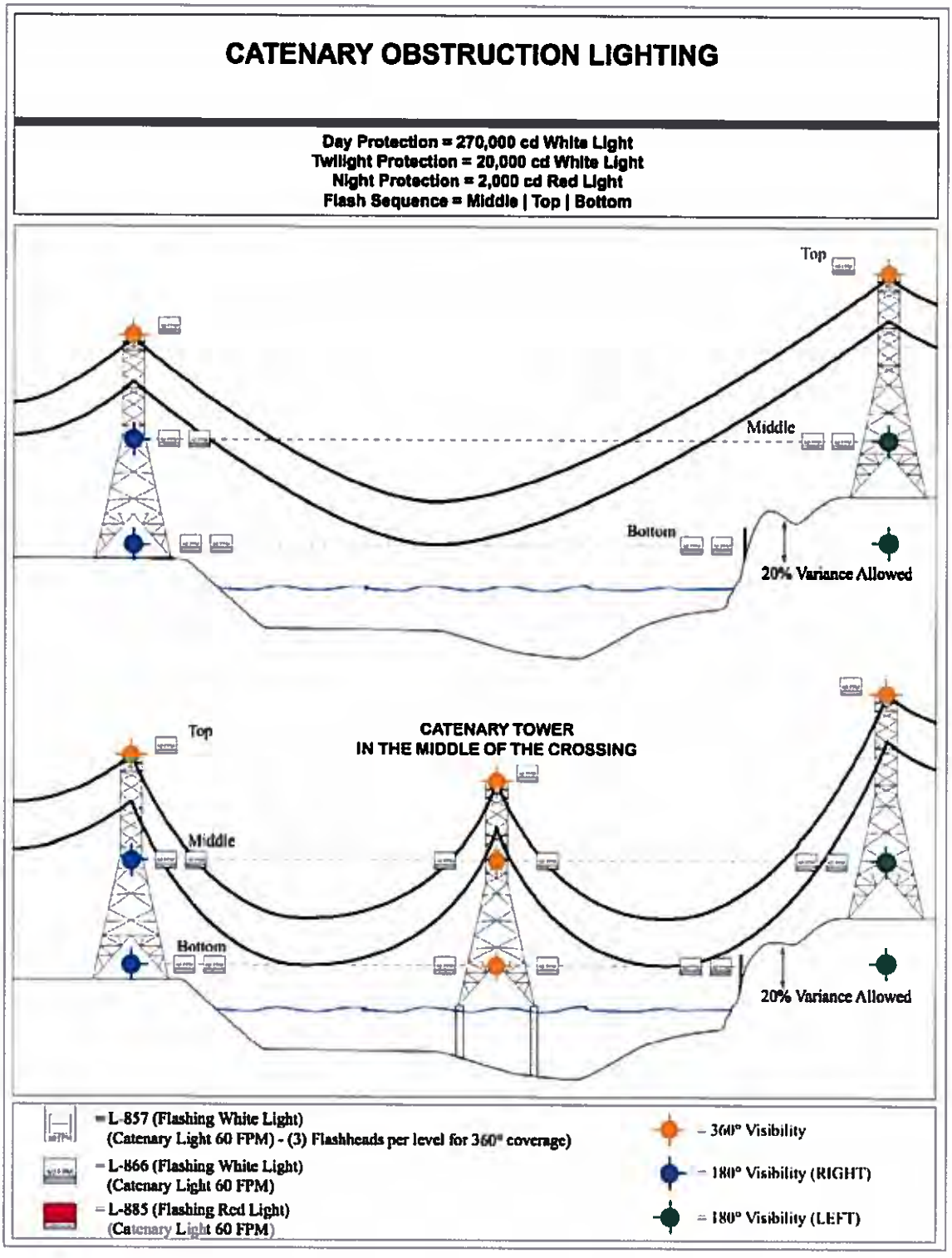


Figure A-4. Catenary Obstruction Lighting

DCLS/WCLS LED Medium Intensity Catenary Lighting System L-866/L-885

UNIMAR
Brighter lighting solutions

3195 Vickery Rd. North Syracuse NY 13212 | (315) 699 4400 | Unimar.com

Certified to:
FAA AC 150/5345-43F
FAA Engineering Brief No. 67
Interlek ETI

Features

- 5 year warranty; 10+ year life expectancy
- Easy access, color coded terminal blocks for quick and easy installation.
- Hinged Flash Head with color coded terminal block for secure cable install.
- Strategically placed control components to simplify troubleshooting.
- "No-Fault" current limiters built in to protect system from incorrect installs.
- No high voltages as found in Xenon systems
- Patented optics eliminate ground scatter
- No moving or serviceable parts in Flash Head, all replacement components located at tower base.
- Resistant to shock and vibration
- Tested and passed surge tests up to 1.9 Million Volts
- No EMI or RF
- IP66 rated

Meets US Fish & Wildlife Services recommendation for proposed rule meeting the FCC standards (WT Docket No 03-187, FCC 06-164) regarding the protection of migratory birds

Application

The all LED Medium Intensity Catenary Lighting System is designed for the lighting of structures that support power lines spanning rivers or valleys and other obstructions to aerial navigation as specified by the FAA and FCC. Flashing of multiple structures is synchronized utilizing GPS technology. The Dual L866/L885 uses LED technology for light output for both the Red Beacon and the White Strobe. Unlike conventional Xenon flashtube technology, little or no maintenance is required during its lifetime. Working voltages of less than 200 VDC are significantly less than those of Xenon flashtube designs. Therefore, this system represents an advance in safety. The system operates from either 120 VAC or 240 VAC 50/60 Hz supply, and controller which can be located up to 550 ft away from the Flash Head.

Specifications

Operating Voltage:	120 VAC or 240 VAC, 50/60 Hz power factor corrected supply	
Wattage:	White Day	100W
	White Night	35W
	Red Night	25W
Candela:	White Day	20,000 cd
	White Night	2,000 cd
	Red Night	2,000 cd
Flash Rate:	60 Flashes per Minute; Sequenced	
Power Factor:	> .9	
Operating Temperature:	-40° F to +131° F (-40° C to +55° C)	
Synchronization:	Multiple unit sync from single controller	
Warranty:	5 years	

System Part Numbers

System Part Number:	Description
DCLS(X*)-008	Medium Intensity Dual Catenary Lighting System
WCLS(X*)-008	Medium Intensity White Only Catenary Lighting System

*Note: X=1 120VAC or X=2 230VAC

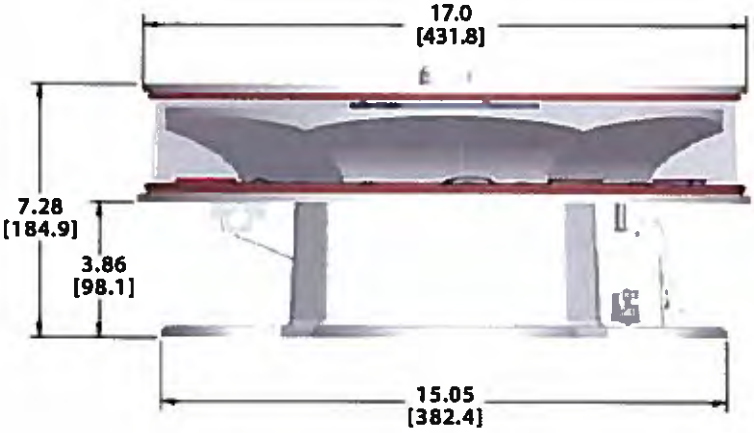
DCLS/WCLS LED Medium Intensity Catenary Lighting System L-866/L-885

UNIMAR
Brighter lighting solutions

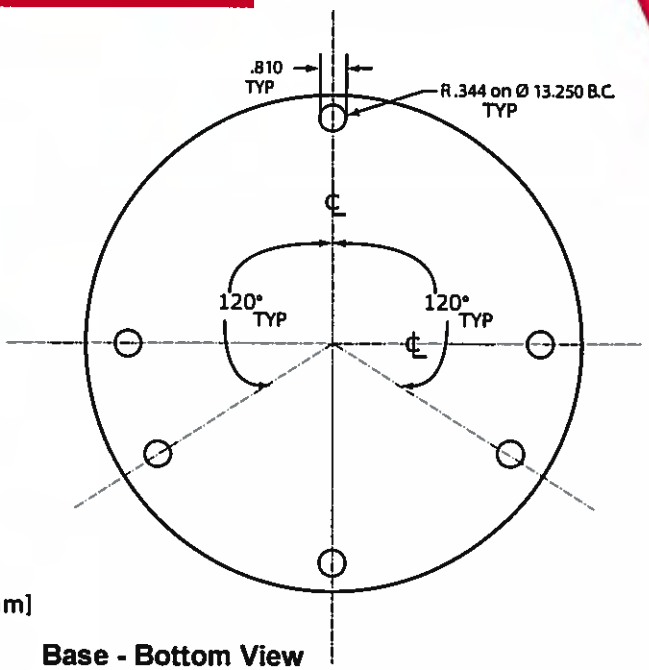
3195 Vickery Rd. North Syracuse NY 13212 | (315) 699 4400 | Unimar.com

Mechanical Dimensions

Light Engine Dimensions

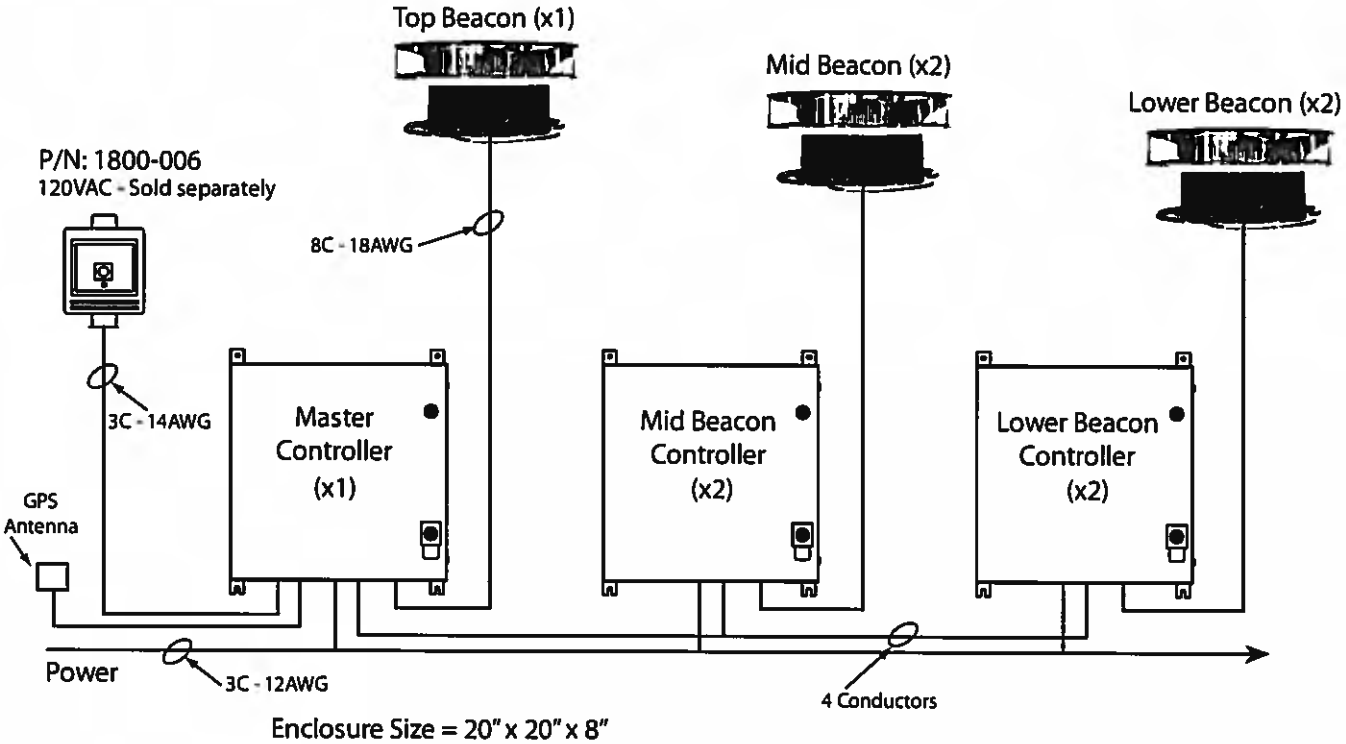


Dimensions in inches [mm]



Base - Bottom View

Six (6) mountung holes are provided on the Light Engine base. These mounting holes will align with most tower pedestals.



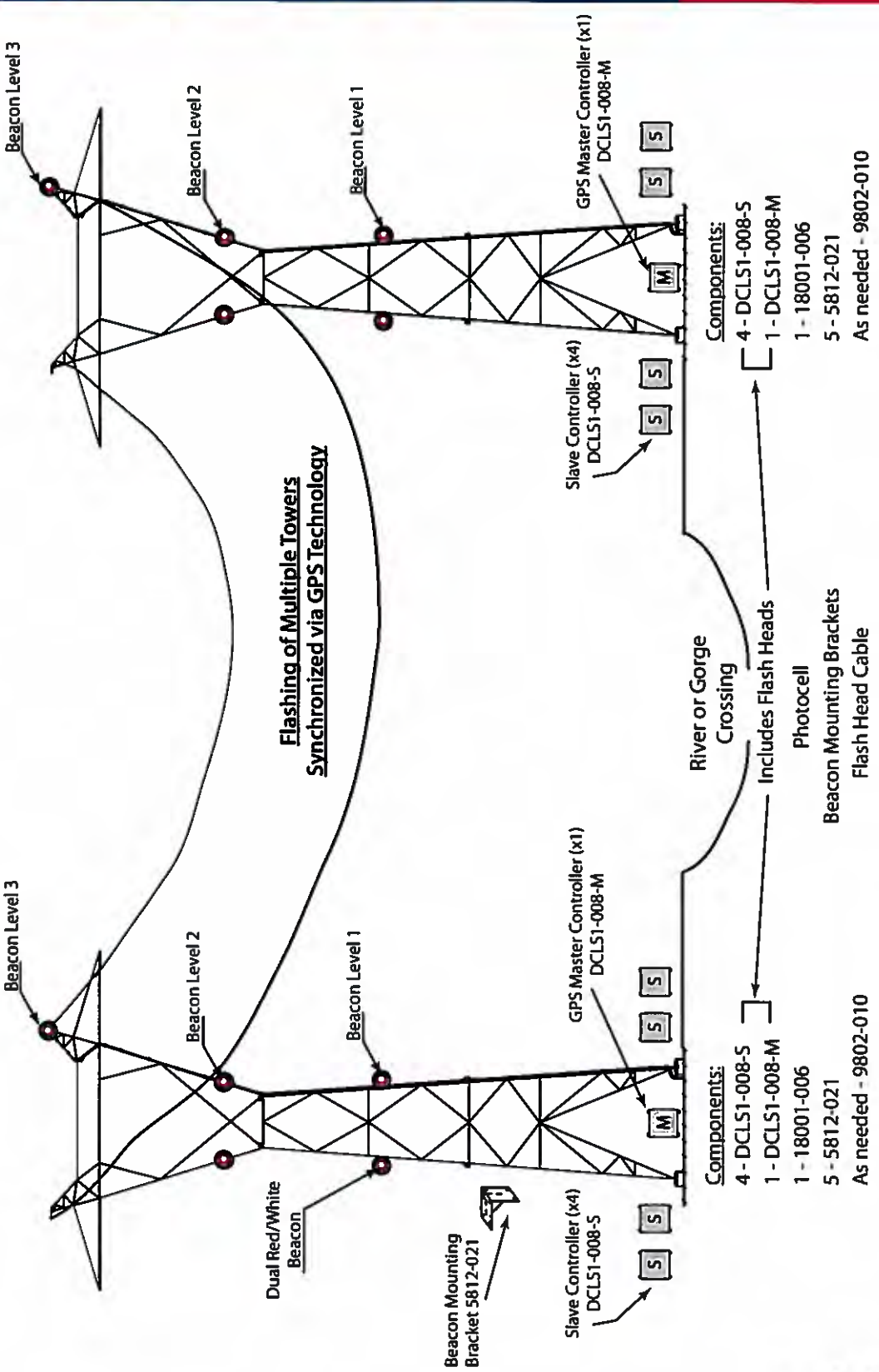
Enclosure Size = 20" x 20" x 8"

DCLS/WCLS LED Medium Intensity Catenary Lighting System L-866/L-885

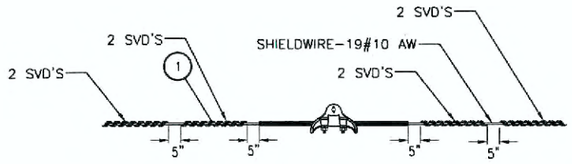
UNIMAR
Brighter lighting solutions

3195 Vickery Rd. North Syracuse NY 13212 | (315) 699 4400 | Unimar.com

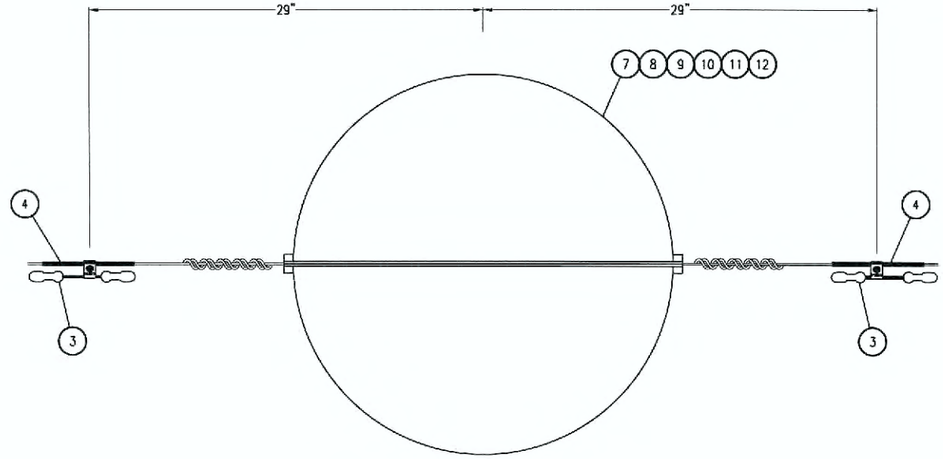
L866 / L885 Catenary Dual Medium Intensity
Synchronized Flashing Lighting System



LED_Dual_1Level_Catenary270813



TANGENT SHIELD WIRE



SPANGUARD ABS MARKER BALL

MATERIAL LIST

STATIC WIRE DAMPER

ITEM	QTY	DESCRIPTION	STOCK NO.
1	16	VIBRATION DAMPER SPIRAL (HI MASS) 19#10 5050202	TRC-591

OPGW WIRE DAMPER

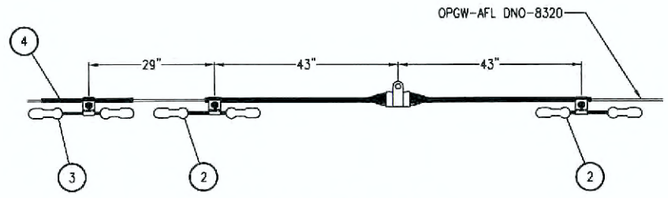
ITEM	QTY	DESCRIPTION	STOCK NO.
2	5	VIBRATION DAMPER OPGW VSD-3540	TRC-592
3	7	VIBRATION DAMPER OPGW VSD-3532	TRC-593
4	7	PROTECTOR RODS OPGW	TRC-590

CONDUCTOR DAMPER

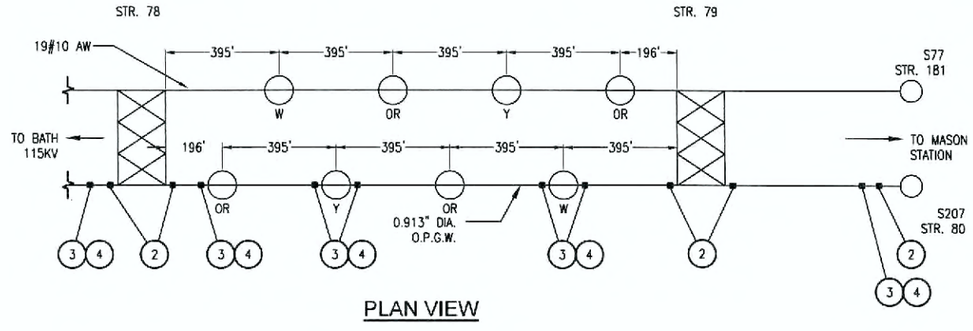
ITEM	QTY	DESCRIPTION	STOCK NO.
5	24	VIBRATION DAMPER CONDUCTOR VSD-4032	TRC-595
6	24	VIBRATION DAMPER CONDUCTOR VSD-4050	TRC-594

MARKER BALLS

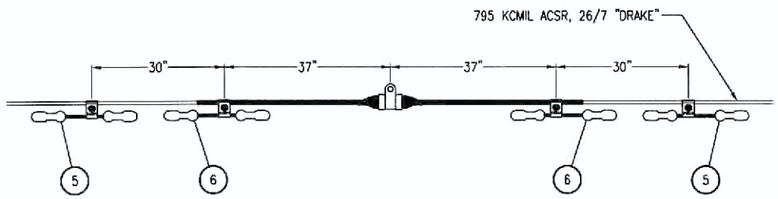
ITEM	QTY	DESCRIPTION	STOCK NO.
7	2	AERIAL MARKER BALL, 36" INTERNATIONAL ORANGE FOR 19#10AW	TRC-58
8	2	AERIAL MARKER BALL, 36" INTERNATIONAL ORANGE FOR OPGW	TRC-59
9	1	AERIAL MARKER BALL, 36" WHITE FOR 19#10AW	TRC-60
10	1	AERIAL MARKER BALL, 36" WHITE FOR OPGW	TRC-61
11	1	AERIAL MARKER BALL, 36" YELLOW FOR 19#10AW	TRC-62
12	1	AERIAL MARKER BALL, 36" YELLOW FOR OPGW	TRC-63



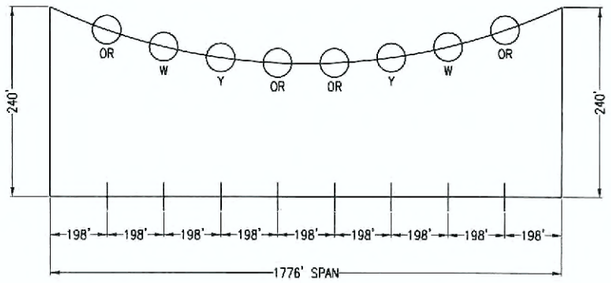
TANGENT OPGW



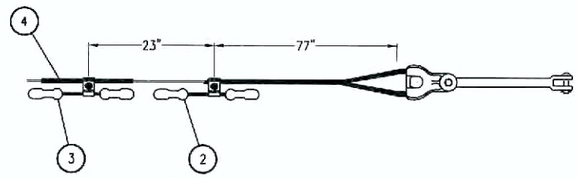
PLAN VIEW



TANGENT CONDUCTOR
DAMPER PLACEMENT



PROFILE VIEW



DEADEND OPGW

ANSI B CADD Drawing, DO NOT REVISE MANUALLY.

TRC 249 WESTERN AVENUE AUGUSTA, ME 04330 PROJECT NO: 233503

REV.	DESCRIPTION	DATE	BY	CK	APP

OWNER ENGINEER: APPROVAL STAMP:

DRAWING PREPARED BY: ACCEPTED BY OE:

PE Stamp

STATE OF MAINE
CRAIG R. PERREAULT
No. 12136
July 25 2016
LICENSED PROFESSIONAL ENGINEER

IUSA ENGINEERING
CONFIDENTIAL, PROPRIETARY and TRADE SECRET INFORMATION
Property of Iberdrola, USA

CMP IBERDROLA - USA

REV.	DATE	BY	DESCRIPTION	APP.
0-0	7/25/2016	TRC	IFC ISSUED FOR CONST. 2016	CRP

KENNEBEC RIVER CROSSING TRANSMISSION LINE DAMPER DETAILS

SHEET 1 OF 1

SECTION 207/77 BATH

DR.	JJD/TRC	SCALE: N.T.S.	FILE: 538-T207-110.DWG
CK.	EGS/TRC	NO.	REV.
APP.	CRP/TRC	538-T207-110	0-0
DATE:	4/29/16		

Federal Airways & Airspace®

January 27, 2019 Ref No. 20FAA002GN

Kenneth Farber
Senior Counsel
Avangrid Service Company
162 Canco Road
Portland, Maine, 04013

Re: *Opinion Letter on Mr. Ed Friedman Letter of 12/24/2019*

Dear Mr. Farber:

As you requested, Federal Airways & Airspace (FA&A) has reviewed the December 24, 2019 letter from Ed Friedman, Chair, Friends of Merrymeeting Bay to Doug Herling regarding Central Maine Power Company's (CMP) new towers at the Chops crossing on Merrymeeting Bay and, in particular, requirements of the Federal Aviation Administration (FAA) to light the towers. It is Mr. Friedman's contention that under the FAA's regulations and guidance, CMP was not required to install lighting on its new towers and, having done so, the Company should now re-file for a change in status to remove the lights. Mr. Friedman also suggests that pending approval of such a request, CMP should extinguish the lighting and provide a Notice to Airmen (NOTAM) of unlit towers and wire crossing and should also abandon its request to enhance the current lighting with a radar activated system.

FA&A CREDENTIALS

Federal Airways and Airspace (FA&A) is a private, woman owned, small business that was established in 1984. Its founder was motivated by the need within the telecommunications industry to automate the obstacle evaluation process of locations for proposed towers. In addition to our commercial and government software FA&A also provides consulting services to industries that need to comply with the rules and regulations of the FAA. FA&A employs a team of highly trained Airspace Specialists with expertise in FAR Part 77 as well as Terminal Instrument Procedure Analysis (TERPS criteria).

SUMMARY OF FA&A OPINION

As discussed below, it is FA&A's opinion that Mr. Friedman's analysis is not consistent with FAA policy or with generally accepted industry practice in implementing the FAA regulations and guidance. Adopting Mr. Friedman's recommendations would increase safety risks for aviation and subject CMP to substantial liability risks should there ever be an aviation incident. Accordingly, FA&A advices CMP to maintain the currently installed

obstruction lighting system. In addition, the company should continue with its efforts to obtain expeditious approval from the FAA for the proposed radar system to augment the current lighting.

DISCUSSION

It might be helpful to put the current situation into perspective. In 2019 CMP replaced two lattice towers on either side of the Kennebec River. These towers are each 240' tall and double circuited with a 34.kV and a 115kV three phase line, there is a static wire on top with marker balls. A lighting study was conducted by CMP's consultant and was submitted to the FAA originally in 2016 and updated in February 2018. The lighting study recommended that the towers each include lighting, specifically, L-866 daytime and L-885 nighttime. FA&A agrees that it was appropriate for CMP's consultant to include that recommended lighting in the Company's Notice of Proposed Construction that it submitted to the FAA for approval.

On March 3, 2019, the FAA issued its Determination of No Hazard to Air Navigation. One of the conditions for the Determination requires that the towers be marked/lighted in accordance with FAA Advisory Circular 70/7460-1 L Change 1, Obstruction Marking and Lighting, a med-dual system-Chapters 4,8 (M-Dual), & 12. Chapter 2.1 of the referenced Circular states that " Any temporary or permanent structure, including all appurtenances, that exceeds an overall height of 200 feet (61m) above ground level (AGL) or exceeds any obstruction standard contained in 14 CFR Part 77 should be marked and/or lighted"(emphasis added). Importantly, 14 CFR Part 77, referenced above in the Circular requires marking/lighting if the height of the structure is above 200 feet and within a certain distance from an airport.

Mr. Friedman is correct in his letter that the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport. Mr. Friedman goes on to suggest that because the Circular uses the word "should" rather than "must" that CMP had discretion to not install lighting. Mr. Friedman is incorrect in his interpretation of the Circular. Because CMP's Determination letter specifically includes an obstruction lighting specification, it is the FAA policy that the lighting is mandatory.

Moreover, even if the lighting had not been a requirement in the Determination letter, CMP nonetheless would have wanted to include it on the towers. The language in Chapter 2.1 of the Circular cited above and referenced by Mr. Freidman is viewed by experts in the industry as setting the standard of care for applicants, meaning that "should" is generally viewed as "shall" unless there is a compelling reason not to include the lighting. It is FA&A's opinion that CMP's use of tower lighting is following the reasonable and expected standard of care in the industry. To do otherwise, as suggested by Mr. Friedman, would subject aviators to safety risks and CMP to liability risks that should be avoided.

In light of FA&A's above analysis, we also conclude that Mr. Friedman's suggestion of extinguishing the lighting and issuing a NOTAM is not an appropriate option. A main use of a NOTAM is for reporting obstruction light outages. It is designed to notify the aviator of such equipment outages/failures. Outages related to what one may consider nuisance related, when it has been deemed by installation/maintenance professionals that obstruction lighting to be in good working order, would, in our opinion, be an abuse of the NOTAM system. Furthermore, from a National Transportation Safety Board (NTSB)

perspective, if obstruction lighting were extinguished pending a marking and lighting study (lights in good working order), even though a NOTAM was in place notifying the aviator of the unlit existing structure, we believe Central Maine Power (CMP) would dramatically widen their liability footprint. Aircraft accident risk would significantly increase along with the potential for fatalities due to a mishap. Chapter 1.5 of the referenced Circular notes the sponsor is responsible for adhering to the approved lighting limitations and/or recommendations given in the determination and should notify the FAA prior to removal of marking and/or lighting. We advise CMP against potentially compromising aviation safety or increasing the Company's liability footprint by pursing a NOTAM on lighting systems that were recommended by the FAA and complied with by CMP.

FA&A appreciates that CMP sought our expertise to respond to the questions raised by Mr. Friedman. Please don't hesitate to contact me should you have any follow-up questions. For your convenience I have attached my CV to this letter.

Respectfully,

Clyde Pittman, Director of Engineering
Federal Airways & Airspace, Inc.

Federal Communications Commission

Wireless Telecommunications Bureau

RADIO STATION AUTHORIZATION

LICENSEE: CENTRAL MAINE POWER CO

CENTRAL MAINE POWER CO
83 EDISON DRIVE
AUGUSTA, ME 04336

Call Sign	File Number
WRHZ402	0009070583

Radio Service
RS - Land Mobile Radiolocation

Regulatory Status
PMRS

Frequency Coordination Number

FCC Registration Number (FRN): 0003687464

Grant Date	Effective Date	Expiration Date	Print Date
07-20-2020	07-20-2020	07-20-2030	07-21-2020

STATION TECHNICAL SPECIFICATIONS

Fixed Location Address or Mobile Area of Operation

Loc. 1 **Address:** 425 Chops Point Rd
City: Woolwich **County:** SAGADAHOC **State:** ME
Lat (NAD83): 43-58-59.6 N **Long (NAD83):** 069-49-41.3 W **ASR No.:** **Ground Elev:** 14.3

Antennas

Loc No.	Ant No.	Frequencies (MHz)	Sta. Cls.	No. Units	No. Pagers	Emission Designator	Output Power (watts)	ERP (watts)	Ant. Ht./Tp meters	Ant. AAT meters	Construct Deadline Date
1	1	009220.00000000-009480.00000000	LR	1		45M0P0N	188.000	181618.000	74.4		07-20-2021

Control Points

Control Pt. No. 1
Address: 83 Edison Drive
City: Augusta **County: KENNEBEC** **State: ME** **Telephone Number: (207)629-9535**

Associated Call Signs

Conditions:
Pursuant to §309(h) of the Communications Act of 1934, as amended, 47 U.S.C. §309(h), this license is subject to the following conditions: This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized herein. Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934, as amended. See 47 U.S.C. § 310(d). This license is subject in terms to the right of use or control conferred by §706 of the Communications Act of 1934, as amended. See 47 U.S.C. §606.

Licensee Name: CENTRAL MAINE POWER CO

Call Sign: WRHZ402 **File Number:** 0009070583 **Print Date:** 07-21-2020

Waivers/Conditions:

NONE

.

Denise Plourde

From: William Most <williammost@gmail.com>
Sent: Friday, July 17, 2020 7:50 PM
To: Farber, Kenneth W.
Subject: EXTERNAL: Fwd: ASR Application No. A1161872

[redacted]

---------- Forwarded message ---------
From: **Jennifer Flynn** <Jennifer.Flynn@fcc.gov>
Date: Fri, Jul 17, 2020 at 11:13 AM
Subject: RE: ASR Application No. A1161872
To: williammost@gmail.com <williammost@gmail.com>, fomb@comcast.net <fomb@comcast.net>, steven.faulhaber@cmpco.com <steven.faulhaber@cmpco.com>

Good afternoon,

Applicant Central Maine Power Company proposes in ASR Application No. A1161872 to add aircraft detection lighting system (ADLS) to an existing utility pole in a right-of-way in Woolwich, ME. The subject utility pole is categorically excluded from environmental processing under the Commission's rules. *See* 47 CFR § 1.1306(c)(1)(i). The requests for further environmental processing are therefore dismissed. We also note that antenna structure registration is not required for this utility pole under the Commission's rules. *See* 47 CFR §§ 17.2(a), 17.4(a).

Jennifer Flynn

Attorney-Advisor

FCC/WTB/CIPD

From: Jennifer Flynn
Sent: Monday, May 18, 2020 4:52 PM
To: 'williammost@gmail.com' <williammost@gmail.com>; 'fomb@comcast.net' <fomb@comcast.net>;

steven.faulhaber@cmpco.com
Subject: RE: ASR Application No. A1161872

Attempting to add applicant contact to email chain again.

From: Jennifer Flynn
Sent: Monday, May 18, 2020 4:40 PM
To: williammost@gmail.com; fomb@comcast.net; steven.faulhaber@cmpco.com
Subject: ASR Application No. A1161872

Good afternoon,

I am contacting you to let you know that requests for further environmental processing have been submitted with respect to the above-referenced application. Under the FCC's rules, the applicant may file an opposition to the request within 10 days after the expiration of the time for filing requests, which expires 30 days after the national notice date you set, and is required to serve its response on the requester. The requester may file a reply to your response within 5 business days after the expiration of the time for filing oppositions. Because of the delay in commencing this pleadings email chain, the pleading cycle is adjusted as follows: The applicant's opposition will be due by Friday, May 29, 2020, and the requesters' reply (replies) will be due by Friday, June 5, 2020.

The requester is copied on this email. All parties should be aware that proceedings under ASR Application No. A1161872 are restricted proceedings under the rules of the Federal Communications Commission. Thus, under those rules, you may not make a written presentation on the merits of the case without serving it on the other parties to the proceeding (the applicant and any requesters). In addition, you may not make an oral presentation on the merits of the proceeding without inviting the other parties to participate.

Please submit any filings into the application on the Commission's ASR website as well as serving them on the other parties by way of replying to all on this e-mail chain.

Additionally, please notify all parties by way of replying to all on this email chain immediately if you change the national notice date.

Thank you,

Jennifer Flynn

Attorney-Advisor

FCC/WTB/CIPD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

BIG STONE BROADCASTING, INC., Plaintiff, v. DR. BURON LINDBLOOM, in his official capacity as Chairman of the South Dakota Aeronautics Commission, et al., Defendants.	Civ. No. 00-1012

BRIEF OF AMICUS CURIAE
OF THE FEDERAL AVIATION ADMINISTRATION

Pursuant to the Court's Memorandum and Opinion of September 22, 2000, the Federal Aviation Administration ("FAA") hereby submits this brief of amicus curiae regarding the question of federal preemption.

BACKGROUND

Big Stone Broadcasting, Inc., a South Dakota corporation, is seeking to build an 875-foot radio transmission tower in Codington County, South Dakota. Big Stone Broadcasting successfully sought and received permission from the FAA, pursuant to 14 C.F.R. Part 77, to build the tower. Big Stone Broadcasting was unsuccessful, however, in seeking approval from the South Dakota Aeronautics Commission ("SDAC"), which concluded that the tower would violate the "protected visual flight rule routes" and would be a hazard to air navigation.

Big Stone Broadcasting appealed the SDAC's decision to a South Dakota state court in Codington County. At the same time, Big Stone Broadcasting filed an action in federal court alleging that the South Dakota statutes and regulations upon which the SDAC based its decision are preempted by federal law, and that these statutes violate the Commerce Clause. South Dakota moved to dismiss Big Stone Broadcasting's federal case, asserting that the action violated the State's Eleventh Amendment immunity.

On September 22, 2000, the Court denied in part and granted in part South Dakota's motion to dismiss on Eleventh Amendment grounds. In particular, the Court ruled that Big Stone Broadcasting's cause of action for prospective relief against state officials named in their official capacity could be maintained under the doctrine of Ex parte Young, 209 U.S. 233 (1908). The Court granted South Dakota's motion to dismiss, however, as to the South Dakota Department of Transportation and the South Dakota Aeronautics Commission.

The Court also *sua sponte* raised the question whether, in view of the state court action pending in Codington County, the doctrine established in Younger v. Harris, 401 U.S. 37 (1971), should be applied in the case. The Court noted that, under the Younger doctrine, it is appropriate for a federal court to abstain from hearing a case when there are pending state judicial proceedings absent extraordinary circumstances. The Court found that extraordinary circumstances were present in this case, including the fact that, "if given proper notice, the FAA may wish to intervene or at least file an *amicus curiae* brief * * * *." Memorandum Opinion and Order at 8.

The Court therefore ordered that Big Stone Broadcasting was to furnish a copy of the complaint, the answer, and the court's Memorandum Opinion and Order to the FAA, advising

the agency that it has 60 days from the date of mailing the documents in question in which to make a decision whether to seek to intervene or file an *amicus curiae* brief. On November 28, 2000, the Court granted the motion for an enlargement of time of ten days, or until December 7, 2000, in which to make a decision whether to seek to intervene or file an *amicus curiae* brief.

ARGUMENT

The doctrine of preemption is based on the Supremacy Clause of the Constitution, which provides that "[t]he Constitution and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land." U.S. Const. art. VI, cl.2. As Chief Justice Marshall explained, "in every case, the act of Congress, or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824).

A federal statute may preempt state and local laws in one of three ways. First, Congress, in enacting a statute, may express a clear intent to preempt state law. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 203 (1983). Second, absent express preemption, federal law may have an implied preemptive effect if Congress revealed this intent by "occupying the field" of regulation, when there is a "scheme of federal regulation * * * so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982). Stated differently, field preemption will be inferred when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Finally, there is federal preemption when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

The relevant statutory scheme at issue in this case, the Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. §§ 1301-1542, does not contain an express preemption clause. Hence, federal preemption will apply only if an intent to preempt is "implicitly contained in the [Federal Aviation Act's] structure and purpose," Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); in other words, if there exists field or conflict preemption.

The Federal Aviation Act authorizes the FAA to promote air safety and to regulate the use of navigable air space. The Act provides, in pertinent part, that: In particular, the Act provides, in pertinent part, that:

> (a)(1) The United States Government has exclusive sovereignty of [the] airspace of the United States.
>
> * * *
>
> (b)(2) The Administrator [of the FAA] shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for --
>
> (A) navigating, protecting, and identifying aircraft;
>
> (B) protecting individuals and property on the ground;
>
> (C) using the navigable airspace efficiently; and
>
> (D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 40103.

In addition, the Act specifically recognizes the threat that tall structures may pose to air safety and provides that the FAA:

> shall, by rules and regulations, or by order where necessary, require all persons to give adequate public notice, in the form and manner prescribed by the (Administrator), of the construction or alteration, or of the proposed construction or alteration, of any structure where notice will promote safety in air commerce.

49 U.S.C. § 1501. Congress also has explicitly addressed the role of the FAA (together with the FCC) in determining when broadcast towers will be built and the exclusive role of the FAA in determining the circumstances in which a tower, or other construction, might pose a hazard to air navigation. See 49 U.S.C. § 44718.

Pursuant to these statutory powers, the FAA promulgated Part 77 of the Federal Aviation Regulations governing "Objects Affecting Navigable Airspace," 14 C.F.R. § 77. The pertinent provisions of these regulations require each person who proposes construction or alteration of structures of particular dimensions and within specific proximity to airports to notify the FAA. See 14 C.F.R. §§ 77.11, 77.13, 77.15. The FAA uses this information to make "(d)eterminations of the possible hazardous effect of the proposed construction or alteration on air navigation." Id. § 77.11(b)(2). The FAA Administrator's determination is a "final disposition," judicially reviewable in the courts of appeals under 49 U.S.C. § 1486.

In view of this statutory and regulatory background, it is the position of the FAA that the Federal Aviation Act occupies the field regarding the question whether a proposed broadcast tower would constitute a navigable hazard. Here, pursuant to the Part 77 process, the FAA considered Big Stone Broadcasting's request to build the broadcast tower in question and

determined that no navigable hazard would be created. Hence, any contrary ruling by a state or local authority is preempted by federal law.[1] Such questions are for the FAA to determine, and the proper course for a state or local authority to follow to ensure its views are being considered regarding this important issue is to participate in the Part 77 process. Indeed, the legislative history of section 44718 of the Federal Aviation Act specifically provides that "[t]he FAA should coordinate * * * evaluations with state and local aviation officials" House Conf. Rep. No. 100-484, reprinted in 1987 U.S. Code Cong. & Admin. News 2533, 2630, 2660.

Moreover, the federal courts have consistently held that Congress, through its passage of the Federal Aviation Act, has largely preempted the field of airspace safety and management. The leading case is City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), in which the Supreme Court held that the Federal Aviation Act preempted a city ordinance regarding aircraft noise. In pertinent part, the Supreme Court adopted the Solicitor General's argument that, "as respects 'air management' there is pre-emption," id. at 627, and held that, "[i]t is the pervasive nature of federal regulation of aircraft noise that leads us to conclude that there is pre-emption." Id. at 633. The Supreme Court further found that:

> The Federal Aviation Act requires a delicate balance between safety and efficiency, and the protection of persons on the ground. Any regulations adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

Id. at 639 (internal citations omitted).

---

[1] A state or local authority could, of course, determine that a proposed broadcast tower should not be built on separate and independent grounds; i.e., on a ground that did not involve the question whether the broadcast tower constitutes a navigable hazard, or that would otherwise be impermissible under federal law.

Following the Supreme Court's decision in City of Burbank, the federal courts have uniformly held that the Federal Aviation Act preempts the regulation of aircraft and airspace, with the sole exception being for the regulation of noise levels at airports by local aircraft proprietors. See, e.g., National Helicopter Corp. v. City of New York, 137 F.3d 81, 88 (2d Cir. 1998) ("[F]ederal courts have recognized federal preemption over the regulation of aircraft and airspace, subject to a complementary though more limited role for local aircraft proprietors in regulating noise levels at their airports." (internal quotation omitted)); Burbank-Glendale-Pasadena Airport Auth. v. City of Los Angeles, 979 F.2d 1338, 1340 (9th Cir. 1992) ("It is settled law that non-proprietor municipalities are preempted from regulating airports in any manner that directly interferes with aircraft operations."); Pirolo v. City of Clearwater, 711 F.2d 1006, 1008-09 (11th Cir. 1983) (holding that city airport ordinances regulating night operations and prescribing air traffic patterns were preempted by federal law); Price v. Charter Township of Fenton, 909 F. Supp. 498, 501-05 (E.D. Mich. 1995) (holding that township ordinance limiting frequency of flights was preempted by Federal Aviation Act); United States v. City of Berkeley, 735 F. Supp. 937, 940 (E.D. Mo. 1990) (holding that "the comprehensive federal regulation of air naviation facilities and air safety would permit the Court to conclude that local regulation of the construction of air navigation facilities is preempted."); Blue Sky Entertainment v. Town of Gardiner, 711 F. Supp. 678, 682 (N.D.N.Y. 1989) (finding that town law regulating parachute jumping was pre-empted and stating that "[i]t is well-settled that FAA has been delegated exclusive responsibility by Congress for the safe and efficient management of the navigable airspace of the United States"). See also Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2d Cir. 1960) ("The Federal Aviation Act was passed by Congress for the purpose of

centralizing in a single authority – indeed, in one administrator – the power to frame rules for the safe and efficient use of the nation's airspace.").

Accordingly, based on a consideration of both the statutory and regulatory background of the Federal Aviation Act, as well as relevant authority, it is the position of the FAA that the Federal Aviation Act occupies the field and, consequently, preempts the SDAC's determination to disapprove the broadcasting tower at issue based on the SDAC's conclusion that the tower would constitute a hazard to air navigation.

Respectfully submitted,

DAVID W. OGDEN
Assistant Attorney General

TED L. MCBRIDE
United States Attorney

SANDRA M. SCHRAIBMAN
Assistant Branch Director

MARK T. QUINLIVAN
Senior Counsel
U.S. Department of Justice
901 E Street, N.W.; Room 1048
Washington, D.C. 20530
Telephone: (202) 514-3346

Attorneys for the FAA

OF COUNSEL:

JAMES S. DILLMAN
Assistant Chief Counsel for Litigation
Federal Aviation Administration

Date: December 8, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December 2000, I caused true and accurate copies of the foregoing to be deposited in first-class mail, postage-prepaid, addressed to the following counsel for the parties:

Brent A. Wilbur
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-0160

Darin P. Bergquist
Assistant Attorney General
700 East Broadway
Pierre, SD 57501-5070

MARK T. QUINLIVAN