STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

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LAW COURT DOCKET NO. BCD-21-43

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FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,
*Plaintiffs-Appellants*,

v.

CENTRAL MAINE POWER COMPANY,
*Defendant-Appellee*.

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On Appeal from Order of Business and Consumer Docket
Docket No. BCD-CV-2020-36

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# REPLY BRIEF OF APPELLANTS

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## B. LEGAL ARGUMENT

NOW COME Appellants, Friends of Merrymeeting Bay, Kathleen McGee, Ed Friedman, and Colleen Moore, who file this Reply Brief in opposition to the Appellee's Brief and in support of their appeal.

In its brief, CMP makes two key concessions:

(1) That the No Hazard Determination (NHD) reflects the FAA's recommendation, not an FAA order.[1]

(2) That the NHD says on its face that it "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body."[2]

Thus, when CMP argues for federal preemption based on the NHD, CMP is asking this Court to endorse an entirely novel legal theory: that a document containing a federal recommendation triggers federal preemption – even if the document explicitly says otherwise.

CMP cites no case for the proposition that an NHD triggers federal preemption. Nor does it cite any case for the proposition that a document like an NHD triggers federal preemption. Rather, CMP cited a case which found that state-law requirements are *not* preempted by an NHD.[3]

[1] Appellee's Brief at 11-12.
[2] Ex. J at 2; Appellee's Brief at 25 ("NHD itself says that CMP is not relieved of its obligation to comply with other laws.")
[3] *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019) ("On balance, we decline to hold the FAA no-hazard determination preempted enforcement of local zoning requirements.")

To adopt CMP's theory – that a federal recommendation triggers complete federal preemption – would mean that the State of Maine can no longer regulate broad swathes of activity such as food safety (because the CDC recommends washing hands before preparing food),[4] traffic enforcement (because the NHTSA recommends that passengers buckle up),[5] or recreational fishing (because NOAA recommends the use of circle or barbless hooks).[6]

But part of the value of a NHD is that it does *not* entirely preempt state-law regulation, because it invites a dialogue between project sponsor, the state, and the FAA. (CMP cites a case that describes this as "cooperative federalism," and indicates that cooperation was Congress' intent.[7]) Here, CMP proposed a package of safety measures to the FAA, and the FAA indicated that the towers would be safe with those measures. But the FAA did not say that the towers would *only* be safe with that particular set of measures. The FAA never specified that the measures CMP proposed are the only possible way to make the towers safe for air traffic. In fact, Plaintiffs have proposed several alternatives which could have

[4] *When and How to Wash Your Hands*, Centers for Disease Control and Prevention (Jun. 10, 2021), https://www.cdc.gov/handwashing/when-how-handwashing.html
[5] *Seat Belts*, National Highway Traffic Safety Administration (Jul. 15, 2021), https://www.nhtsa.gov/risky-driving/seat-belts
[6] *Catch and Release Best Practices*, National Oceanic and Atmospheric Administration (Oct. 23, 2020), https://www.fisheries.noaa.gov/national/resources-fishing/catch-and-release-best-practices
[7] *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019).

satisfied CMP's obligations to both the FAA and local ordinances without causing the disruption that led to this lawsuit, which CMP declined to adopt.[8]

If certain of CMP's proposed devices conflict with Maine's law of nuisance, such as a light that flashes sixty times a minute over four thousand square miles,[9] then that would mean that the dialogue would continue. CMP could go back to the FAA with an alternative package of safety measures, like any of the ones proposed by Plaintiffs, and see if the FAA would issue an NHD for that package.[10]

That is why the NHD says <u>on its face</u> that it does not interfere with the law of any "State, or local government body." This was emphasized by one of the cases cited by CMP, which held that "we rely on the very language of this specific no-hazard determination, which expressly warned the Danners that they still must comply with state and local laws."[11] CMP, however, asks this Court to rule that a NHD completely preempts compliance with the law of any State or local government body – which is exactly the opposite of the text of the NHD.

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[8] App'x at 46, 52-56.

[9] CMP argues that the flashes-per-minute standard derives only from "an article by one person that on its face says it is not FAA policy." Appellee's Brief at 8. Not so. The FAA's flashing standards are described in official FAA policy documents, such as FAA Circular 150/5345-43J (Specification for Obstruction Lighting Equipment), March 11, 2019. Available online at: https://www.faa.gov/airports/resources/advisory_circulars/index.cfm/go/document.current/documentnumber/150_5345-43

[10] It is for this reason that Issue # 4 in CMP's Statement of Issues is a total *non sequitur*. That "issue" is: "Does the FAA have jurisdiction to conduct no hazard determinations given the broad delegation of duties to the FAA and the existence of detailed regulations concerning no hazard determinations?" Plaintiffs are not, however, challenging in any way the FAA's right to issue NHDs. They only challenge whether those NHDs result in the total preemption of state law.

[11] *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019).

CMP is correct, of course, that the "recommendation" nature of a NHD does not render it "essentially meaningless."[12] As they point out, the NHDs have "real, practical effects on whether lenders will lend money, insurers will provide insurance, **local authorities will issue permits**, and so forth."[13]

This is an admission that state law is not preempted here. If the NHD had the preemption effect that CMP is arguing for, then local authorities would not have any ability to withhold or issue permits, and there would be no need to obtain "approval from state or local authorities."[14] Thus, the caselaw cited by CMP proves that the NHD means exactly what it says when it states that it does not interfere with the law of any "State, or local government body."

Nobody in this case is asking that the towers go without safety measures. The only question is whether the law of the State of Maine can have any input on the question of which safety measures should be chosen.

Respectfully Submitted,

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[12] Appellee's Brief at 28.
[13] *Id*. at 29, *citing BFI Waste Sys. of N. Am., Inc. v. F.A.A.*, 293 F.3d 527, 532 (D.C. Cir. 2002) (emphasis added) (NHD's lack of "enforceable legal effect" still had practical impact because it could affect "obtaining approval from state or local authorities").
[14] *BFI Waste Sys. of N. Am., Inc., supra*, 293 F.3d at 532.

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## 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.

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## 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.

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