



JANET T. MILLS
GOVERNOR

017
STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

Memorandum

To: Board Members

From: William F. Hinkel, Executive Analyst

Date: March 18, 2021

Re: Board jurisdiction – CMP/NECEC Transmission LLC minor revision application

This memorandum provides an overview of the March 18, 2021, Board meeting agenda item regarding two requests for original Board jurisdiction of a minor revision application related to the New England Clean Energy Connect (NECEC) project.

On January 15, 2021, and January 18, 2021, the Natural Resources Council of Maine (NRCM) and Maine Chapter of the Sierra Club (Sierra Club), respectively, requested that the Board assume original jurisdiction over an application for a minor revision (NECEC minor revision application) of the May 11, 2020, Order of the Commissioner conditionally approving the application of Central Maine Power Company (CMP) to construct the New England Clean Energy Connect (NECEC Order). Appeals of the NECEC Order and a December 4, 2020, partial transfer of that order (Transfer Order) are pending before the Board. The requests for Board jurisdiction are attached.

This memorandum revises my March 11, 2021, memorandum by including as an additional attachment the February 2, 2021, response of CMP and NECEC Transmission LLC to NRCM's and Sierra Club's requests for Board jurisdiction.

On February 10, 2021, then Acting Commissioner Loyzim provided the Board with a determination that the NECEC minor revision application does not meet at least three of the four criteria necessary for the Board to assume original jurisdiction over the application and, as such, the Board should not assume original jurisdiction over the NECEC minor revision application. Commissioner Loyzim's determination letter is attached.

At its meeting on February 18, 2021, the Board expressed interest in obtaining additional information about the minor revision application as part of a further discussion of the issue, which has now been scheduled for March 18, 2021.

Purpose of the NECEC minor revision application

As the design of some larger approved projects advances from the permitting stage to the construction stage, certain revisions to a license previously granted by the Department may be proposed. In general, the NECEC minor revision application proposes:

- minor changes to pole locations to avoid or minimize impacts;
- changes to temporary access roads;
- a re-route near Bowman Airfield in Livermore Falls as required by the Federal Aviation Administration;
- changes to the Merrill Road Converter Station access road;
- changes at the termination stations on either side of Kennebec River; and
- changes in the corridor clearing limits and centerline alignments.

At the Board's meeting on March 18, 2021, Department staff will provide an overview of the NECEC minor revision application at issue. In addition, staff and counsel to the Board will discuss the procedural framework, including applicable Board rule provisions, and the posture of the original jurisdiction requests in the context of the pending Board appeals of the underlying NECEC Order and Transfer Order. Additional information regarding this matter and expectations for the March 18, 2021, meeting are provided in the attached February 25, 2021, letter from the Board Executive Analyst to participants and interested persons in the NECEC appeals proceeding.

Attachments (5): NRCM request
 Sierra Club request
 CMP and NECEC Transmission LLC response
 Commissioner Loyzim determination letter
 Executive Analyst letter

ATTACHMENT

By Email (NECEC.DEP@maine.gov)

January 15, 2021

James R. Beyer
Regional Licensing and Compliance Manager
Bureau of Land Resources
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

Re: *CMP's Minor Revision Application: Order #L-27625-26-A-N/L-27625-TB-B-N/L-276252C-C-N/L-27625-VP-D-N/L-27625-IW-E-N; USACE Permit NAE-2017-01342*

Mr. Beyer:

I write on behalf of the Natural Resources Council of Maine (“NRCM”) regarding the above-referenced “Minor Revision” Application by Central Maine Power Company and NECEC Transmission, LLC (together herein referred to as “CMP” and the “CMP Application”), to request that (1) the Department process the CMP Application pursuant to Chapter 2 of Department Rules, not as an exempt Minor Revision, and (2) that the Board assume jurisdiction over the Application, which involves a project of statewide significance. Alternatively, given the volume, breadth and technical nature of materials presented in the CMP Application, as well as certain formatting issues making review of those materials difficult, NRCM requests additional time (through February 1, 2021) to review and comment on the submissions.

I. The Application Is Not A Minor Revision

Chapter 2 of the Department’s Rules defines a “Minor Revision as an “application to modify a license previously granted by the Department, where the modification significantly decreases or eliminates an environmental impact, does not significantly expand the project, does not change the nature of the project, or does not modify any Department findings with respect to any licensing criteria.” 06-96 C.M.R. ch. 2 § 1(N). The CMP Application does not meet this definition.

Critically, the CMP Application, if freestanding, is jurisdictional under two separate portions of the Site Location of Development Act, 38 M.R.S. § 482 *et seq.* (“Site Law”). The Site Law applies to a “[d]evelopment of state or regional significance that may substantially affect the environment.” *Id.* The CMP Application is a development of state or regional significance as a hazardous activity (38 M.R.S. § 487-A) and because it “occupies a land or water area in excess of 20 acres” and involves “areas to be stripped or graded and not to be revegetated that cause a total project to occupy a ground area in excess of 3 acres.” 38 M.R.S. § 482(2, 6). First, the hazardous activities of any size subject to Site Law review and approval include transmission lines, which the New England Clean Energy Connect (“NECEC”) is. Second, the additional

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parcels of land CMP identified for newly proposed development for this newly proposed portion of the transmission line (including those near the Bowman Airfield, the Section 3007 Widening and the new substation additions) total more than 20 acres. *See* Application at 3-8.

It cannot be the case that project changes that would themselves trigger Site Law review can be completed as a minor revision. To find otherwise would void the Site Law. The Department must exercise its statutory review obligations pursuant to the Site Law by making findings pursuant to Section 484 and 487-A regarding the newly proposed transmission line and Site Law impacts identified in the CMP Application. 38 M.R.S. § 484 (outlining standards of development and required Department findings); 38 M.R.S. § 487-A(4) (The Department “shall make such orders regarding [the transmission line’s] location, character, width and appearance as will lessen its impact on the environment.”). Further, the Department must do so in compliance with all applicable procedural requirements of Chapters 2 and 3 of the Department’s Rules. 06-96 C.M.R. ch. 2-3. Doing otherwise provides an end run around the Department’s public notice and participation provisions and avoids its statutory review authority under the Site Law. By definition, the Department will be required to make findings about the licensing criteria as applied to the new parcels—findings that it did not make as part of the original permit review. As such, consideration of the Application as a minor revision constitutes an error of law. Further, CMP cannot begin construction during the Department’s review. *See* 38 M.R.S. § 486-A(4).

CMP’s Application is likewise problematic pursuant to the Natural Resources Protection Act (“NRPA”). While CMP purports to replace and revise all previously submitted resource maps, it does not provide any alternatives analysis, nor do the newly submitted maps delineate NRPA protected resources as required by Chapter 310 of the Department’s Rules. *See* 06-96 C.M.R. ch. 310. It appears that the maps in the CMP Application merely overlay various publicly available resource maps on the preferred alternative route. As the Department is aware, Chapter 310 requires site specific delineations of protected resources, which delineations must be conducted under specific conditions (such as specific seasonal windows for significant vernal pools) and with specific reference to the NRPA and Chapter 310 requirements. 06-96 C.M.R. ch. 310 § 2, 4(C). For instance, Chapter 310 defines a jurisdictional stream much more broadly than just anything shown as a blue line in Maine’s GIS mapping. 06-96 C.M.R. ch. 310 § 2(A); 38 M.R.S. §480-B. Without a Chapter 310 compliant delineation of protected resources, it is impossible for CMP, or the Department, to proceed with the avoidance, minimization, and compensation analysis necessary to determine whether there is a practicable alternative to the proposed impacts. Preliminary review indicates that the CMP NRPA delineations of protected resources do not meet Chapter 310 requirements or allow for assessment pursuant to NRPA.

Naming an application a “Minor Revision” does not make it so. Independent of any comparison to the major size of CMP’s line, this new submission proposes a statutorily defined hazardous activity of state or regional significance in its own right. By casting its Application as a “Minor Revision,” CMP attempts to sidestep the requirements of Chapter 2 to avoid public process and to obtain an accelerated review process that will bypass the robust procedures the Department has in place to review project changes, like those now before it, that will alter the environmental impacts, expand and change the nature of the project, and modify Department findings.

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In addition to the issues identified above, it is improper for the Department to exempt revisions to a Commissioner decision currently on appeal to the Board from the requirements of Chapter 2. 06-96 C.M.R. ch. 2 § 2(A). The Department should reject CMP's characterization of this submission and process these proposed changes to the NECEC pursuant to Chapter 2. *Id.*; see 06-96 C.M.R. ch. 2 § 14(B) ("If a modification application filed as minor revision is determined during processing to constitute an amendment, Notice of Intent to File in accordance with this section must be provided. The Department may not act on the amendment application earlier than 20 days after the public notice is published.").

With respect to the January 18, 2021 deadline to submit comments on the Application, NRCM submits that this is not enough time to review and comment in any technical detail on such a voluminous submission of this breadth and technical complexity. First, the current deadline, January 18, 2021, is a State holiday, and so NRCM understands the actual deadline to be the first subsequent business day, January 19, 2021, pursuant to 06-96 C.M.R. ch. 2 § 3(C). Second, and more importantly, the Department must process these changes in compliance with the deadlines established by Chapter 2 of the Department's Rules. Although CMP filed the Application on December 30, 2020, it was not circulated to the service list until January 4, 2021, and the natural resources maps that are part of the Application were not circulated until January 6, 2021. The deadline of January 18, which allows only ten business days for comments from the date on which NRCM first received the Application (less than the 20 days allotted by the Department to request Board jurisdiction over an application), is simply too short in light of the nature of this submission, which must be noticed and reviewed pursuant to Chapter 2.

II. The Board Must Assume Jurisdiction Over The Application

NRCM requests that the Board assume jurisdiction over the Application and hold a hearing on it pursuant to 06-96 C.M.R. ch. 2 § 17. This request is timely because NRCM is submitting it less than 20 days after filing of the CMP Application. The NECEC is undoubtedly a project of statewide significance. NRCM has so contended in numerous filings before the Department and does not here belabor the point,¹ but the NECEC (1) will have an environmental or economic impact in more than one municipality, territory or county, (2) involves an activity not previously permitted or licensed in the State (a high-impact transmission line that will primarily benefit foreign jurisdictions), (3) has already come under significant public scrutiny and will continue to be the subject of significant public scrutiny, and (4) is located in more than one municipality, territory, or county. See 06-96 C.M.R. ch. 2 § 17(C); 38 M.R.S. § 341(D)(2).

The Commissioner must refer the Application to the Board, and the Board must assume jurisdiction over it because the Board alone has the authority to assess projects of statewide significance. See 38 M.R.S. § 341(D)(2) ("The board *shall* decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance . . .") (emphasis added); 38 M.R.S. § 344(2-A)(A) (the "commissioner *shall* decide as expeditiously as

¹ NRCM incorporates herein by reference its prior Department filings establishing that the NECEC is a project of statewide significance.

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possible if an application meets [the criteria for a project of statewide significance] and shall request that the board assume jurisdiction of that application”) (emphasis added). The Board should also assume jurisdiction over the Application because it seeks to modify permits that are currently before the Board on appeal, and it would be inefficient and illogical to allow the Department, rather than the Board, to assess the Application at this juncture.

Thank you for your attention to this matter.

Sincerely,

/s/ James T. Kilbreth

James T. Kilbreth
Counsel for Natural Resources Council of Maine

cc: Service List (by email only)

ATTACHMENT



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January 18, 2021

Re: CMP's Minor Revision Application: Order #L-27625-26-A-N/L-27625-TB-B-N/L-276252C-C-N/L-27625-VP-D-N/L-27625-IW-E-N; USACE Permit NAE-2017-01342

Dear Mr. Beyer,

I am writing to represent Sierra Club Maine, one of 64 Chapters of the Sierra Club nationwide. We represent the interests of 24,000 members and supporters in Maine and are among 4 million members and supporters nationwide. We submitted comments throughout the process of the NECEC application and permitting schedule.

We urge you to recognize that the above referenced revision application proposed by CMP is not a 'minor' revision. 700 pages of revision can hardly be considered a minor revision with a straight face. This proposed project is of statewide, in fact region wide, significance. Moving a section of the transmission line corridor triggers public purview by law. Once again CMP has ignored the requirement to provide alternatives analysis as required for any application even to be found complete.

Further, we want to urge you to recognize the lack of proper public notice and extend to the public proper participatory opportunity. Less than two weeks notice is inadequate by any standard, however given the size of the application the comment period should be further extended at least to the first of February.

Secondly, since it meets all four of the criteria pursuant to 06-96 C.M.R. ch. 2 § 17 Sierra Club Maine also requests that the Board of Environmental Protection assume jurisdiction over this application including a public hearing on it. The fact that this project is of statewide significance alone thrusts it before the Board, see 38 M.R.S. § 341(D)(2).

We respectfully request that DEP process the application not as a minor revision but as an application. And we request that the application be submitted under the jurisdiction of the Board of Environmental Protection due to its statewide significance. In any case we request further time for public comment as is our right at least until 02/01/21.

Respectfully submitted,

Becky Layton Bartovics
Chapter Volunteer Leadership Team

ATTACHMENT

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February 2, 2021

VIA ELECTRONIC MAIL

Mr. James R. Beyer
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RE: New England Clean Energy Connect; Minor Revision of Department Order
#L-27625-26-A-N, L-27625-TB-B-N, L-27625-2C-C-N, L-27625-VP-D-N, L-27625-
IW-E-N; USACE Permit NAE-2017-01342

Dear Mr. Beyer:

On behalf of Licensees Central Maine Power Company and NECEC Transmission LLC, please find enclosed a Response to NRCM, West Forks Petitioners, and the Sierra Club Comments on Minor Revision Application.

Please let me know if you have any questions.

Sincerely,



Matthew D. Manahan

Enclosure

cc: DEP Service List (via email only)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY)
 NEW ENGLAND CLEAN ENERGY CONNECT)
 L-27625-26-A-N/L-27625-TG-B-N/)
 L-27625-2C-C-N/L-27625-VP-D-N/)
 L-27625-IW-E-N)

**CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC'S
RESPONSE TO COMMENTS ON MINOR REVISION APPLICATION**

Central Maine Power Company (CMP) and NECEC Transmission LLC (NECEC LLC) (collectively, Licensees) hereby respond to the comments of the Natural Resources Council of Maine (NRCM), the West Forks Petitioners (West Forks Petitioners), and the Sierra Club Maine (Sierra Club) regarding Licensees' December 30, 2020 application for a minor revision (Minor Revision Application) of its May 11, 2020 DEP permit (Order) for the New England Clean Energy Connect Project (Project). Sierra Club now joins NRCM and the West Forks Petitioners in their renewed obfuscation of the DEP's rules and procedures in an attempt to fatally delay the Project. Their comments on the Minor Revision Application – a proposed revision that will *reduce* Project impacts – are yet another transparent attempt to stall the Project by whatever means. Contrary to their comments, the DEP's requirements for minor revision applications are straightforward and clearly met here.

I. The Application is for a minor revision.

Sierra Club points to the size of the Minor Revision Application filing as proof that it cannot possibly be “minor.” Sierra Club Comments at 1. Similarly, NRCM points to the size of newly acquired parcels and submission of natural resources maps as proof that the Minor Revision Application cannot be “minor.” NRCM Comments at 1-2 (Jan. 15, 2021); NRCM

Comments at 1-2 (Feb. 1, 2021). West Forks Petitioners point to the impacts of the Project's "original design" somehow as evidence that the proposed revisions are not minor. West Forks Comments at 3. But neither number of pages, nor acreage, nor provision of a new map set, nor already considered impacts of the underlying and permitted Project is determinative of what qualifies an application as a minor revision under the DEP's rules. Nor would such restrictions make sense, but would instead deter applicants from improving licensed projects with thorough analysis and acquisitions resulting in a reduction in impacts.

Rather, the DEP's rules classify a "Minor Revision" as an application to modify a permit where the modification (1) significantly decreases or eliminates an environmental impact, (2) does not significantly expand the project, (3) does not change the nature of the project, or (4) does not modify any Department findings with respect to any licensing criteria. DEP Regs. Ch. 2 § 1(N). While only one such criterion must be met, the Minor Revision Application nevertheless meets all four.

First, the revisions Licensees propose significantly decrease the permitted Project impacts. For example, permanent conversion of forested wetlands overall would be reduced by *more than 40 acres*. Minor Revision Application at NRPA Table 13-1. Further, the proposed modification to the permanent access road at the Merrill Road Converter Station will reduce permanent wetland fill in wetlands of special significance by 0.714 acre. Minor Revision Application at Site Law p. 6, NRPA p. 15. And the revisions also will reduce visual impact, for example at Moxie Pond, where the visual impact rating is reduced from moderate to minimal due to proposed structure location shifts. Minor Revision Application at Site Law Appendix B, page 4.

Second, the revisions Licensees propose do not significantly expand the Project. Where new property is added to the Project – at Bowman Airfield and in Lewiston – such minor additions are required for aeronautical safety (Bowman) and to allow the required vegetation management clearance for Section 3007 (Lewiston). Minor Revision Application at Site Law pp. 3-6. The addition of just over three acres to the Project right-of-way to accommodate air safety and required vegetation management is not significant in comparison to the overall Project. And, in fact, modification of the Merrill Road Converter Station access road actually shortens the access to that station by 456 feet.

Third, the revisions Licensees propose do not change the nature of the Project. The minor revisions in fact have no impact on the Project purpose at all, which is for Licensees to deliver up to 1,200 MW of Clean Energy Generation from Québec to the New England Control Area via an HVDC transmission line, at the lowest cost to ratepayers. Upon approval of the Minor Revision Application, the Project will still meet this purpose, but with less overall environmental impact.

Finally, the revisions Licensees propose do not modify any Department findings with respect to any licensing criteria. To the contrary, the revisions in large part are the product of the DEP's findings, which NRCM acknowledges. NRCM Comments at 2 (Feb. 1, 2021). For example, proposed revisions include minor pole location and access road modifications to comply with and maximize the impact avoidance and minimization requirements of the Order. Minor Revision Application at Site Law p. 2, NRPA p. 2-3. Modifications to comply with the Order's Special Condition 12 result in significant decreases in permanent wetland fill, including fill in significant vernal pool habitat and inland waterfowl and wading bird habitat, and permanent forested wetland conversion. Minor Revision Application at NRPA p. 3.

NRCM’s allegation that the proposed revisions “will alter the environmental impacts” is true – the Project will alter such impacts by reducing impacts to both environmental and visual resources – but its allegation that the proposed revisions will “expand and change the nature of the project, and modify Department findings” is patently false. NRCM Comments at 2 (Jan. 15, 2021). So too are the West Forks Petitioners’ unsubstantiated and conclusory statements on impact – that the proposed revisions “do not minimize [environmental] impacts but rather increase the damage due to the number and location of access roads, and better-defined areas of rare, threatened or endangered species habitat” – entirely without merit. West Forks Comments at 3. The Minor Revision Application reflects a significant decrease in environmental impact, does not significantly expand the Project, does not change the nature of the Project, and does not modify any DEP findings with respect to any licensing criteria. It is, therefore, a “Minor Revision.” DEP Regs. Ch. 2 § 1(N).

II. Minor revision applications are exempt from the DEP’s Chapter 2 rules.

NRCM complains that the Minor Revision Application should be “noticed and reviewed pursuant to Chapter 2” and requests that the Board assume jurisdiction over and hold a hearing on the Application. NRCM Comments at 3 (Jan. 15, 2021); NRCM Comments at 1 (Feb. 1, 2021). Sierra Club echoes this complaint, alleging “lack of proper public notice” and requesting additional unspecified “participatory opportunity.” Sierra Club Comments at 1. But the process and procedure NRCM and Sierra Club claim are deficient simply are not applicable here. NRCM Comments at 2-4 (Jan. 15, 2021); Sierra Club Comments at 1. As NRCM recognizes, minor revision applications are largely exempt from the DEP’s Chapter 2 rules. NRCM Comments at 1 (Feb. 1, 2021).

In no uncertain terms, DEP’s Chapter 2 rules expressly state that “minor revisions are not subject to this chapter, unless specifically included.” DEP Regs. Ch. 2 § 2(B). Consequently, minor revisions are subject to the Chapter 2 requirements, for example, regarding appeals to the Board, only because they are specifically included: “Notwithstanding Section 2(B), license decisions that may be appealed to the Board include acceptances of permit by rule notifications, decisions on minor revisions, and public benefit determinations.” DEP Regs. Ch. 2 § 24.¹ Neither the section 7 hearing provisions, nor the section 14 public notice provisions,² nor the section 17 Board jurisdiction provisions³ of Chapter 2 specifically include minor revisions, and thus they are inapplicable here. NRCM Comments at 2-4 (Jan. 15, 2021); Sierra Club Comments at 1.

Nor does the acreage of proposed minor revisions trigger new Site Law or NRPA review, as NRCM alleges, or review by additional state and federal agencies, as the West Forks Petitioners allege. NRCM Comments at 1-2 (Jan. 15, 2021); NRCM Comments at 1-3 (Feb. 1,

¹ It is not “improper” for the DEP to “exempt” minor revisions from the Chapter 2 rules while an appeal of the underlying permit is pending, nor is it “inefficient and illogical” for the DEP to process minor revisions while such appeal is pending, as NRCM claims. NRCM Comments at 2, 3 (Jan. 15, 2021). That is precisely the process that the rules require. DEP Regs. Ch. 2 §§ 2(B), 24. Because the DEP’s rules provide an explicit avenue for appeal of minor revisions, and because the pending appeal of the Order does not stay that Order, it is entirely appropriate for the DEP to process the Minor Revision Application during the pendency of the Order appeal. DEP Regs. Ch. 2 § 24; *see also Androscoggin River Alliance v. BEP*, 2012 WL 3133945 (Me. Super. July 18, 2012) (Murphy, J.) (recognizing in that Rule 80C appeal of a DEP permit that DEP issued an order approving the application for a minor revision to that permit during the pendency of the 80C appeal, and that petitioners therefore filed a separate 80C petition for review of the order approving the minor revision); Order on NRCM’s Motion to Stay DEP Commissioner’s Order at 8, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.) (declining to stay DEP Order).

² In any event, and while not required to do so, the DEP notified parties to this proceeding of the Minor Revision Application via email on December 4 and posted the Minor Revision Application to its website. NRCM and the West Forks Petitioners, both parties to this proceeding, and Sierra Club, a member of the public, cannot complain of insufficient notice or comment opportunity. In fact, DEP extended the public comment period at NRCM’s and Sierra Club’s request.

³ Even if the rules permitted the Board to assume jurisdiction over minor revision applications, which they do not, the Commissioner should not recommend Board jurisdiction because the Minor Revision Application is not an application for a project of statewide significance, as discussed below.

2021); West Forks Comments at 3.⁴ If that were the case, that would be a strong disincentive for a licensee to modify its licensed project, even where the modifications would result in substantial impact reductions, as proposed here. Furthermore, revising the license to reflect reductions in impact across large swaths of acreage here cannot “void the Site Law,” as NRCM claims, because none of the revisions affects the DEP’s Site Law or NRPA analyses. NRCM Comments at 2 (Jan. 15, 2021).⁵ The DEP has already engaged in a thorough review of the Project pursuant to the Site Law, NRPA, and DEP’s rules implementing those statutes, including an analysis of alternatives to the Project⁶ and of the Project’s environmental and visual impact.⁷ Requiring a new or amendment application for minor revisions to an already permitted activity, where those

⁴ The West Forks Petitioners call for review of the Application by “the Department of Inland Fisheries and Wildlife and the Department of Agriculture, Conservation, and Forestry,” and also for “a thorough environmental impact assessment.” West Forks Comments at 2-3; *see also* West Forks Comments at Appendix A ¶ 2 (criticizing the lack of an “independent Environmental Assessment and Impact Analysis (EAIS),” which is called for in no state or federal rule). But these state agencies have already reviewed the Project. *See, e.g.*, DEP Order at 27, 62-64, 87-88, 106-107 (May 11, 2020); Department of Agriculture, Conservation, and Forestry Land Use Planning Commission Site Law Certification (Jan. 8, 2020). And two federal agencies conducted a thorough Environmental Assessment of the Project, each concluding that the Project causes no significant impact and requires no further study of the Project’s environmental impacts. U.S. Army Corps of Engineers Environmental Assessment and Finding of No Significant Impact (Jul. 7, 2020; Nov. 4, 2020); U.S. Department of Energy Environmental Assessment and Finding of No Significant Impact (Jan. 14, 2021).

⁵ NRCM further claims that the natural resource maps that are part of the Minor Revision Application do not delineate NRPA protected resources as required by Chapter 310. NRCM Comments at 2 (Jan. 15, 2021); NRCM Comments at 1-2 (Feb. 1, 2021). To the contrary, the natural resource maps exceed the information and overlays required by the DEP’s rules.

⁶ Both NRCM and Sierra Club allege that the Minor Revision Application is improperly devoid of an alternatives analysis. NRCM Comments at 2 (Jan. 15, 2021); Sierra Club Comments at 1. While such analysis is not required here, because the Minor Revision Application is not a new application under the Site Law or NRPA, it is entirely illogical in any event to require an analysis of alternatives to proposed modifications that reduce impacts already permitted by a license that was the subject of a thorough alternatives analysis.

⁷ West Forks Comments at 1-3, Appendix A. The West Forks Petitioners further allege, with no basis in record or fact, that the “real truth” is that CMP intends to develop the entirety of a 300-foot wide corridor spanning Segment 1, and thus its Minor Revision Application photosimulations are somehow deficient. *Id.* The record shows that CMP does not own a 300-foot wide corridor across the entirety of Segment 1, and even if it did there is no record evidence of any plan to develop an additional project within that corridor. DEP Order at 4, n.6 (May 11, 2020). And, in any case, such development would require issuance of additional permits and consideration of the required approval criteria.

revisions reduce the permitted impacts and in no way affect the DEP's findings, is illogical and would result in a colossal waste of the DEP's, the licensee's, and the public's time and resources.

III. The Board is not required or authorized to assume jurisdiction over the Minor Revision Application, or to vote on NRCM's and Sierra Club's requests.

As explained above, DEP's section 17 provisions governing Board assumption of jurisdiction do not specifically include minor revision applications; thus, they are inapplicable here and the Board is not authorized to assume jurisdiction over the Minor Revision Application. DEP Regs. Ch. 2 §§ 2(B), 17.⁸ The Minor Revision Application must be processed in the first instance by the Commissioner, and may later be appealed to the Board as expressly provided in the DEP's rules. DEP Regs. Ch. 2 § 24. But even if the DEP's Chapter 2 section 17 rules were applicable to the Minor Revision Application, which they are not, Board assumption of jurisdiction is inappropriate here. Because the Minor Revision Application is not an application for a project of statewide significance, NRCM's resuscitation of its oft-repeated original jurisdiction argument, which Sierra Club now parrots, should be disregarded.

NRCM and Sierra Club illogically extend the discredited original jurisdiction argument to the Minor Revision Application. NRCM Comments at 3-4 (Jan. 15, 2021); NRCM Comments at 1, n.1 (Feb. 1, 2021); Sierra Club Comments at 1. First and foremost, the Superior Court has determined that NRCM has waived its argument that the Board should have assumed jurisdiction over the underlying permit. Order on NRCM's Motion to Stay DEP Commissioner's Order at 6-7, KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Jan. 11, 2021) (Murphy, J.) ("Even assuming

⁸ Furthermore, the statewide significance criteria apply to the permitting of an underlying project and not to a subsequent minor revision of the permit issued for that project. Title 38 M.R.S. § 341-D(2) plainly applies only to an "application for approval of permits and licenses," and not to minor revisions of such approvals. 38 M.R.S. § 341-D(2); *see also* DEP Regs. Ch. 2 § 17(C) ("The Board shall assume jurisdiction over and decide each license application that in its judgment represents a project of statewide significance.") (emphasis added). A minor revision application itself cannot be a request for licensing of "a project" of statewide significance because the license for the project to be revised already was approved.

movants are correct that the Board *should* have been the entity to decide CMP's permit application, any such argument was waived because it was not raised in the several-year process before the Commissioner until after the Commissioner issued the conditional approval of the permits.”). Nevertheless, NRCM persists, relying here on its argument that the Board should have been the entity to decide the underlying permit applications, and citing to the very same filings discredited by the Superior Court, to support its argument that the Board should assume jurisdiction over the Minor Revision Application, presumably because the Minor Revision Application proposes to revise the underlying Order. Because NRCM's untimely request for Board jurisdiction of the underlying permit applications was rejected by Superior Court, it would make no sense – applying NRCM's own logic – to have the Board assume jurisdiction over the Minor Revision Application.⁹

In any event, NRCM and Sierra Club do not, and cannot, allege that the Minor Revision Application itself meets three of the four criteria that could result in Board assumption of jurisdiction, because a minor revision application by definition involves an activity previously permitted and rarely comes under significant public scrutiny, precisely because it generally reduces impacts. *See* 38 M.R.S. § 341-D(2); DEP Regs. Ch. 2 § 17(C). NRCM's and Sierra Club's attempts to manufacture public scrutiny with their baseless complaints about an application that will reduce permitted impacts should be disregarded. Furthermore, the complaints of two parties and one member of the public do not constitute significant public scrutiny.

⁹ Similarly, Sierra Club at no time during the processing of the underlying permit requested Board jurisdiction over that process, and certainly did not make such request within 20 days after the date the underlying permit applications were accepted as complete for processing. DEP Regs. Ch. 2 § 16. Accordingly, it cannot rely on any argument that the underlying “project” is of statewide significance here.

Even if NRCM’s and Sierra Club’s request for Board jurisdiction over the underlying permitting proceeding had not been waived, and even if the Minor Revision Application were a “license application” for which it would be permissible to apply the statewide significance factors, NRCM’s request for Board jurisdiction and consolidation with the pending appeal would not result in the efficiencies that NRCM suggests. Contrary to NRCM’s suggestion, it is more efficient for the Department to address the Minor Revision Application separately from the appeal of the Order. The Minor Revision Application is not an “amendment” of the Order; it is a minor revision in part because it does not impact the Order’s findings.¹⁰ NRCM Comments at 3 (Jan. 15, 2021); NRCM Comments at 3 (Feb. 1, 2021); West Forks Comments at 3. Because it does not require modification of any DEP findings with respect to any licensing criteria, no efficiency will be gained by consolidating it with the pending BEP appeal. For this reason, pursuant to the DEP’s rules, the minor revision of a DEP permit occurs outside of and distinct from the process by which a DEP permit may be appealed.¹¹ Consolidation of the Minor Revision Application with the pending appeals at the Board would be inappropriate and contrary to the procedures set forth in the Department’s rules.

IV. A hearing is unwarranted.

Again, DEP’s Chapter 2 rules expressly state that “minor revisions are not subject to this chapter, unless specifically included.” DEP Regs. Ch. 2 § 2(B). Consequently, minor revisions

¹⁰ “Amendment Application” is defined as “an application to modify a license previously granted by the Department, except for minor revisions.” DEP Regs. Ch. 2 § 1(C). “Minor Revision” is defined as “an application to modify a license previously granted by the Department, where the modification significantly decreases or eliminates an environmental impact, does not significantly expand the project, does not change the nature of the project, or does not modify any Department findings with respect to any licensing criteria. This term may be further defined by the Department by rule.” DEP Regs. Ch. 2 § 1(N). The Minor Revision Application is a minor revision because it meets the section 1(N) elements, and it is not an amendment application because amendment applications do not include minor revisions.

¹¹ See n.1, *supra*.

are not subject to the Chapter 2 section 7 provisions governing requests and criteria for holding hearings, because those provisions do not specifically include minor revisions. To allow a hearing, the Commissioner would have to determine that the Minor Revision Application should be converted to an amendment application, which it is not.¹²

Even if the Chapter 2 section 7 rules were applicable here, which they are not, a hearing on the Minor Revision Application is unwarranted, before either the Commissioner or the BEP, and would result in the inefficiencies that NRCM protests. NRCM Comments at 3 (Jan. 15, 2021); Sierra Club Comments at 1. A hearing is necessary only in those instances where there is “credible conflicting technical information regarding a licensing criterion and it is likely that a hearing will assist the Department in understanding the evidence.” DEP Regs. Ch. 2 § 7(B). The purpose of a hearing is to develop the record with additional testimony and other evidence, without which the Department cannot render a decision. Neither NRCM nor Sierra Club make any showing that there is credible conflicting technical information regarding a licensing criterion implicated by the Minor Revision Application. Nor could they, because the Minor Revision Application does not modify any DEP findings with respect to any licensing criteria, as discussed above. There is no reason, and NRCM and Sierra Club state no reason, to further develop the record on the Minor Revision Application by holding a hearing.

Because there is an adequate record on which the Department can base its decision on the Minor Revision Application, and because NRCM and Sierra Club cannot demonstrate that there is sufficient conflicting technical evidence on a licensing criterion to warrant a public hearing, a hearing on the Minor Revision Application is unwarranted and would be a waste of Department


¹² See n.10, *supra*.

resources. *Concerned Citizens to Save Roxbury v. BEP*, 2011 ME 39, 15 A.3d 1263; *Martha A. Powers Trust v. BEP*, 2011 ME 40, 15 A.3d 1273.

* * * * *

In sum, NRCM’s assertion, and West Forks Petitioners’ and Sierra Club’s insinuation, that a minor revision to the Project that *reduces* impacts is somehow an “end run” around rules meant to protect Maine’s environment has no basis. NRCM’s and West Forks Petitioners’ renewed obfuscation of the DEP’s rules and procedures in furtherance of its strategic attempts to fatally delay the Project – which Sierra Club now joins – should, again, be rejected. CMP and NECEC LLC respectfully request that the DEP continue to process the Minor Revision Application without delay.

Dated this 2nd day of February, 2021.



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040
STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
ACTING COMMISSIONER

February 10, 2021

Via E-mail Only

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RE: DEP Project #L-27625-26-L-C/ L-27625-TB-M-C/ L-27625-2C-N-C/ L-27625-VP-O-C/ L-27625-IW-P-C, Minor Revision Application

Dear Ms. Bartovics and Mr. Kilbreth:

The Department is in receipt of Mr. Kilbreth’s letter, dated January 15, 2021, on behalf of the Natural Resources Council of Maine (NRCM), concerning CMP/NECEC Transmission, LLC’s minor revision application to make changes to the Department’s approval of the New England Clean Energy Connect (NECEC) project. In the letter, NRCM requests that the Board assume jurisdiction over the application and hold a public hearing, argues the proposed changes to the NECEC project do not qualify as a minor revision, and asks for additional time to review the application materials.

The Department also is in receipt of Ms. Bartovics’s letter, dated January 18, 2021, on behalf of the Maine Chapter of the Sierra Club (Sierra Club). The Sierra Club similarly requests that the Board assume jurisdiction over the minor revision application and hold a public hearing, argues the changes to the NECEC project do not qualify as a minor revision, and asks for additional time to review the application materials.

I. Request for Board Assumption of Jurisdiction Over an Application

The Department, as established in its Chapter 2 *Rules Concerning the Processing of Applications and Other Administrative Matters*, recognizes multiple different types of license applications, including new license applications, amendment applications, minor revision applications, renewal applications, and transfer applications. *See, e.g.,* Ch. 2, § 1(L) (defining the term license and listing the many types of

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licenses). When reviewing a minor revision application, the Department evaluates that application. The Department does not re-evaluate the development activity that is the subject of the original order the permittee seeks to modify through minor revision – the presently proposed changes to the previously permitted project are the sole focus of the review.

The Board may assume jurisdiction over applications for projects of statewide significance. The criteria used by the Commissioner when deciding whether to recommend to the Board that it assume jurisdiction, and by the Board when deciding whether to exercise its discretion to assume jurisdiction, are set forth in 38 M.R.S. § 341-D(2) and in Chapter 2, § 17(C). The statute (and similarly the rule) provides:

A project of statewide significance is a project that meets at least 3 of the following 4 criteria:

- (1) Will have an environmental or economic impact in more than one municipality, territory or county;
- (2) Involves an activity not previously permitted or licensed in the State;
- (3) Is likely to come under significant public scrutiny; and
- (4) Is located in more than one municipality, territory or county.

NRCM argues all four of the criteria are satisfied, stating:

The NECEC is undoubtedly a project of statewide significance. NRCM has so contended in numerous filings before the Department and does not here belabor the point, but the NECEC (1) will have an environmental or economic impact in more than one municipality, territory or country, (2) involves an activity not previously permitted or licensed in the State (a high-impact transmission line that will primarily benefit foreign jurisdiction), (3) has already come under significant public scrutiny and will continue to be the subject of significant public scrutiny, and (4) is located in more than one municipality, territory, or country.

(Jan. 15, 2021 NRCM Letter, p. 3.) NRCM also incorporates by reference its prior filings containing argument that the Board should have assumed jurisdiction over initial permitting of the NECEC. Sierra Club states the pending application “meets all four of the criteria pursuant to 06-96 C.M.R. ch. 2 § 17” and that the pending application involves a project of statewide significance, but does not discuss the basis for its conclusion or any of the four criteria.

Title 38, Section 341-D(2) and Chapter 2 provide for Board assumption of jurisdiction over “each application” for approval if, in its judgment, the application represents a project of statewide significance. The Commissioner similarly reviews each application when considering requests for Board jurisdiction pursuant to Chapter 2, § 17. Here the application is for a minor revision. The project before the Department consists of the changes that are sought as part of this application. NRCM’s focus on prior applications and reiteration of its arguments that those applications should have been subject to Board jurisdiction are not directly relevant here.

Focusing on the present application over which NRCM and Sierra Club request Board jurisdiction, CMP/NECEC Transmission, LLC note that Chapter 2 provides that “minor revisions are not subject to this chapter, unless specifically included.” Ch. 2, § 2(B). CMP/NECEC Transmission, LLC argue that

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since Chapter 2, § 17 does not expressly provide for Board assumption of jurisdiction over minor revisions the Board lacks authority to do so. Express provision is made, they note, for appeal of minor revisions to the Board. Embedded in CMP/NECEC Transmission, LLC's argument is the position that the general exemption of minor revisions from Chapter 2 reflects a determination by the Board, made as part of the rule adoption process, that minor revisions, by their very nature as defined in Chapter 2, do not involve a project of statewide significance. Therefore, CMP/NECEC Transmission, LLC express the view that there is no basis for NRCM or Sierra Club to request assumption of Board jurisdiction because minor revisions are exempt pursuant to Chapter 2. Because I find, for the reasons discussed below, that the present minor revision application does not meet the criteria for assumption of Board jurisdiction, I find it unnecessary to evaluate whether all minor revisions are exempt from Ch. 2, § 17 and ineligible for assumption of Board jurisdiction.

Three of the four criteria listed above must be satisfied for the present application to represent a project of statewide significance. One criterion is that the project involves an activity not previously permitted or licensed in the State. The Department has considerable experience permitting transmission line projects and other linear infrastructure projects. More significant in the context of the pending minor revision application is the Department's experience reviewing and processing minor revision applications associated with these types of large-scale development projects, including transmission lines. Further, the Department's experience is that due to the complexity of permitting and constructing these types of projects, permittees often need to make adjustments and modification, including through application for minor revisions. A large-scale project that is constructed without modification is the exception, not the norm. The Department has considerable experience in this area.

Another criterion is that the project has come under significant public scrutiny and will continue to be the subject of significant public scrutiny. The minor revision application has not come under significant public scrutiny. For example, the Department has received comments from three groups: NRCM, Sierra Club, and the West Forks Plantation intervenor group. Additionally, although future public interest could be higher than normal with respect to the present application because of the interest in the underlying and previously permitted project, the Department does not anticipate interest in this application for minor revision will rise to the level of significant public scrutiny given the nature of the changes proposed in the application.

With two of the four criteria not satisfied, my determination is that the pending minor revision application does not represent a project of statewide significance. Therefore, the Board should not assume jurisdiction over the application. By copy of this letter, with attached copies of NRCM's January 15, 2021 request and Sierra Club's January 18, 2021 request, I am notifying the Board of my determination.

NRCM and Sierra Club also requests that the Board hold a hearing on the minor revision application. Please note, Chapter 2, § 7(B) provides: "When the Board assumes jurisdiction over an application, it will hold a public hearing unless it votes otherwise at the time it assumes jurisdiction."

II. Argument that the Application is Not a Minor Revision

NRCM and Sierra Club argue that the changes proposed by CMP/NECEC Transmission, LLC do not qualify as a minor revision. The Department's review of the pending application is ongoing and this and other comments on the application will be considered as part of this review.

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III. Request for Additional Time to Review and Comment on the Pending Application

NRCM and Sierra Club also requested additional time to review and comment on the pending minor revision application. The Department extended the comment deadline to 5:00 p.m. on February 1, 2021. This is the date requested by NRCM and Sierra Club, and I understand additional comments were submitted in accordance with the amended deadline by NRCM and that Sierra Club did not comment further.

Sincerely,



Melanie Loyzim, Acting Commissioner
Maine Department of Environmental Protection

Enclosures

cc: Mark Draper, Chair BEP
William Hinkel, Executive Analyst BEP
Scott Boak, AAG
Peggy Bensinger, AAG
Service List

ATTACHMENT

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTIONJANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel
Executive AnalystRuth Ann Burke
Board Clerk

February 25, 2021

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boepple@nhlandlaw.comBecky Layton Bartovics
Sierra Club Maine
bbartovics@gmail.com**Re: Request for Board jurisdiction on minor revision application of underlying New England Clean Energy Connect Order**

Dear Participants and Interested Persons:

The Natural Resources Council of Maine (NRCM) and Sierra Club Maine have requested that the Board of Environmental Protection (Board) assume original jurisdiction of a minor revision application of Central Maine Power Company (CMP) and NECEC Transmission LLC to the May 11, 2020, Order of the Commissioner of the Department of Environmental Protection conditionally approving the applications of CMP to construct the New England Clean Energy Connect project (NECEC Order).

As required by rule, Acting Commissioner Loyzim sent to the Board her determination as to whether the Board should assume original jurisdiction of the application. The Acting Commissioner determined that the minor revision application does not qualify for original Board jurisdiction because the changes that are the subject of the minor revision application do not represent a project of statewide significance; she found this application fails to meet the requisite three of four criteria set forth in

Department rule Chapter 2, section 17(C). At its meeting on February 18, 2021, some Board members expressed interest in obtaining additional information about the minor revision application as part of a further discussion at a later meeting.

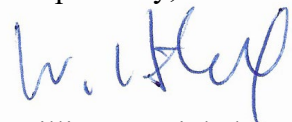
The Board has tentatively scheduled to hold such a further discussion of the matter of Board jurisdiction at its regular meeting on March 18, 2021. At that time, Department staff will initially provide for the Board an overview of the minor revision application at issue. In addition, staff and counsel to the Board will discuss the procedural framework, including applicable Board rule provisions, and the posture of the original jurisdiction requests in the context of the pending Board appeals of the underlying NECEC Order and Transfer Order.

The Board's rules do not prescribe an opportunity for oral argument or written comment when the Commissioner's recommendation is that the Board not assume original jurisdiction of an application. However, if following the staff overview and counsel's discussion of procedural matters the Board decides to independently consider the issue, separate from the Commissioner's determination and advance its discussion to an evaluation of the criteria used to determine projects of statewide significance and whether to assume original jurisdiction of the minor revision application, the Board Chair would allow brief oral argument from the Applicants, requestors NRCM and Sierra Club Maine, and Intervenor who participated in the underlying NECEC Order, which would be considered by the Board alongside those comments already submitted to the Board by members of the public.

As of the date of this letter, no further written comment will be considered by the Board regarding the matter of Board jurisdiction of the minor revision application.

A meeting agenda, once available, will be posted on the Board's website at <https://www.maine.gov/dep/bep/index.html>. If you have any questions, you may contact Board Executive Analyst William F. Hinkel at bill.hinkel@maine.gov (207) 314-1458 or Assistant Attorney General Peggy Bensinger at peggy.bensinger@maine.gov (207) 626-8578.

Respectfully,



William F. Hinkel
Executive Analyst
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cc (via e-mail only): Service List (rev. October 19, 2020)
Interested Persons List