

By Email and First Class Mail

June 19, 2020

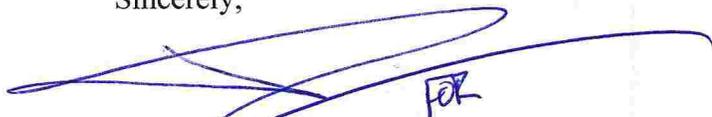
James R. Beyer
Regional Licensing and Compliance Manager
Department of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: *Stay of Department 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*

Dear Mr. Beyer,

I write in response to the Department's invitation to comment on the Application for Stay of Agency Decision submitted by Attorney Boepple on behalf of her clients (Groups 2 and 10 in the underlying proceedings). The Natural Resources Council of Maine (NRCM) was an Intervenor in the proceedings before the Department and supports this request for a stay. NRCM separately asked that the Board review and stay the Department's Order for the reasons set forth in the attached memorandum, incorporated herein by reference, all of which are equally applicable here.

Sincerely,



Elizabeth C. Mooney

cc: Service List (by email)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY
Application for Site Location of Development
Act permit and Natural Resources Protection
Act permit for the New England Clean Energy
Connect (“NECEC”)

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

**APPLICATION FOR STAY OF
AGENCY DECISION**

The Natural Resources Council of Maine (“NRCM”) respectfully requests that the Board of Environmental Protection (“Board”) stay the May 11, 2020 Order (“Order”) issued by the Commissioner of the Department of Environmental Protection (the “Department”) conditionally approving Central Maine Power Company’s (“CMP”) applications for State environmental permits for the New England Clean Energy Connect (“NECEC” or “Corridor”). Staying the Order during the pendency of NRCM’s appeal, filed simultaneously herewith, is within the authority of the Board and is appropriate for this project of statewide significance that has not yet been reviewed by the Board. Applicable statutes require that the Board—not the Department—“**shall** decide each application for approval of permits and licenses that **in its judgment** represents a project of statewide significance” and identify the criteria that determine whether a project is of “statewide significance.” 38 M.R.S. §§ 341-D(2), 344(2-A) (emphasis added); 06-96 CMR. Ch. 2 § 17. The Corridor meets each of the criteria identified in statute and rule and can only be permitted

by the Board. Thus, until the Board determines that the NECEC *is not* a project of statewide significance or exercises its mandatory review of projects of statewide significance, the Order must be stayed.

Further, the Order issued in error. Where, as here, construction of the Corridor will irreparably harm NRCM and a stay will not harm CMP, the Board should stay the Order pending its review. Me. Op. Att'y Gen. No. 80-116 (July 15, 1980); 5 M.R.S.A § 11004.

BACKGROUND

CMP is proposing to build a 145-mile, high-voltage, direct current (HVDC) transmission line from Québec to an interconnection with the New England grid in Lewiston. About 54 miles of the transmission line route would consist of an entirely new 150-foot wide transmission corridor through a currently undeveloped section of Maine's North Woods. The record before the Department reveals that CMP's proposed Corridor includes above-ground transmission lines that would severely fragment this critical forest habitat, crossing the Appalachian Trail, countless wetlands and streams, a large, high-quality deer wintering area, and encroaching upon Beattie Pond, a Class 6 remote pond.¹

The record before the Department also reflects that CMP's Corridor would expand the clearing along a significant portion of the remaining corridor length that runs within its existing power lines, requiring clearing even more vegetation and undertaking additional development within existing corridors. As demonstrated before the Department, this project poses a unique and substantial threat to Maine's environment.

The Department considered applications for a Natural Resources Protection Act (NRPA) permit pursuant to 38 M.R.S. §§ 480-A – 480-JJ and a Site Location of Development Law (Site

¹ "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. § 342-D(4)(A).

Law) permit pursuant to 38 M.R.S. §§ 481 – 490 for CMP’s proposed NECEC Project. The record conclusively demonstrates that this project will not fit harmoniously into the existing natural environment and will adversely affect existing uses, scenic character, and natural resources, including significant vernal pools, brook trout habitat, wildlife habitat and lifecycles, and deer wintering areas. The NECEC complies with neither NRPA nor the Site Law. A stay is appropriate while the Board reviews the NECEC’s compliance with NRPA and the Site Law.

ARGUMENT

I. The Board Must Issue a Stay and Review the Application *de novo* Because This is a Project of Statewide Significance That Cannot Be Authorized by the Department

Controlling statutes require the Board to assume jurisdiction over and decide license applications that involve projects of statewide significance. 38 M.R.S. §§ 341-D(2), 344(2-A); 06-96 CMR. Ch. 2 § 17(C). These statutes state that the Board—not the Department—“**shall** decide each application for approval of permits and licenses that **in its judgment** represents a project of statewide significance.” 38 M.R.S. § 341-D(2) (emphasis added). A project is of statewide significance if it meets at least 3 of the 4 statutorily defined 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.

Id. § 341-D(2)(E); *accord* 06-96 CMR. Ch. 2 § 17(C).

Use of the word “shall” imposes a mandatory duty and does not provide the Board or Commissioner with discretion. The Legislature set forth specific rules to “be observed in the construction of statutes, unless such construction is inconsistent with the plain meaning of the enactment.” 1 M.R.S. § 71. One of those specific rules is that, when used in laws enacted after

December 1, 1989, the words “‘shall’ and ‘must’ are terms of equal weight that indicate a mandatory duty, action or requirement.” *Id.* § 71(9-A); accord *McGee v. Sec’y of State*, 2006 ME 50, ¶ 14 & n.3, 896 A.2d 933, 938–39. “If the meaning of the language is clear, we interpret the statute to mean what it says.” *N.A. Burkitt, Inc. v. Champion Rd. Mach. Ltd.*, 2000 ME 209, ¶ 6, 763 A.2d 106, 107 (citing *Kimball v. Land Use Regulation Comm’n*, 2000 ME 20, ¶ 18, 745 A.2d 387, 392). Here, the statutory mandate is clear.

Nor is the Commissioner possessed of authority to retain jurisdiction over an application that meets 3 of the 4 criteria. 38 M.R.S. § 344(2-A) (“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. If 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”) (emphasis added).²

Thus, unless the Board determines in its judgment that the Corridor *is not* a project of statewide significance—a conclusion that would be flatly contrary to the statutory definition of “statewide significance”—then the Order must be stayed or vacated until the Board reviews it independently.

The Corridor is clearly a project of statewide significance:

- *First*, the Corridor will have environmental or economic effects across many more than one municipality, territory, or county. The Order describes the breadth of the project,

² This section of the law also contemplates that interested persons may request that the commissioner refer an application to the Board, and the commissioner is required to issue a written decision if he declines to do so. 38 M.R.S. § 344(2-A). However, the statutory mandate imposed on the Commissioner and the Board is entirely independent of a request from an interested person. 38 M.R.S. §§ 341-D(2), 344(2-A); 06-96 CMR. Ch. 2 § 17(C). Moreover, because the statutes are written with regard to whether the Commissioner or the Board shall “assume jurisdiction” of a particular decision, *id.*, this issue of subject matter jurisdiction within the agency may be raised at any time—including on appeal—and is decided based on the “jurisdiction, powers and authority that are conferred on the Board by express legislative grant” or necessary implication. *Ford Motor Co. v. Darling’s*, 2014 ME 7, ¶¶ 41-42, 86 A.3d 35, 49.

which includes a 145.3-mile-long transmission line from Beattie Township to Lewiston a 26.5 mile line from Windsor to Wiscasset, and multiple new or renovated converter stations or substations. Order, 3. The environmental impacts pursuant to NRPA and the Site Law are, as described in the Order, significant. Order, 1.

- *Second*, the Corridor involves an activity not previously permitted or licensed in the State—unlike other transmission line projects contemplated by the Department and the Land Use Planning Commission in the past, the Corridor does not meet any reliability need for Maine or connect a new generator within Maine to the grid, but instead proposes a massive corridor as a for-profit passthrough primarily for the benefit of foreign jurisdictions.
- *Third*, the CMP Corridor has undoubtedly come under significant public scrutiny. The sheer number of parties to the underlying Department proceeding evidence the hotly contested nature of the project. A Google search reveals the same: the term “CMP Corridor” returned roughly 21,600 results on June 8, 2020. More than 66,000 Mainers likewise signed petitions in support of a ballot initiative aimed at stopping the Corridor, which is slated to appear on the November ballot. *Reed v. Sec’y of State*, 2020 ME 57, ¶ 2. This project has attracted significant and ongoing public scrutiny because people are rightly concerned about its negative effects.
- *Fourth*, as described above, the project is located across multiple municipalities and counties. *See* Order, 3.

In light of the foregoing, the Board is the proper—and only—licensing decision maker.

The Commissioner was required to refer the matter to the Board, and the Board is required to assert original jurisdiction over and decide CMP’s applications for the Corridor. *See* 38 M.R.S. §§ 341-D(2), 344(2-A); 06-096 CMR Ch. 2 § 17(C). The Board must correct this flawed process and assume responsibility by holding a public hearing, *see* 06-096 CMR Ch. 2 § 7(B), and undertaking its own independent review of CMP’s application.

II. The Board Should Issue a Stay Pursuant to the Administrative Procedures Act

Separate from the issues specific to projects of statewide significance, on any permit granted by the Department, the Board “may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.” 5 M.R.S.A § 11004; *see also* Me. Op. Att’y Gen. No. 80-116 (July

15, 1980) (opining that the Board of Environmental Protection can issue a stay during pendency of appeal). All three factors apply here.

First, NRCM will suffer irreparable injury if the stay is not granted. “An irreparable injury is one for which there is no adequate remedy at law.” *Suzman v. Harvey*, No. AP-07-78, 2008 WL 7929211 (Me. Super. May 05, 2008) (Jabar, J.) (citations omitted). Here, no remedy at law can reverse the irreparable damage that will result to Maine’s environment if CMP begins construction on the Corridor.

As outlined in its simultaneously filed appeal, incorporated herein by reference, NRCM is a membership organization with more than 25,000 supporters that exists solely to protect, restore, and conserve Maine’s environment.³ As the record of the underlying proceeding reflects, there will be significant adverse environmental effects if CMP begins construction of the Corridor based on the Department’s conditional approval of its land use permits. Such construction will devastate trout streams, wildlife habitats, and the other natural resources that NRCM exists to protect. As Dr. David Publicover, Senior Staff Scientist and Acting Director of Research with the Appalachian Mountain Club (AMC), testified in the underlying proceedings, CMP’s proposed Corridor would negatively affect “the heart of a globally significant forest region that is notable for its relatively natural forest composition, lack of permanent development, and high level of ecological connectivity.”⁴ Jeff Reardon, Maine Brook Trout Project Director for Trout Unlimited in Maine, likewise testified about the Corridor’s devastating effects, noting that the planned area of

³ See <https://www.nrcm.org/about-nrcm/>.

⁴ David Publicover Direct Testimony, 3, available at <https://www.maine.gov/dep/ftp/projects/necec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%203%20-%20Group%204%20D%20Publicover%20Direct%20Testimony%20with%20Exhibits%2014-18.pdf>.

construction contains the majority of the remaining un-degraded aquatic habitat in the northeast region, making this project an incredible threat to Maine's brook trout habitat.⁵

NRCM and its members will also suffer economic harm if the Board does not stay the Orders. NRCM counts among its members guides who make their living offering guided tours (*e.g.*, fishing and hunting opportunities) on the land that is the subject of this Order. If the Board does not stay the Order and CMP begins construction, it will gravely affect the ability of NRCM members to pursue their livelihoods. For example, Todd Towle, NRCM member and owner of Kingfisher River Guides, testified that the Corridor will impact both the health of wild brook trout in the region and his fishing and guiding business. He noted that he is particularly concerned about the effect on: (a) Cold Stream and Tomhegan Stream because of the number of crossings that are likely to affect stream temperatures and be visible to clients; (b) Gold Brook because of the proximity of the NECEC and the number of crossings of the brook and its tributaries; and (c) Horse Brook because it is a coldwater tributary to a stream that gets very warm in the summer, making the cold water tributary very important for brook trout health and because it is close to a family camp.⁶

Ron Joseph, another NRCM member and a retired wildlife biologist for the Maine Department of Inland Fisheries and Wildlife and U.S. Fish and Wildlife Service, testified that the NECEC will cross 22 deer yards and increase fragmentation in 11 deer yards through tree clearing.⁷ He noted that "continued loss of our remaining deer yards has a significant economic impact on

⁵ Jeff Reardon Direct Testimony, 6, available at <https://www.maine.gov/dep/ftp/projects/neccec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%201%20-%20Group%204%20J%20Reardon%20Direct%20Testimony%20with%20Exhibits%201-7.pdf>.

⁶ Todd Towle Direct Testimony, 3-6, available at <https://www.maine.gov/dep/ftp/projects/neccec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%202%20-%20Group%204%20T%20Towle%20Direct%20Testimony%20with%20Exhibits%208-13.pdf>.

⁷ Ron Joseph Direct Testimony, 2, available at <https://www.maine.gov/dep/ftp/projects/neccec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%205%20-%20Group%204%20R%20Joseph%20Direct%20Testimony.pdf>.

traditional Maine sporting lodges and rural communities that depend on income from deer hunters.”⁸ Most importantly, the potential effects to the Upper Kennebec Deer Wintering Area are particularly troubling because this deer yard is in an area of the state already suffering from low deer densities, making it critically important to deer populations as well as recreational hunters and hunting businesses in the region.⁹

As outlined in greater detail in its appeal, incorporated herein by reference, NRCM is also concerned that CMP failed to adequately assess alternatives. For example, CMP did not consider whether burying the transmission line is a possible alternative that would allow the project to proceed while significantly decreasing the impact to the environment. If CMP is allowed to begin construction, it could limit NRCM’s ability to address CMP’s inadequate alternative analysis during the course of this appeal.

For the foregoing reasons, NRCM and its members will be irreparably harmed if CMP begins construction, and the Board should therefore grant NRCM’s stay request. *See Suzman*, No. AP-07-78, 2008 WL 7929211 (“simple notion” that an ill patient deprived of care will suffer sufficient to show irreparable harm).

Second, NRCM has a strong likelihood of success on the merits of its appeal and a stay is appropriate. *See Me. Op. Att’y Gen. No. 80-116* (July 15, 1980) (this “requirement need not amount to a probability that the appeal will succeed but rather *merely a substantial possibility of success*) (citations and quotations omitted) (emphasis added). The Department reached incorrect conclusions of fact and law in the Order, and the Board is substantially likely to overturn the Department’s decision on appeal.

⁸ *Id.* at 3.

⁹ *Id.* at 4.

The record reflects—and the Department agreed—that the Corridor will cause substantial environmental harm. Despite this overwhelming evidence, the Department nevertheless conditionally approved CMP's permits. The mitigation conditions imposed by the Department are insufficient, as NRCM will show the Board, to assuage the harm the Corridor will cause. For example, the Department's proposed mitigation conditions will not adequately protect affected fisheries, and the money CMP must set aside for culvert replacements has no nexus to, and will not mitigate, the harm to affected brook trout habitats. The Department-imposed mitigation conditions likewise will not compensate for the harm caused to wildlife, including deer, birds, and other native species who make their home in the affected area. Troublingly, the Department did not permit NRCM to present evidence about the greenhouse gas effects of the Corridor, and it erred by relying, without any independent assessment, on CMP's incorrect representations that the Corridor will result in climate benefits. For these and the other reasons outlined in NRCM's appeal, NRCM is likely to succeed in demonstrating that the Order insufficiently addresses the impacts from NECEC to protected resources and the environment and a stay of the Department's decision is appropriate.¹⁰ See, e.g., *Vafiades v. Maine State Harness Racing Com'n*, No. CUMSC-AP-16-21, 2016 WL 4151506, at *2 (Me. Super. June 8, 2016) (granting stay request where no competent and substantial record evidence supported agency's holding).

Moreover, the CMP Corridor will substantially alter two public reserve lots owned by the State of Maine and managed by the Bureau of Parks and Lands. The record reflects that when CMP presented its application to the Department, it included a Bureau of Parks and Lands (BPL)

¹⁰ NRCM's appeal details the Commissioner's errors. Because both NRCM's appeal and this Stay Application are now before the Board, NRCM has not restated herein every argument made in its appeal and instead incorporates its appeal by reference.

lease of State Public Reserved Land in Johnson Mountain and West Forks Plantation Northeast¹¹ parcels that was void as a matter of law because it lacked the requisite approval of the State Legislature and was further unlawfully issued to a utility that lacked the requisite certificate of public convenience and necessity (“CPCN”). This lease was a clear violation of 35-A MRS § 3132(13) because no CPCN had yet been issued for any project crossing Johnson Mountain or West Forks Plantation Northeast.¹² This lease was also in plain violation of the Constitutional and statutory requirements that a 2/3rd vote of the Legislature is necessary to approve a substantial alteration to public reserve lands. Me. Const. art. IX, § 23; 12 M.R.S. §§ 598-598-B. The Department’s treatment of this issue was an error of law and NRCM is likely to prevail on this issue before the Board.

Third, CMP, other adverse parties, and the general public will not be harmed if the Board implements a stay. The NECEC is not yet authorized at the federal level, including issuance of either a Presidential Permit or authorization under the Clean Water Act by the US Army Corps of Engineers. Further it is not clear that CMP has yet commenced any necessary local approval processes. Without these permits, the NECEC is not “shovel ready.”¹³ Moreover, more than

¹¹ 2014 Transmission Line Lease Between Department of Agriculture, Conservation, and Forestry, Bureau of Parks and Lands and Central Maine Power, p. 11 (Attachment A to Group 4’s Comments on Draft Order).

¹² 35-A M.R.S. § 3132 states: “Public lands. The State, any agency or authority of the State or any political subdivision of the State may not sell, lease or otherwise convey any interest in public land, **other than a future interest or option to purchase an interest in land** that is conditioned on satisfaction of the terms of this subsection, to any person for the purpose of constructing a transmission line subject to this section, unless the person **has received** a certificate of public convenience and necessity from the commission pursuant to this section” (emphasis added).

¹³ For example, CMP still needs to obtain at least the permits listed below.

- a) Presidential Permit from the Department of Energy. *See* Cent. Me. Power Co., Request for a Certificate of Public Convenience and Necessity for the Construction of the New England Clean Energy Connect (NECEC) Transmission Project, Me. Pub. Utils. Comm. Docket No. 2017-00232, App., Vol. I at 21, 24 (Sept. 27, 2017) (“CMP MPUC App.”).
- b) Clean Water Act Permit under Section 10 of the Rivers and Harbors Act from the U.S. Army Corps of Engineers. *See id.*
- c) PUC approval of CMP’s joint petition pursuant to 35-A M.R.S. §§ 707, 708, 901, 902, and 1101, which includes approval transferring CMP’s interest in several transmission service agreements, third-party vendor agreements, related assets, permits, leases, easements, and pending applications to NECEC LLC. *See* Cent. Me. Power Co. & NECEC Transmission LLC, Request for Approval of Petition Pursuant to 35-A M.R.S.A.

66,000 Mainers signed circulated petitions in support of a ballot initiative aimed at stopping the Corridor, which initiative the Secretary of State, Superior Court, and Law Court declared valid and which is slated to appear on the November ballot. *See Reed v. Sec'y of State*, 2020 ME 57. The CMP Corridor is a multi-year project that continues to wind its way through the various federal, state, and local permitting and approval processes, including related appeals and challenges. CMP therefore should not be allowed to begin construction on any part of the Corridor until it obtains all necessary permits and the approval of Maine voters at the ballot box, and staying the Order will help prevent that from happening. Waiting to begin construction until all permits have been granted is common construction practice, and staying these permits to ensure that no construction begins prior to that point will not harm CMP and the other adverse parties.

A stay likewise will not harm the general public. In fact, a stay will *benefit* the general public by avoiding permanent adverse impacts to Maine's natural resources for the benefit of energy consumers in Massachusetts before all necessary authorizations for the NECEC issue. It is the most pristine parts of Maine that are most at risk because they are outside local control or regulation and far from close oversight by a vigilant public. A stay is undoubtedly appropriate where, as here, there is no harm to the party seeking the permits and substantial harm to the party

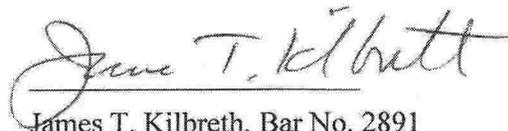
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- 707, 708, 901 and 1101 Related to the Transfer of the New England Clean Energy Connect to NECEC Transmission LLC; Me. Pub. Utils. Comm. Docket No. 2019-00179, Petition at 17-21 (August 13, 2019).
- d) Submerged land and public reserve leases from the Maine Department of Agriculture, Conservation and Forestry. *See* CMP MPUC App. at 18.
 - e) Permits from the Maine Department of Transportation. *Id.*
 - f) Rezoning or site plan approvals—as well as permits required by local ordinances—from twenty municipalities. *Id.* at 18-19, 26-27.
 - g) ISO-NE approval for interconnection pursuant to Section I.3.9 of ISO-NE's Transmission Markets and Services Tariff (Jan. 2020 Progress Report at 4), which CMP has not yet obtained, *see* ISO-NE, Generator Interconnection Queue, <https://irtt.iso-ne.com/reports/external> (last visited May 29, 2020) (refer to Queue Position 639).

seeking the stay. *See Vafiades*, No. CUMSC-AP-16-21, 2016 WL 4151506, at *2 (stay appropriate where no harm would result to the public or the party opposing the stay).

CONCLUSION

For the foregoing reasons, NRCM respectfully requests that the Board stay the Order until the Board completes its review.

Dated at Portland, Maine
this 10th day of June 2020



James T. Kilbreth, Bar No. 2891
David M. Kallin, Bar No. 4558
Elizabeth C. Mooney, Bar No. 6438
DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 772-1941
jkilbreth@dwmlaw.com
dkallin@dwmlaw.com
emooney@dwmlaw.com