



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

November 24, 2021

James T. Kilbreth  
Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland, ME 04101

Elizabeth A. Boepple  
Murray Plumb & Murray  
75 Pearl Street  
PO Box 9785  
Portland, ME 04104-5085

Re: Natural Resources Council of Maine’s and West Forks’ Renewed Requests for a Stay

Dear Mr. Kilbreth and Ms. Boepple:

This letter serves as my decision on your clients’ pending, renewed requests for a stay of the May 11, 2020 order conditionally approving the application to construct the New England Clean Energy Connect project (NECEC Order).

**I. Procedural Background**

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guides Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pillsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting the Commissioner stay the NECEC Order. West Forks filed supplements to its motion on June 15, 2020 and June 25, 2020.

On June 10, 2020, the Natural Resources Council of Maine (NRCM) separately filed a request for stay of the NECEC Order with the Commissioner.

On August 26, 2020, Commissioner Reid issued his decision denying the stay requests filed by West Forks and NRCM. This decision is attached as Exhibit A. The Commissioner determined that West Forks and NRCM had failed to demonstrate that any of the three required factors necessary to obtain a stay had been met.

On November 2, 2020, NRCM filed a motion to stay the NECEC Order in Kennebec County Superior Court. West Forks joined in NRCM’s motion.

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On January 8, 2021, following a hearing, the Superior Court denied NRCM and West Forks' stay request. This Superior Court decision is attached as Exhibit B.

On May 27, 2021,<sup>1</sup> West Forks filed a renewed request for stay of the NECEC Order with the Commissioner. West Forks filed a supplement to its request on June 17, 2021. By letter dated August 4, 2021, I denied West Forks' renewed request for a stay of the NECEC Order. This denial is attached as Exhibit C.

On August 11, 2021, NRCM filed another renewed request for a stay of the NECEC Order following the Maine Superior Court decision dated August 10, 2021, in the case of *Black v. Cutko*, No. BCD-CV-2020-29. In that decision the Superior Court reversed the decision of the Bureau of Public Lands (BPL) to enter into a lease with Central Maine Power Company (CMP) for public lands in Johnson Mountain Township and West Forks Plantation. The leased premises include a stretch of land over which approximately 0.9 miles of the NECEC transmission line would be built.

On August 12, 2021, I notified the licensees and the other parties to the appeals of the NECEC Order pending before the Board of Environmental Protection (Board) that I was initiating a proceeding to consider whether the Superior Court's decision in *Black v. Cutko* is a change in circumstance that requires suspension of the NECEC Order. CMP and NECEC Transmission, LLC (Licensees) timely filed a request for hearing on August 27, 2021.

On August 18, 2021, West Forks joined in NRCM's August 11, 2021 renewed stay request, raising similar arguments with respect to the Superior Court's August 10, 2021 decision in *Black v. Cutko*. On August 20, 2021, I issued a letter denying NRCM's and West Forks' renewed stay requests. This letter is attached as Exhibit D.

Under the supervision of a designated Presiding Officer, the Department of Environmental Protection (Department) held a hearing on October 19, 2021, during which the Licensees, intervenors, and members of the public presented evidence on whether a suspension of the NECEC Order is required in light of the decision in *Black v. Cutko*. Following the hearing, the parties submitted post-hearing briefs and reply briefs on that issue.

On November 2, 2021, voters approved a referendum question regarding implementation of IB 1 (LD 1295) (130th Legis. 2021).<sup>2</sup> This law, if implemented, could affect some or all of the NECEC project. In a letter dated November 5, 2021, I notified the Licensees that I had determined that the referendum result, if certified such that it will become law, represents a change in circumstance warranting a re-opening of the hearing record in order to consider this additional potential basis for suspension.

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<sup>1</sup> West Forks' May 27 filing is mistakenly dated 2020, as opposed to 2021.

<sup>2</sup> The Presiding Officer in this proceeding took official notice of the fact that the Secretary of State certified the preliminary results of the election and the Governor made a public proclamation of the result of the vote. At the hearing held on November 22, 2021, NRCM entered the Secretary of State's certification of the results of the election into evidence as an exhibit.

On November 9, 2021, in their reply brief regarding the October 19, 2021 hearing, West Forks requested that the Department stay or immediately revoke Licensees' permit based on both the decision in *Black v. Cutko* and the results of the November 2, 2021 referendum. On November 4, 2021, NRCM also submitted a renewed request for a stay based both on the November 2, 2021 referendum vote result as well as NRCM's argument that certain public lands leases held by Licensees are unlawful. On November 12, 2021 Licensees submitted a response to the pending stay requests, contending that they must be denied for failing to adequately demonstrate the criteria necessary to obtain a stay.

## **II. Stay Criteria**

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 11004. The filing of an appeal does not operate to stay a permit issued by the Department. A petitioner seeking a stay (here West Forks and NRCM) bears the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioner, (2) there is a strong likelihood of success on the merits on the petitioner's appeal, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. A petitioner must satisfy all three parts of this test to obtain a stay. The burden of demonstrating that the criteria are met rests with the petitioner.

## **III. Analysis**

### **A. West Forks' Request for a Stay**

West Forks raises a legal argument not previously raised in prior stay requests, contending that the stay criteria in 5 M.R.S. § 11004 are not applicable here because the NECEC Order granting Licensees' permit is not "final." West Forks asserts that the May 11, 2020 NECEC Order issued by the Commissioner is not final because it has been appealed and therefore the Licensees are not authorized to act on it. On this basis, West Forks argues that the NECEC Order should be immediately stayed.

By statute, a license granted by the Commissioner is effective when the commissioner signs the license. 38 M.R.S. § 344(8). Licensing decisions made by the Commissioner are final agency action, 38 M.R.S. § 341(D)(4)(A), and may be appealed to the Board or directly to Superior Court. 38 M.R.S. § 344(2-A). By the express terms of the Department's statute, therefore, a Commissioner's license decision is a final action, subject to judicial or administrative appeal. Consistent with these statutory provisions, the Department's rules provide that a license decision by the Commissioner "constitutes a final agency action on that application, subject to administrative appeal," and that the filing of an appeal to the Board does not stay the license decision. Ch. 2 §§ 19(E), 24(A).

Accordingly, West Forks' contention that a stay may immediately be issued without consideration of the applicable stay factors in 5 M.R.S. § 11004 because the NECEC Order is not "final" lacks merit. As West Forks' renewed request makes no attempt to address the required

criteria necessary to obtain a stay, West Forks has failed to demonstrate a stay is warranted in this case and the request for a stay is denied.

### **B. NRCM's Request for a Stay**

NRCM argues that the stay criteria have been met. NRCM's renewed request also stems from the November 2, 2021 referendum vote, asserting that the Department should consider the law constitutional unless and until the Law Court determines otherwise, and because the law will bar operation of the NECEC transmission line, a stay is warranted. They also make an argument similar to West Forks, concerning final agency action and the NECEC Order approving the project. In addition, they contend they are likely to win on the merits of their appeal to the Board due to the fact that any leases granted by the Bureau of Public Lands are invalid and the Department should not have relied on them to demonstrate sufficient title, right, or interest. NRCM also contends the leases are only valid for 25 years and the Transmission Service Agreements entered into by Licensees are for a term of 40 years. Therefore, they contend that the Licensees did not have sufficient title, right, or interest for the entire life of the project. As in their other request for a stay, NRCM contends its members will be irreparably harmed, there would be no harm to Licensees, and a stay is in the public interest.

As noted above, I do not agree that the NECEC Order is not final agency action. NRCM relies on bases for suspension that have either already been considered and rejected, or do not relate to the merits of the appeal. As I have explained in past responses to stay requests, in order to demonstrate a likelihood of success on the merits of the appeal, a petitioner must demonstrate a likelihood of success in convincing the Board that, based solely upon the record on appeal, the order as issued was made in error. Claims that, after the issuance of the challenged permit, circumstances have changed such that the permit should be revoked or suspended are not appropriately raised in a request for a stay pending appeal and should instead be brought in a petition for suspension or revocation of a permit as provided by Chapter 2 § 26(B).

As to NRCM's assertion that they can demonstrate a likelihood of success on appeal based on the Department's error in relying on the judgment of its "sister agency" in accepting the validity of Licensees' leases over public lands, this issue has been repeatedly considered and rejected as a basis for a stay of the appeal.

I expressly rejected an identical claim raised in the August 20, 2021 denial of NRCM's most recent request for a stay, noting that "[w]ith the BPL lease that had been issued, [Licensees] maintained sufficient TRI throughout the entire Department application processing period." See Appendix D, at p. 3. NRCM has supplied no new information calling into question this determination, and has instead made the same arguments previously considered and rejected.<sup>3</sup> As previously stated, NRCM is unlikely to successfully demonstrate that relying on the issuance of a lease by the Bureau of Public Lands without conducting an independent adjudicatory

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<sup>3</sup> As to NRCM's claim that lease terms relied upon by Licensees were of insufficient duration to complete the contractual length of the project, NRCM does not provide sufficient detail or evidence to assess this claim, and, in any event, makes no attempt to demonstrate that this issue was raised in the appeal and that the information is before the Board on appeal.

investigation into the validity of that lease was an error sufficient for reversal on appeal, notwithstanding that the lease in question may be later invalidated in a legal proceeding. The appropriate method for addressing any such change in the legal status of Licensees' permit after its issuance is, as previously explained in past responses to stay requests, through the suspension proceeding process provided by statute and Department rules.

As to NRCM's second basis for a stay, the results of the November 2, 2021 election, NRCM fails to demonstrate how this event relates to the likelihood of success on the pending appeal. The referendum result and its accompanying legal effects are not before the Board and are not part of the record on appeal.

A stay is not warranted based on a subsequent change of law which imperils a project as previously permitted. Such a change in circumstances is not relevant to the questions presented to the Board on appeal, that being whether, at the time that it was issued, a licensing decision was made in error. Instead, the result of a newly passed law which may alter the conditions under which a permit was issued should be addressed via the statutorily provided process for considering whether changes in circumstances or conditions warrant suspension or revocation of a permit, 38 M.R.S. § 342(11-B). As this, rather than a stay pending the appeal, is the appropriate method for addressing the change in circumstances produced by the November 2, 2021 referendum results, NRCM's request for a stay on this basis is not warranted.

Because NRCM has failed to demonstrate a likelihood of success on the merits of the appeal on the basis of the grounds raised in the renewed request for a stay, and because West Forks makes no attempt to do so, addressing the remaining mandatory criteria contained in 5 M.R.S. § 11004 is not necessary. However, I will briefly note that I have previously found in response to requests for stays raised by both NRCM and West Forks, that they have failed to demonstrate they are likely to suffer irreparable harm, or that there will be harm to adverse parties and the general public if a stay is not granted. Neither party has provided compelling evidence to cause me to reconsider those prior determinations. I will additionally note that any claim of irreparable harm or harm to adverse parties and the general public is mitigated by the fact that Licensees' construction activities are suspended by operation of my order released in the recently concluded suspension proceeding.<sup>4</sup> As all construction and permit activities are currently suspended, the parties are unable to demonstrate either that they will suffer irreparable harm, or that harm to adverse parties and the general public will occur, if a stay is not granted.


For all of the reasons set forth above, neither West Forks nor NRCM have made the showings necessary to justify a stay of the NECEC Order. West Forks and NRCM have failed to establish a strong likelihood of success on the merits of their respective appeals, and this criterion alone warrants denial of their stay requests. Additionally, they have failed to demonstrate that they will suffer irreparable harm, or that there will be harm to adverse parties and the general public if a stay is not granted. Accordingly, the stay requests of West Forks and NRCM are denied.

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<sup>4</sup> In addition, by letter dated November 19, 2021, Licensees have committed to suspending all construction activities until a court has ruled on their pending motion for a preliminary injunction barring implementation of the law passed as a result of the November 2, 2021 referendum.

Letter to Elizabeth Boepple and James Kilbreth  
November 24, 2021  
Page 6

Regards,

A handwritten signature in blue ink, appearing to read "Melanie Loyzim", with a long horizontal flourish extending to the right.

Melanie Loyzim, Commissioner

cc: Service List

# EXHIBIT A



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



GERALD D. REID  
COMMISSIONER

August 26, 2020

Elizabeth Boepple  
BCM Environmental & Land Law, PLLC  
2 Union St, Suite 402  
Portland ME 04101

James Kilbreth  
Drummond Woodsum  
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Portland ME 04101-2480

Dear Ms. Boepple and Mr. Kilbreth:

This letter serves as my decision on your clients' pending requests for a stay of the May 11, 2020, Order conditionally approving the application of Central Maine Power (CMP) to construct the New England Clean Energy Connect project (NECEC Order).

**PROCEDURAL BACKGROUND**

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pilsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting that the Commissioner stay the NECEC Order. West Forks subsequently filed supplements to its motion on June 15, 2020, and June 25, 2020. The following intervenors and intervenor groups filed supporting, opposing, and neutral responses to the West Forks Motion: Old Canada Road, Friends of Boundary Mountains, Industrial Energy Consumer Group, the Natural Resources Council of Maine (NRCM), Wagner Forest, and Western Maine Mountains & Rivers Corp. CMP filed a response in opposition to the West Forks Motion.

NRCM filed a separate application for a stay of the NECEC Order with the Board of Environmental Protection (Board) on June 10, 2020 (NRCM Motion) in conjunction with its appeal to the Board of the Commissioner-issued NECEC Order. The following intervenors and intervenor groups filed supporting and opposing responses to the NRCM Motion: Friends of

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PORTLAND  
312 CANCO ROAD  
PORTLAND, MAINE 04103  
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE  
1235 CENTRAL DRIVE, SKYWAY PARK  
PRESQUE ISLE, MAINE 04769  
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Boundary Mountains, Industrial Energy Consumer Group, AMC, Trout Unlimited, and Western Maine Mountains & Rivers. CMP filed a response in opposition to the NRCM Motion.<sup>1</sup>

On July 16, 2020, Board Chair Mark Draper referred the NRCM Motion to the Commissioner to allow for a single, consolidated Departmental decision with respect to both the West Forks and NRCM Motions. NRCM objected to Chair Draper's decision and filed an appeal to the full Board. Chair Draper ruled that such a decision is not appealable to the full Board.

### **STAY CRITERIA**

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S § 11004. The filing of an appeal does not operate to stay a permit issued by the Department. Petitioners seeking a stay (here West Forks and NRCM) bear the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits on the petitioners' appeals, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. Petitioners must satisfy all three parts of this test to obtain a stay. Importantly, the burden of demonstrating that the criteria are met rests with the petitioners.

### **ARGUMENTS**

In support of its stay request, West Forks argues that several appeals were likely to be filed and any one of them could result in an ultimate denial of the permit application, that a citizen referendum could negate the Maine Public Utilities Commission's (PUC) approval of the project, and that the project will cause irreparable harm through the destruction of "pristine" forests and the disruption of wildlife corridors. With regard to the likelihood of success on the merits of their appeal, West Forks argues that the evidence in the record does not support the Commissioner's decision on the impacts of forest fragmentation and impacts to scenic resources, and that the conditions on the permit requiring the conservation of 40,000 acres of land are inadequate. West Forks' first supplement to its motion adds discussion of the challenges to the Commissioner's factfinding in the NRCM Board appeal and NextEra's Superior Court appeal. In its second supplemental filing, West Forks argues that a lease CMP relies upon to show title, right, or interest (TRI) in the land proposed for development is legally defective – an issue NRCM raises in its Board appeal. West Forks also states that a stay of the NECEC Order would not cause substantial harm to CMP as it has not yet received its federal approvals for the project and, in any case, an additional delay to begin construction would not cause substantial harm. Finally, West Forks asserts that a stay would cause no harm to the general public; rather, it would benefit the public if a stay were in place until the appeals are resolved and the referendum decided.

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<sup>1</sup> West Forks filed an appeal of the NECEC Order in Somerset County Superior Court, Docket No. SOM-AP-20-04. NextEra Energy Resources, LLC (NextEra) also filed an appeal of the NECEC Order in Kennebec County Superior Court, Docket No. KEN-AP-20-27. NRCM filed an administrative appeal of the NECEC Order before the Board. By a combined order dated August 11, 2020, the Superior Court consolidated and remanded the West Forks and NextEra judicial appeals to the Board for consideration with NRCM's pending administrative appeal.

NRCM's Motion focuses primarily on the argument in its appeal that the Board should have decided this permit application on the basis that the NECEC project meets the definition of a project of statewide significance. NRCM also argues that it is likely to succeed on its claims that the Commissioner insufficiently addressed impacts of the project and that CMP's lease of two public reserve lots lacks requisite approval. NRCM contends there will be irreparable harm if the stay is not granted, citing as support testimony it provided at the hearing about the significance of the forest and aquatic habitat that will be affected, and the impacts to its members who are outdoor guides in the area. NRCM also argues that the initiation of construction would limit its ability to address potential alternatives to the proposed project during the appeal. On the question of harm to CMP, other parties, or the public if a stay is granted, NRCM states that no harm will ensue because CMP has not obtained federal approvals and a state-wide vote on whether the PUC approval should be reversed is scheduled for November 2020.

CMP argues that West Forks has failed to meet the high bar for the issuance of a stay. CMP states that vegetation that will be cut in the construction of the transmission line would grow back if the permits are ultimately vacated. CMP further argues that the harm alleged by West Forks involves impacts to existing recreational uses, which was a topic considered during the licensing proceeding, with the Commissioner finding no unreasonable harm to those uses resulting from the NECEC project. On the likelihood of success on the merits of the West Forks appeal, CMP contends that the evidence in the record, and the analysis and conclusions in the NECEC Order, demonstrate that there will be no irreparable harm in the form of forest fragmentation and visual impacts.

In response to both the West Forks and NRCM Motions, CMP states that a stay would harm CMP because construction must begin well before any appeals are resolved in the Maine Law Court in order to meet a required in-service date. CMP contends that such a delay would risk possible cancellation of the project pursuant to its contractual in-service obligations, and a cancellation would result in harm to the general public with the loss of economic benefits of the NECEC project.

## DISCUSSION

Petitioners have not carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required.

### I. Irreparable Harm to Petitioners

There is a contradiction at the heart of the Petitioners' arguments that undercuts their stay request. On the one hand they argue that a stay is essential to forestall the project's environmental impacts, and on the other they argue a stay will not harm CMP because construction cannot begin until two additional federal permits have been issued. Petitioners cannot have it both ways: either a stay is urgently needed or it will have no immediate, real-world impact, but both things cannot be true.<sup>2</sup> The Petitioners have provided no legal analysis of what, if any, construction CMP can perform before it receives its federal permits, and no factual analysis of whether and how any such construction would actually cause them harm. Without satisfactorily answering these questions, Petitioners did not carry their burden of showing irreparable harm.

The Petitioners' underlying claims of irreparable harm are also unpersuasive. They assert that the cutting of trees and other vegetation in a pristine and significant forest will harm their economic and recreational interests as users of the area. The evidence in the record supports a finding that the project would pass through an ecologically significant forest, but contradicts the claim that this forest is "pristine." The evidence shows that the project area is largely within a commercial forest that is harvested periodically and rather intensely. My observations from a visit to several locations within the proposed project site are consistent with the evidence presented. Segment 1 of the corridor (that segment with no pre-existing transmission line) would run through an area that has been harvested significantly and contains a patchwork of clearcuts, both fresh and in various stages of regeneration. It is remote, but certainly not pristine. The question is whether Petitioners would suffer irreparable harm if clearing of the corridor in this area were to begin while an appeal is pending.

CMP argues that the area cleared would regenerate as it does when it is commercially harvested, and therefore, even if the appeals were successful, any harm to Petitioners would not be irreparable. This theory, by itself, is not a full answer to the Petitioners' claim of harm. The cutting of trees and clearing of vegetation during an appeal could very well cause irreparable harm depending on the circumstances, because such activity will have immediate effects where it takes place, and those effects cannot quickly be reversed. But Petitioners have failed to explain how clearing that occurs through commercial forestland and in compliance with the numerous conditions set forth in the NECEC Order – many of which are designed to reduce or eliminate

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<sup>2</sup> The NECEC Order approves both a Site Location of Development Act permit and a Natural Resources Protection Act permit. Both permits require, in Standard Conditions C and B respectively, as follows: "The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate." When Petitioners filed their stay requests, both a Presidential Permit and a permit from the U.S. Army Corps of Engineers were still required. The Army Corps of Engineers issued an initial proffered permit while the stay requests were pending. A Presidential Permit has not yet been issued.

the environmental and aesthetic impacts of concern to Petitioners – would cause them any concrete and specific injury. Their argument amounts to the conclusory assertion that any such clearing or construction activity would inherently cause them irreparable harm. That is not enough to justify the issuance of a stay.

## II. Likelihood of success on the merits of the Petitioners' appeals

Both Petitioners have likewise failed to show a strong likelihood of success on the merits of their appeals. As to the significant portions of West Forks' and NRCM's appeals that are challenges to the factual findings made in the NECEC Order, I find that the likelihood of success with respect to those arguments is low. West Forks and NRCM challenge the findings on the practicability of the underground option and alternative routes, the impacts to brook trout habitat and forest fragmentation, and the conservation land. Petitioners made these same arguments during the processing of the application, and the evidence of potential harm to the environment received great scrutiny. The terms and conditions of the NECEC Order are supported by extensive evidence in the record, and are the product of thorough analysis by the Department's professional staff. The order's factual findings are therefore likely to be upheld on appeal.

Petitioners' argument that a November 2020 referendum vote might effectively strip the project of a required PUC approval is not relevant to the likelihood of success on the merits of the two appeals of the Commissioner's NECEC Order, and consequently to these stay requests. In any event, I take notice of a recent Maine Law Court decision addressing whether the question is within the citizens' referendum authority, and the Secretary of State's response, which together make clear the question will not be appearing on the ballot.

NRCM's Motion also argues that it has a strong likelihood of success on the merits of its claim that the Board was required to assume original jurisdiction pursuant to Chapter 2, §17 of its regulations, and 38 M.R.S. §§ 341-D(2) and 344(2-A), and that the NECEC Order is therefore invalid. The record reflects that neither NRCM nor any other party requested that the Board assume jurisdiction of the permit applications during the 20-day period for filing such a request set forth in Ch. 2, §17(A). Similarly, no party ever attempted to raise this issue in the two and a half years the applications were pending. In a proceeding where neither the Commissioner nor any party requests Board jurisdiction, the Board has discretion as to whether to assume jurisdiction, but is not required to do so. *See* 38 M.R.S. § 341-D(2) ("The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection are met."); Chapter 2, §17(B) ("The board may assume jurisdiction over any application on its own initiative if it finds that at least 3 of the 4 criteria in section 17(C) are met."). In any event, all appeals of the NECEC Order are now before the Board, *see* fn. 1 above, and in its review of the NECEC Order the Board "is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify, or reverse findings of fact or conclusions of law established by the commissioner." 38 M.R.S. § 341-D(4)(A). Even if NRCM could show that the Board was required to assume jurisdiction over the application at the outset, which they cannot, it is difficult to see how the Board's current involvement would not render that harmless error. Accordingly, I find that there is not a strong likelihood of reversal of the NECEC approval on the basis of this argument.

NRCM also makes the argument, echoed by West Forks, that CMP failed to show adequate TRI over two lots leased from the Maine Bureau of Public Lands, and that this argument has a strong likelihood of success. NRCM contends that the lease relied on was void because it was issued by the Bureau of Public Lands in violation of statutory and Constitutional requirements. NRCM challenged the validity of the lease in the hearing record, and as I understand it is now separately challenging an amended and restated version of the lease in litigation that is pending against the Bureau of Public Lands in Kennebec County Superior Court, Docket No. CV-2020-94. If NRCM's argument indeed has merit, it presumably could pursue judicial remedies in its pending litigation to enjoin CMP's reliance on the lease. It is, however, outside the purview of this Department to determine the merits of those claims. Courts have recognized that the Department has discretion in making its determinations of TRI, and the Department's determination that a lease that on its face gives the lessee the right to construct the proposed project, absent a court ruling otherwise, is likely to be upheld. *See* Chapter 2, §11(D) (“[A]n applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property proposed for development or use.”). Accordingly, I find that there is not a strong likelihood of success on the merits of this TRI argument.

Overall, I find that the Petitioners have not demonstrated a strong likelihood of success on the merits of their respective arguments and appeals.

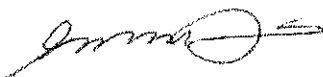
III. Harm to adverse parties or the general public

The parties make competing claims of harm to their interests and the general public depending on whether a stay is granted or denied. As noted above, Petitioners' failure to analyze whether and to what extent construction activities may begin before required federal permits have been issued makes it difficult to assess these claims. Putting that aside, and noting that full analysis of this issue is not necessary in light of my conclusions regarding irreparable harm and likelihood of success on the merits, I find that these considerations do not, on balance, weigh in favor of a stay of the NECEC Order.

CONCLUSION

For all the reasons set forth above, Petitioners have not made the showings necessary to justify a stay of the NECEC Order. Petitioners have failed to establish a strong likelihood of success on the merits of their respective appeals, and this criterion alone warrants denial of their stay requests. The grounds for this denial are bolstered when all three of the stay criteria, as discussed above, are considered and weighed together. Accordingly, the stay requests of the Petitioners West Forks and NRCM are denied.

Sincerely,



Gerald D. Reid  
Commissioner

cc: Cynthia Bertocci, Executive Analyst BEP

Peggy Bensinger, Asst. Attorney General

# EXHIBIT B

STATE OF MAINE  
KENNEBEC & SOMERSET, ss.

SUPERIOR COURT  
CIVIL ACTION  
DKT. NOS. KEN-AP-20-27  
SOM-AP-20-04

NEXTERA ENERGY RESOURCES  
LLC,  
Petitioner,

v.

MAINE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
Respondent,

and

CENTRAL MAINE POWER  
COMPANY,  
Party in interest.

Docket No. KEN-AP-20-27

WEST FORKS PLANTATION, *et al.*,  
Petitioner,

v.

MAINE DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
Respondent,

and

CENTRAL MAINE POWER  
COMPANY,  
Party in interest.

Docket No. SOM-AP-20-04

ORDER ON NRCM'S MOTION TO  
STAY DEP COMMISSIONER'S  
ORDER

Received and Filed

JAN 11 2021

Augusta District Court  
Kennebec Superior Court

In this consolidated Rule 80C action, party-in-interest Natural Resources Council of Maine ("NRCM") moves—pursuant to 5 M.R.S. § 11004—for a stay of an order by the Commissioner

of the Department of Environmental Protection (“DEP” or the “Commissioner”) conditionally approving the applications of Central Maine Power Company (“CMP”) to construct the New England Clean Energy Connect (“NECEC”).<sup>1</sup> DEP, CMP, the Industrial Energy Consumer Group, and the Maine State Chamber of Commerce, the City of Lewiston, and the Lewiston-Auburn Metro Chamber of Commerce oppose NRCM’s motion. The Court held a hearing on December 11, 2020. Following consideration of the parties’ briefs, their oral presentations, the supporting material, and the law, the Court denies the request for a stay based on the reasoning laid out below.

The Maine Administrative Procedure Act section that governs stays of agency action provides, in part, as follows:

Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner,<sup>2</sup> a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public. A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the petitioner had requested. In addition, the motion shall show the reasons for the relief requested and the facts relied upon, which facts, if subject to dispute, shall be supported by affidavits.

5 M.R.S. § 11004. The required showing to obtain a stay pending appeal is the same showing that must be made to obtain a preliminary or permanent injunction. *See, e.g., Bangor Historic Track, Inc. v. Dep’t of Agric., Food & Rural Resources*, 2003 ME 140, ¶ 9, 837 A.2d 129. “The first two

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<sup>1</sup> Petitioners West Forks Plantation, the Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pilsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (“West Forks”) join NRCM’s motion. The Court will refer to all parties seeking the stay as “movants.”

<sup>2</sup> CMP argues that NRCM is not a proper party to move for a stay because it is a party in interest, not a “petitioner” within the meaning of the statute. Notwithstanding the legal effect, if any, of the Petitioners’ joinder in the motion for a stay, the Court does not address CMP’s argument because this motion can be decided on the merits.



factors are the most critical. Both require a showing of more than mere possibility. Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction.” *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). Because a stay cannot be obtained without a showing of a strong likelihood of success on the merits, the Court begins and ends the analysis there.

Movants put forth three separate contentions as to why they are likely to succeed on the merits.<sup>3</sup> The first is that the governing statute vests in the Board of Environmental Protection (“BEP” or the “Board”) exclusive jurisdiction over applications for permits regarding projects of statewide significance, *see* 38 M.R.S. § 341-D(2), meaning the Commissioner was without authority to decide CMP’s applications. The second is that CMP did not and does not have sufficient title, right, or interest (“TRI”) in the public reserved lands that constitute a portion of the NBCEC transmission line in order to pursue the permit applications.<sup>4</sup> The third generally falls under the sufficiency-of-the-evidence standard: as argued by NRCM, the record overwhelmingly demonstrates the NBCEC will result in devastating environmental effects, and, as argued by West Forks, the Commissioner’s conditional approval is based on several untried and open-ended mitigation measures that do not compensate for the adverse impacts. The Court addresses, in turn, why it concludes the movants have not demonstrated a strong likelihood of success on any

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<sup>3</sup> As the statute requires, a stay of the order conditionally approving CMP’s permit applications was sought before the agency, first to the Commissioner. (NRCM Ex. 1 (Aug. 26, 2020).) Following the Commissioner’s denial, renewed requests were made to the Board, but were denied. (NRCM Ex. 2 (Oct. 23, 2020).)

<sup>4</sup> As the parties and the Court are aware, this argument stems from the Bureau of Public Land’s 2014 lease (and then 2020 “amended and restated lease”) of public reserved land in Johnson Mountain Township and West Forks Plantation to CMP. In parallel litigation, NRCM, as a plaintiff, is challenging the 2014 lease on the basis that it was issued before CMP received a certificate of public convenience and necessity (“CPCN”), *see* 35-A M.R.S. § 3132(13), and that it was not issued with the constitutionally required 2/3 majority approval of both houses of the legislature for conveyances that substantially alter the uses of public lands, *see* Me. Const. art. IX, § 23. The 2014 lease served as the basis for CMP’s application to DEP. (DEP Ex. A at 8 (May 11, 2020).)

contention.

With regard to whether the Board had exclusive jurisdiction, it must be noted that the process followed in this case fell within a statutory scheme that is not exactly a model of clarity. Indeed, the parties do not seem to agree about how the process is expected to work in any particular case. The particular issue facing the Court, however, is what event had to occur, or what factors had to be present, before the Board could have assumed "jurisdiction" of an application such as the one before the Court. As is relevant here, the statutory scheme undoubtedly provides that

the board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance . . . [i.e.,] a project that meets at least 3 of the following 4 criteria: Will have an environmental or economic impact in more than one municipality, territory or county; Involves an activity not previously permitted or licensed in the State; Is likely to come under significant public scrutiny; and Is located in more than one municipality, territory or county.

38 M.R.S. § 341-D(2)(E)-(H). The Commissioner, however, is vested with the responsibility of initially processing applications.<sup>5</sup> *See id.* § 344(1). Once an application is accepted as complete, the statute envisions two scenarios in which the Commissioner *must* request that the Board take jurisdiction over the application.

First, "the commissioner shall decide as expeditiously as possible if an application meets 3 of the 4 criteria set forth in section 341-D, subsection 2 and shall request that the board assume jurisdiction of that application." *Id.* § 344(2-A)(A). Second, "[i]f at any subsequent time during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner shall request that the board assume jurisdiction of the application." *Id.* Essentially, these two sentences of the statutory section impose a mandatory action upon the Commissioner once he has exercised his discretion in determining that an

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<sup>5</sup> The Commissioner must notify the Board of all applications accepted as complete. 38 M.R.S. § 344(1).

application is for a project of statewide significance. The section dictating the Board's responsibilities has a matching sentence for when the Commissioner exercises that discretion: "The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A when it finds that at least 3 of the 4 criteria of this subsection have been met."<sup>6</sup> *Id.* § 341-D(2).

Here, the Commissioner apparently never determined that CMP's applications represented a project of statewide significance, otherwise he would have been statutorily obligated to refer the applications to the Board for the Board to determine whether it was a project of statewide significance. Therefore, neither scenario invoking mandatory referral from the Commissioner to the Board occurred here because the Commissioner never made the discretionary decision (either at the outset or at any time during) that CMP's applications represented a project of statewide significance (or exercised his discretion to determine it did not represent a project of statewide significance).<sup>7</sup> Either way, the key allegation here is that the discretionary decision was not made in a fashion the movants contend it should have been such that it would have triggered mandatory referral of the applications to the Board.

It cannot be ignored that the statute speaks in terms of "jurisdiction," which movants rely on to analogize the Board's role as being akin to subject-matter jurisdiction of courts over particular disputes. Despite this, in the unique context of this statute, the requirement of Board assumption of "jurisdiction" over an application appears to the Court to be akin to a claims-processing rule that can be waived if not timely raised, as compared to a jurisdictional prescription that cannot be waived. *Cf. Landmark Realty v. Leasure*, 2004 ME 85, ¶ 7, 853 A.2d 749

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<sup>6</sup> The applicant and the Commissioner can also jointly refer an application to the Board. *See id.* § 341-D(2). CMP and the Commissioner did not jointly refer CMP's applications to the Board in this case.

<sup>7</sup> Movants have not argued that any such decision by the Commissioner was an abuse of discretion.

(alterations, citations, and quotation marks omitted) (“Jurisdiction is a word of many, too many, meanings. Courts have been less than meticulous in using the term jurisdictional. As the United States Supreme Court stated: “Clarity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”); *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (explaining that an objection based on a claim-processing rule may be forfeited “if the party asserting the rule waits too long to raise the point”). It is in this context that the statute envisions a scenario where a party has an opportunity to raise the issue of Board assumption of “jurisdiction.”

On that point, the statute prescribes a process regarding the Commissioner referring an application over which there is an apparent dispute as to whether it is a project of statewide significance: “If an interested person requests that the commissioner refer an application to the board and the commissioner determines that the criteria are not met, the commissioner shall notify the board of that request.”<sup>8</sup> *Id.* § 344(2-A)(A). DEP regulations clearly state that there is a 20-day window from the date the application is accepted as complete for “[a]ny person” to so request. *See* 06-096 C.M.R. ch. 2, § 17(A). NRCM would qualify as such an interested person. Despite this, as the Commissioner detailed in his decision,

[t]he record reflects that neither NRCM nor any other party requested that the Board assume jurisdiction of the permit applications during the 20-day period for filing such a request set forth in Ch. 2, § 17(A). Similarly, no party ever attempted to raise this issue in the two and a half years the applications were pending.

(NRCM Ex. 1 at 5 (Aug. 26, 2020).) Even assuming movants are correct that the Board *should*

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<sup>8</sup> This at least superficially appears to pair with the sentence in the Board-responsibility section that says the Board “may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection have been met.” *Id.* § 341-D(2). This sentence also gives the Board broad discretion to otherwise determine any project is of statewide significance if it so decides.

have been the entity to decide CMP's permit applications, 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. The Court is not inclined to endorse such an extended delay in raising the issue, particularly when it would unfairly prejudice CMP, DEP, and the 2-plus-year process engaged in by numerous individuals and entities to reach the ultimate conditional approval.<sup>9</sup> *Cf. Longley v. Knapp*, 1998 ME 142, ¶ 10, 713 A.2d 939 ("Laches is the omission to assert a right for an unreasonable and unexplained length of time and under circumstances prejudicial to the adverse party.").

Next, the Court concludes that movants have not met their burden to show they have a strong likelihood of success on the merits regarding their argument that CMP did not and does not have TRI in the public reserved lands that constitute a portion of the NECEC transmission line in order to pursue the permit applications. DEP rules require

[a]n applicant [to] maintain sufficient title, right or interest throughout the entire application processing period . . . [and, w]hen the applicant has a lease or easement on the property, . . . [t]he lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required.

06-096 C.M.R. ch. 2, § 11(D)(2). Movants argue that the 2014 lease of portions of public reserved land from the Bureau of Public Lands to CMP was void as a matter of law (as highlighted in footnote 4, *supra*). Because of this, they contend, CMP did not have—at any time during the

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<sup>9</sup> Moreover, the relief requested by movants for this alleged error is similar to what the Board will be doing as it reviews the Commissioner's conditional approval. Compare NRCM Mot. 7 ("[T]he Board should review the previously created record, treat the NECEC Order as a recommendation, and allow focused testimony on that Order before it makes a determination.") with 38 M.R.S. § 341-D(4)(A) ("The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes made by the board under this paragraph must be based upon the board's review of the record, any supplemental evidence admitted by the board and any hearing held by the board . . .").

application process before the DEP—TRI in the public reserved lands in Johnson Mountain Township and West Forks Plantation.

Though movants rely heavily on *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175, this case is more like *Southridge Corporation v. Board of Environmental Protection*, 655 A.2d 345 (Me. 1995), than it is *Tomasino*. The issue of TRI in *Tomasino* centered on the *scope* of the easement (i.e., what the easement actually allowed the easement holder to do on the land). 2020 ME 96, ¶ 7, 237 A.3d 175. Here, though movants label it as the “scope” of CMP’s 2014 lease with the Bureau of Public Lands, they truly challenge the *validity* of the lease itself (as opposed to the specific activities authorized or not by the language of the lease). Whether a possessory interest in land is valid and whether a possessory interest in land authorizes a particular activity are different questions. The fact that an applicant’s TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP. *See Southridge*, 655 A.2d at 348. Because of this, movants have not demonstrated they have a strong likelihood of success on the merits of this issue.

It is worth noting that the issue of whether the 2014 lease at issue is void or invalid looms large in the parallel litigation (*Black, et al. v. Cutko, et al.*, No. BCD-CV-20-29). That case is still in its relative infancy, and the issue will be decided on the merits after further factual development and argument. Though the undersigned is the Justice presiding over that case, the Court cannot prejudge what will happen, especially because there are parties in that case who cannot be heard on the motion in this case.

Finally, as it pertains to the movants’ argument that the record overwhelmingly demonstrates the NECEC will result in devastating environmental effects and that the Commissioner’s conditional approval is based on several untried and open-ended mitigation

measures that do not compensate for the adverse impacts, the Court acknowledges they highlighted in detail numerous environmental impacts of the NECEC notwithstanding the mitigation measures. Despite this, the Court's review of this issue is by design highly deferential, and the question on appeal is not whether there is evidence in the agency record that runs counter to the Commissioner's ultimate decision, but whether the record lacks any competent evidence to support the decision.<sup>10</sup> See Alexander, *Maine Appellate Practice* § 458(c)(2) (5th ed. 2018) (citing *Passadumkeag Mountain Friends v. Bd. of Env'tl. Prot.*, 2014 ME 116, ¶¶ 12, 14, 102 A.3d 1181) ("The reviewing court will affirm findings of fact if they are supported by 'substantial evidence in the record,' even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency."). "As the fact-finder, the [agency] has the authority to determine the weight to be given to the evidence," *Rossignol v. Me. Pub. Emples. Ret. Sys.*, 2016 ME 115, ¶ 6, 144 A.3d 1175, and the Commissioner here weighed the evidence contrary to movants' positions. Highlighting this is not enough for movants to carry their burden to show a strong likelihood of success on the merits, however. As the Commissioner said in his decision denying the movants' request for a stay before the agency,

[a]s to the significant portions of West Forks' and NRCM's appeals that are challenges to the factual findings made in the NECEC Order, I find that the likelihood of success with respect to those arguments is low. West Forks and NRCM challenge the findings on the practicability of the underground option and alternative routes, the impacts to brook trout habitat and forest fragmentation, and the conservation land. Petitioners made these same arguments during the processing of the application, and the evidence of potential harm to the environment received great scrutiny. The terms and conditions of the NECEC Order are supported by extensive evidence in the record, and are the product of thorough analysis by the Department's professional staff. The order's factual findings are therefore likely

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<sup>10</sup> Moreover, it does not appear that the Court has the entire agency record before it at this point, only various selections of it. Further, it is not entirely clear what the final record will be because there is a possibility that the appeal of the Commissioner's conditional approval presently before the Board could result in additional evidence. See 38 M.R.S. § 341-D(4)(A).

to be upheld on appeal.

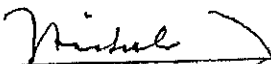
(NRCM Ex. 1 at 5 (Aug. 26, 2020).) Movants have not pointed to the absence of competent evidentiary support for the Commissioner's factual findings; instead, they have pointed to evidence in the record that conflicts with the factual findings. This is not enough, and they have not demonstrated they have a strong likelihood of success on the merits of this issue.

Because the movants have not demonstrated that they have a strong likelihood of success on the merits, as detailed throughout this order, the Court must deny the motion for a stay.

The entry is:

1. NRCM and West Forks' motion for a stay is denied.
2. The Clerk is directed to incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: January 8, 2021

  
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Hon. M. Michaela Murphy  
Justice, Maine Superior Court



# EXHIBIT C



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

August 4, 2021

Elizabeth Boepple  
BCM Environmental & Land Law, PLLC  
2 Union St., Suite 402  
Portland, ME 04101

Dear Ms. Boepple:

This letter serves as my decision on your clients' pending, May 27, 2021, renewed request for a stay of the May 11, 2020, Order conditionally approving the application to construct the New England Clean Energy Connect project (NECEC Order). This letter also addresses additional issues raised along with the renewed request for stay, as well as a separate request to "put a halt to CMP/NECEC's construction work anywhere along the NECEC line," included in your letter dated July 14, 2021.

**RENEWED REQUEST FOR STAY**

**I. Procedural Background**

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guides Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pillsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting the Commissioner stay the NECEC Order. West Forks filed supplements to its motion on June 15, 2020 and June 25, 2020.

On June 10, 2020, the Natural Resources Council of Maine (NRCM) separately filed a request for stay of the NECEC Order with the Commissioner.

On August 26, 2020, the Commissioner issued his decision denying the stay requests filed by West Forks and NRCM. The Commissioner determined that West Forks and NRCM had failed to demonstrate that any of the three required factors necessary to obtain a stay had been met.

On November 2, 2020, NRCM filed a motion to stay the NECEC Order in Superior Court. West Forks joined in NRCM's motion.

On January 8, 2021, following a hearing, the Superior Court denied NRCM and West Forks' stay request.

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On May 27, 2021,<sup>1</sup> West Forks filed a renewed request for stay of the NECEC Order with the Commissioner. West Forks filed a supplement to its request on June 17, 2021.

## II. Stay Criteria

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 11004. The filing of an appeal does not operate to stay a permit issued by the Department. A petitioner seeking a stay (here West Forks) bears the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioner, (2) there is a strong likelihood of success on the merits on the petitioner's appeal, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. A petitioner must satisfy all three parts of this test to obtain a stay. The burden of demonstrating that the criteria are met rests with the petitioner.

## III. Analysis and Conclusion

The most recent analysis of a request for a stay of the NECEC Order was conducted by the Superior Court in which the court noted: "Because a stay cannot be obtained without a showing of a strong likelihood of success on the merits, the Court begins and ends the analysis there." *NextEra Energy Resources, LLC v. DEP and West Forks Plantation v. DEP*, Superior Court Order, Jan. 8, 2021 at 3. I will do the same here.

In the request for a stay before the Superior Court, West Forks (along with NRCM) argued "the record overwhelmingly demonstrates the NECEC [transmission line] will result in devastating environmental effects and the Commissioner's conditional approval is based on several untried and open-ended mitigation measures that do not compensate for the adverse impacts." Superior Court Order at 8-9. The court rejected this assertion as insufficient to demonstrate a likelihood of success on the merits, noting that West Forks and NRCM "have not pointed to the absence of competent evidentiary support for the Commissioner's factual findings; instead, they have pointed to evidence in the record that conflicts with the factual findings. This is not enough, and they have not demonstrated that they have a strong likelihood of success on the merits of this issue." Superior Court Order at 10. I find the same is true of the renewed request.

In the renewed request for a stay, West Forks points to the vegetation clearing completed prior to June 1<sup>2</sup> in Segment 1 and argues:

Given the now clear impact, Petitioners are likely to succeed on the merits of their appeal. The evidence in the record does not support the DEP's decision to approve this project in light of how much wider the corridor's impact is. Evidence and witness testimony made it clear that the NECEC would fragment the largest remaining unfragmented forest east of the Mississippi. CMP/NECEC's cutting makes the disrupting effects of forest fragmentation

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<sup>1</sup> West Forks' May 27 filing is mistakenly dated 2020, as opposed to 2021.

<sup>2</sup> Pursuant to the terms and conditions of the permit issued by the Army Corps of Engineers authorizing the NECEC project, tree clearing in Segment 1 of the project is prohibited in the months of June and July.

completely clear on the ground. Petitioner's observations of corridor cutting in Segment 1 show the negative impact on wildlife habitat. It is now obvious that a 54-foot to more than 90-foot clear-cut is a chasm for small mammals and other wildlife to cross and completely separates the plant communities. It is also evident now how much visual impact will be on scenic roads, ponds, trails, and other recreational resources. No impact is acceptable here and it has become obvious and unavoidable how dramatic the impact will be.

#### Renewed Request for Stay at 6.

The concerns expressed here by West Forks about habitat fragmentation and the visual impact of the NECEC project are concerns that were raised by West Forks and others during the multi-year permitting process. Parties who participated in the public hearing submitted written and oral testimony on these topics and many members of the public submitted comments on these topics, as well. The Department thoroughly reviewed and considered this information, including conflicting testimony, as demonstrated in the final NECEC Order. More than 65 pages of the order are devoted to the analysis of the evidence in the record on potential impacts of the project on scenic character and natural resources, including habitat fragmentation.

The renewed request for stay is similar to the original request in that West Forks asserts that the record evidence supports their position, but does not acknowledge the evidence to the contrary. West Forks' filing does not show an absence of competent evidentiary support for the Commissioner's factual findings; such an absence would be necessary for West Forks to succeed on this claim in its appeal. What distinguishes the renewed request are statements about the clearing completed in Segment 1 pursuant to the NECEC Order and West Forks' assessment that the clearing demonstrates the project will result in a significant impact. See e.g., Renewed Request for Stay at 4 (stating the vegetation clearing that has occurred "is hugely damaging to the natural environment"). These statements and accompanying photos, however, are not part of the record associated with the pending appeal and, therefore, do not bear on West Forks' likelihood of success on the merits in the appeal.<sup>3</sup>

In pointing to the clearing in Segment 1 of the corridor where tapered vegetation is required and describing the vegetation removal as having a "dramatic impact," West Forks states this impact cannot be what the Department intended in issuing the NECEC Order. Tapering is required to minimize impacts of the project by requiring the Licensees to retain, and allow to regrow following construction, as much vegetation at the tallest height reasonably possible within a corridor with energized transmission lines. As originally proposed, the full 150-foot wide

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<sup>3</sup> West Forks also points to two changes to the transmission line project that the Licensees proposed after issuance of the NECEC Order and subsequently withdrew as supporting its request for stay because of the impact these could have. Consideration of these potential impacts is well beyond the record on appeal and does not bear on West Fork's likelihood of success on the merits in the appeal. These two changes cannot occur without the filing of an amendment application and subsequent approval by the Department. The Licensees stated in their response to the renewed stay request the changes "have not and will not be proposed as amendments to the Project." CMP and NECEC Transmission, LLC's Response at 6.

corridor would have been cleared and vegetation would have been maintained at height of less than 10 feet. In areas along Segment 1 where tapering is required, the vegetation retained during construction necessarily depends on the height of the vegetation that existed at each location, within each taper, at the time of construction. This is recognized by the Department. Tapering is one of several types of vegetation management requirements included in the order and vegetation management is one of many requirements that address various potential impacts of the project. For example, the order also requires 40,000 acres of permanent conservation as compensation for habitat fragmentation impacts and \$1,875,000 of funding for culvert replacements to improve stream connectivity and enhance habitat for cold water fish, such as brook trout.

I cannot consider the information presented that is outside the record on appeal in my analysis of the likelihood of the success on the merits of the pending appeal because neither the Board nor the Court will consider evidence outside of the record in the appellate review. I find West Forks has not demonstrated a strong likelihood of success on the merits their appeal. Therefore, West Forks has not made the showing necessary to justify a stay of the NECEC Order. The renewed request for a stay is denied. Additionally, even taking into account the information outside of the record that West Forks has presented, this information does not demonstrate the NECEC Order should be reversed by the Board or a court, or otherwise provide a basis for requiring the Licensees to stop the construction authorized by the order.

#### ADDITIONAL ISSUES

The May 27, 2021 filing with the renewed request for stay also includes what is titled a “request for review of order violations.” West Forks includes a link to a video in which someone measures the width of the cleared portion of the corridor at the intersection with Judd Road where tapering is required, along with measurements taken by another individual at additional locations along the corridor where tapering is required. The Department previously learned of these measurements through the media and has followed up with site visits by DEP staff, as well as by third party inspectors. I also have visited the corridor as part of the Department’s monitoring of the project.

As stated in the NECEC Order: “‘Tapering’ refers to a form of vegetation management along the transmission line corridor where increasingly taller vegetation is allowed to grow as the distance from the wire zone increases.” NECEC Order at C-5. Within the 54-foot wide center area, the “wire zone,” vegetation approximately 10 feet tall will be allowed to regenerate after being cut to the ground during construction. In each 16-foot wide taper on each side of the wire zone, vegetation will be allowed to grow up to the following approximate heights: 15 feet for the first taper, 25 feet for the second taper, and 35 feet for the third taper. During construction, the Licensees may not cut vegetation that is shorter than the maximum height in each taper. Vegetation exceeding these heights may be cut during construction within the entire 150 feet width of the corridor. When vegetation regenerates after construction it must be allowed to grow up to the maximum vegetation height within each taper and the Licensees must make reasonable efforts to avoid the growth of even-aged stands within each taper. NECEC Order at C-6.

Letter to Elizabeth Boepple  
August 4, 2021  
Page 5

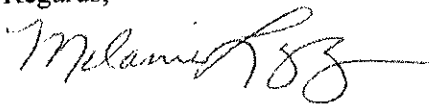
The Department has not observed cutting violations, including when investigating the measurements referred to in West Forks' filing. Department staff examined cut trunks within the taper zones, compared cut trunk diameters to remaining trees in the area, and searched for cut trees shorter than permitted in each taper zone. We found no evidence of trees cut in each taper zone smaller than permitted to be cut during construction. We observed that some lengths of cut corridor have more remaining vegetation in the first taper zone than others, particularly through areas with tall pines.

More specifically, we measured the greatest identifiable distances between cut tree trunks approximately perpendicular to the corridor. DEP staff measured distances up to 98 feet between cut trees, but could not find any cut trees that were less than 15 feet or 25 feet tall within the relevant taper zones. Therefore, we have confirmed that some cutting has been conducted in the second taper zone and that the cutting observed within both the first and second taper zones is consistent with the NECEC Order.

In a letter dated July 14, 2021, West Forks requests that the Department "put a halt" to the NECEC project. The basis for this request was an email sent by a concerned citizen to the Department alleging violations of the permit, specifically with regard to erosion control. These allegations were promptly investigated by a third-party inspector and reviewed by Department staff. As explained to the concerned citizen on July 7, no evidence of soil material having eroded beyond the project boundary was observed. Additionally, no issues warranting a notice of violation were observed, however, as Department staff explained to the concerned citizen, the Department asked for additional erosion and sedimentation control measures and these were implemented.

None of these alleged violations bear on the standards for issuing a stay, nor do they otherwise support suspension of the NECEC Order.

Regards,



Melanie Loyzim, Commissioner

cc: Service List

# EXHIBIT D



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

August 20, 2021

James T. Kilbreth  
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Elizabeth A. Boepple  
Murray Plumb & Murray  
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Re: Natural Resources Council of Maine's and West Forks' Renewed Requests for a Stay

Dear Mr. Kilbreth and Ms. Boepple:

This letter serves as my decision on your clients' renewed requests for a stay of the May 11, 2020, Order conditionally approving the application to construct the New England Clean Energy Connect project (NECEC Order) and additional Orders transferring and amending the NECEC Order.

**I. Procedural Background**

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guides Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pillsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting the Commissioner stay the NECEC Order. West Forks filed supplements to its motion on June 15, 2020 and June 25, 2020.

On June 10, 2020, the Natural Resources Council of Maine (NRCM) separately filed a request for a stay of the NECEC Order with the Commissioner.

On August 26, 2020, then Commissioner Gerald Reid issued his decision denying the stay requests filed by West Forks and NRCM. Commissioner Reid determined that West Forks and NRCM had failed to demonstrate that any of the three criteria necessary to obtain a stay had been met.

On November 2, 2020, NRCM filed a motion in Superior Court to stay the NECEC Order. West Forks joined in NRCM's motion.

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On January 8, 2021, following a hearing, the Superior Court denied the NRCM and West Forks stay request.

On May 27, 2021,<sup>1</sup> West Forks filed a renewed request for stay of the NECEC Order with the Commissioner. West Forks filed a supplement to that request on June 17, 2021. By letter dated August 4, 2021, I denied West Forks' May 27, 2021 renewed request for a stay of the NECEC Order and also addressed additional issues.

On August 11, 2021, NRCM filed another renewed request for a stay of the NECEC Order following a Maine Superior Court decision dated August 10, 2021 in the case of *Black v. Cutko*, No. BCD-CV-2020-29. In that decision the Superior Court reversed the decision of the Bureau of Public Lands (BPL) to enter into a lease with Central Maine Power Company (CMP) for public lands in Johnson Mountain Township and West Forks Plantation. The lease covered a stretch of land over which approximately .9 miles of the transmission line would be built.

On August 12, 2021, I notified the licensees and the other parties to the pending Board appeals that I was initiating a proceeding to consider a suspension of the permit issued in the NECEC Order.

On August 18, 2021, West Forks joined in NRCM's August 11, 2021 renewed stay request, raising similar arguments with respect to the Superior Court's August 10, 2021 decision in *Black v. Cutko*. Additional responses to NRCM's August 11, 2021 renewed stay request were filed by the licensees, CMP and NECEC Transmission LLC, and by Trout Unlimited and Friends of the Boundary Mountains.

## **II. Stay Criteria**

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 11004. As petitioners seeking a stay, NRCM and West Forks bear the burden of demonstrating that: (1) the failure to obtain a stay would result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits of the petitioners' appeals, and (3) the issuance of a stay would result in no substantial harm to adverse parties or the general public. A petitioner must satisfy all three parts of this test to obtain a stay.

## **III. Analysis and Conclusion**

In this renewed request for a stay, NRCM and West Forks argue that CMP no longer has title, right, or interest (TRI) for all property proposed for development as contemplated by Chapter 2, § 11(D) of the Department's rules and that therefore they have a strong likelihood of success on the merits of their appeals to the Board. NRCM and West Forks base their latest renewed requests for a stay of the NECEC Order on the Maine Superior Court's recent August 10, 2021 decision in *Black v. Cutko*, which NRCM asserts "materially alters" the stay factors that former

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<sup>1</sup> West Forks' May 27 filing was mistakenly dated 2020, as opposed to 2021.

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Commissioner Reid assessed in issuing his August 2020 stay denial and is “dispositive” with respect to TRI, and which West Forks asserts is “fatal” to CMP’s application and the NECEC Order due to a lack of TRI. (NRCM Aug. 11, 2021 Stay Request, pp. 2, 4; West Forks Aug. 18, 2021 Response, pp. 1 & n.3, 2-5). I disagree.

NRCM contends throughout its request that, as a result of the Superior Court’s August 10, 2021 decision in *Black v. Cutko*, NRCM’s appeal to the Board will ultimately be successful because “the NECEC cannot be built along the route permitted by the Department.” (NRCM Aug. 11, 2021 Stay Request, p. 1); *see also* p. 4 (discussing irreparable injury with reference to a project CMP “can’t complete” and a project purpose that “can no longer be met with the proposed route”) and p. 6 (discussing public interest with respect to a project CMP “can’t complete”). West Forks adopts all of these contentions. (West Forks Aug. 18, 2021 Response, p. 1 n.2). These assertions overstate the Superior Court’s decision, which does not find that CMP cannot obtain a BPL lease or build the NECEC project on the proposed route permitted by the Department. Rather, the Superior Court found that the process used by the BPL in issuing a lease for an approximately 0.9 mile portion of the permitted route was legally insufficient and that the BPL must make certain findings and determinations before issuing such a lease. The Superior Court’s decision has since been appealed to the Maine Law Court by both the BPL and CMP and the ultimate result of that legal challenge to the decision is uncertain. More fundamentally, the Superior Court did not rule on the merits of the BPL’s lease decision with respect to the 0.9 mile portion of the proposed and permitted route, and even if the Law Court were to affirm the Superior Court’s decision, CMP may re-apply for such a lease.<sup>2</sup>

In any case, NRCM and West Forks have also not demonstrated that they will succeed on the appeal issue of whether CMP’s permit application demonstrated sufficient TRI for purposes of the processing of its application, and maintained TRI throughout the processing period.<sup>3</sup> Chapter 2, § 11(D) requires an applicant to maintain sufficient TRI throughout the application processing period. Chapter 2, § 1(Q) defines the processing time as “the time established by the Department to process an application, as published pursuant to 38 M.R.S. § 344-B(1) or otherwise provided by law.” For this Chapter 2 purpose, the Department’s processing time ends upon issuance of the permit or license. In this case, the processing time ended on May 11, 2020, with the issuance of the NECEC Order, and does not extend beyond that date and encompass the period of any appeals of such licensing decision to either the Board of Environmental Protection or courts.

With the BPL lease that had been issued, CMP maintained sufficient TRI throughout the entire Department application processing period. The concept of sufficient TRI pursuant to the Department’s rules is a distinct issue from any judicial resolution of disputes over underlying matters such as the validity of a lease issued by a separate agency. As the Superior Court Justice who issued the August 10, 2021 decision in *Black v. Cutko* stated in her January 8, 2021 decision

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<sup>2</sup> NRCM and West Forks also contend the Department should have conducted its own analysis of whether the BPL process leading up to the lease between the BPL and CMP was proper. (NRCM Aug. 11, 2021 Stay Request, p. 3; West Forks Aug. 18, 2021 Response, pp. 2-3). That adjudicatory function is not part of the Department’s role in reviewing a permit application before it.

<sup>3</sup> NRCM Aug. 11, 2021 Stay Request, p. 4; West Forks’ Aug. 18, 2021 Response, pp. 1-3, 4-5.

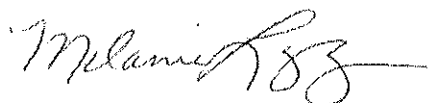
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denying the prior requests by NRCM and West Forks to stay the Department's NECEC Order, "[t]he fact that an applicant's TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP." *NextEra Energy Resources, LLC v. DEP and West Forks Plantation v. DEP*, Nos. KEN-AP-20-27, SOM-AP-20-04, Superior Court Order, Jan. 8, 2021, at 8.<sup>4</sup>

The reasoning above also applies to arguments on the remaining prongs of the test a petitioner must meet to obtain a stay. The issuance of a stay on the sole basis that the sister agency's procedure was ruled invalid may result in unwarranted harm to the licensees or the public. NRCM and West Forks have not established that a stay based solely on such a procedural violation by BPL, which is subject to further appeal and potential correction before the BPL, would result in no substantial harm to adverse parties or the general public. NRCM's and West Forks' contentions regarding irrevocable harm go to evidence submitted during the licensing hearing, which was not found convincing on the issue of whether the statutory criteria have been met for the issuance of a permit. I concur with Commissioner Reid's prior determination that these arguments do not demonstrate irrevocable harm will occur to NRCM or West Forks members if a stay is not granted.

While I am denying NRCM's and West Forks' renewed requests for a stay because the criteria for a stay have not been met, I recognize that the Superior Court's August 10, 2021 decision in *Black v. Cutko* has created some uncertainty with respect to the affected portion of the project. In response, I have already initiated a proceeding to consider the suspension of the NECEC Order in accordance with 38 M.R.S. § 342(11-B) and Chapter 2, § 25(A) of the Department's rules, as more fully described in my August 12, 2021 letter to representatives of CMP and NECEC Transmission LLC, Mr. Dickinson and Mr. Mirabile. That proceeding, rather than NRCM's and West Forks' renewed requests for a stay of the NECEC Order, is the appropriate Department mechanism to consider the change in circumstance represented by the Superior Court's decision.

Based on all of the above, I am denying NRCM's renewed request for a stay of the NECEC Order dated August 11, 2021, and West Forks joinder of that renewed stay request in its filing dated August 18, 2021.



Melanie Loyzim, Commissioner

cc: Service List

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<sup>4</sup> West Forks' reliance on a prior Department case, *Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345 (Me. 1995), in support of its TRI argument is misplaced. (West Forks' Aug. 18, 2021 Response, p. 2). That decision upheld the Department's processing of a permit application where the applicant did not have deeded ownership of a small portion of the land on which the project was located but was involved in a separate court action to resolve a dispute over the applicant's ownership of that parcel.