STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF:	)	
	)	
CENTRAL MAINE POWER COMPANY	)	
25 Municipalities, 13 Townships/Plantations, 7 Counties	)	APPLICATION FOR SITE LOCATION OF DEVELOPMENT
L-27625-26-A-N	)	ACT PERMIT AND NATURAL
L-27625-TB-B-N	)	RESOURCES PROTECTION ACT
L-27625-2C-C-N	)	PERMIT FOR THE NEW
L-27625-VP-D-N	)	ENGLAND CLEAN ENERGY
L-27625-IW-E-N	)	CONNECT
	)	

OPPOSITION OF GROUP 3 TO ANY STAY OF THE ORDER CONDITIONALLY APPROVING NECEC

Group 3 objects to any stay of the Department's order conditionally approving NECEC ("Order"), as might be granted by the Department concerning the Application for Stay of Agency Decision by Groups 2 and 10 or the Board of Environmental Protection ("Board") concerning the Request for Stay by the Natural Resources Council of Maine. Group 3 takes no position at this time on whether there should be any further administrative proceedings concerning the Order as issued and, if so, whether or how the Board is to be involved. It seems clear enough that there is no legal or any other reason for a truly *de novo* proceeding, as distinguished from a non-deferential review of the Order, with or without record supplementation. Group 3 is prepared to participate as appropriate at whatever pace the Department or the Board direct.

Although deciding whether to grant a stay inherently involves some measure of discretion on the part of the Commissioner or Board, it is imperative that any such discretion be carefully exercised in a proceeding as complicated, difficult, and important as this one. It can hardly be said that this process has been rushed to this point. The multiplicity of proceedings in multiple venues in which each seems to be awaiting the result of the others, whether calculated or

inadvertent, will have the effect of slow-walking NECEC to abandonment or failure. Further, both movants argue that the pendency of other permits and approvals required for NECEC is a reason to delay this proceeding. The exact opposite is true; if each relevant agency or authority waited for the others to act first, nothing would ever happen, which is exactly what the Department and BEP should avoid as a matter of law and prudence. While NECEC waits for additional permits and approvals, opponents already effectively enjoy a stay as it relates to the subject matter of those permits and approvals. Delay may be an understandable tactic for opponents who failed on the merits, but delay is not inherently or presumptively any more in the public interest than construction of NECEC or timely decisional processes. Delay is obviously harmful to any permit applicant. Assuming that it is useful or necessary to have further process at the Department or the Board, it ought to occur in the ordinary course and as expeditiously and as efficiently as comports with doing the work properly.

The discretion to grant a stay is not without boundaries. The norms are familiar, and they basically involve an assessment of the likelihood of success on the merits and a fair balancing of the competing harms to be experienced by the permit applicant if the stay is granted or by the movant if the stay is denied.

Before addressing the appropriate factors and the appropriate weight to be assigned to them, one foundational point dominates. It is often said that the decisional process in granting or denying a stay is the same as or similar to the decisional process in granting or withholding a preliminary injunction or a temporary restraining order. In one sense that is correct, as the decision should be made after considering the various predictive judgments relating to future outcomes of disputed matters in conjunction with predictive judgments about harms to be incurred or avoided in one scenario or another. Yet, there is a crucial difference between an

application for a stay pending appeal and a motion for temporary injunctive relief. A stay associated with appellate review of a decided matter presents an entirely different calculation on the question of probability of success on the merits. When one citizen commences a civil action to enjoin another citizen from some act, there is no history, only allegations and denials. When a party to a proceeding that has occupied years of intensive and difficult work seeks a stay to challenge the outcome of that process, the probability of success on the merits is vanishingly small, approaching zero.

Group 3 acknowledges that a party seeking a stay need not show what amounts to a probability of succeeding on the merits but, as the Natural Resources Council of Maine acknowledges, if the predicate for a stay request is a possibility and not a probability of success, that possibility must be substantial and not a strained or speculative longshot.

As a simple matter of common experience, the work done by trial courts and administrative agencies is not regularly riddled with legal error, abuses of discretion, or fact-findings unsupported by substantial evidence. Not merely the vast majority, but all but a very few, of appeals are unsuccessful. No appellant has a probability or even a strong likelihood or possibility of success on the merits except in the very rare case in which the asserted error is so egregious as to be apparent at the outset.

In this circumstance, the review is inherently deferential as a matter of law.[1] The review involves a reassessment of a careful judgment by a highly experienced commissioner after exhaustive and exhausting hearings and briefings. The chance that there will be a reversal for abuse of discretion or for clearly erroneous findings of fact or for error of law is as small as it can

[1] *See, e.g., NextEra Energy Res., LLC v. Me. PUC, 2020 ME 34*, ¶ 22, ___A.3d___ ("An agency's interpretation of an ambiguous statute it administers is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result. The Commission's interpretation of its own rules, regulations and procedures is similarly entitled to considerable deference." (citations and internal punctuation omitted)).

be. Indeed, any party appealing any matter involving a *deferential* standard of review has a miniscule likelihood of success by definition.

The opponents of NECEC have not identified a rule of law that has been wrongly interpreted or applied by the Department. The closest they come is to argue that the law prohibits changes to the application during the proceeding. Groups 2 and 10 essentially allege that the Department's use of conditions—developed on the record using argument and evidence from all parties, and designed to avoid, minimize, rectify, reduce, or compensate for impacts such that, on balance, the impacts are not unreasonable—is improper because the conditions improve a project that was not perfect as initially proposed. This argument is not remotely tenable. The Natural Resources Protection Act specifically contemplates mitigation.[2] There very fact that the Department has authority to issue conditional permits is proof that no application can be expected to be perfect. If applicants could anticipate what the Department's conditions would be, they would just make those conditions part of the baseline project. But applicants cannot anticipate all mitigation that may be necessary when applying, because they have yet to benefit from the invaluable information and expertise brought to bear on the issues during the course of a proceeding by agency staff and parties alike. New or better information may come to light. Would it be better to permit or deny an application based on stale information? The answer is "no" because both the Natural Resources Protection Act and the Site Location of Development Act account for a continually changing environment. For example, Chapter 310 allows for the Department to "require additional monitoring and corrective action, or additional wetland restoration, enhancement or creation in order to achieve the compensation ratio as originally approved."[3] Chapter 310 also permits the Department to establish conditions related to "design

[2] *See, e.g.*, 38 M.R.S. §480-D (3).
[3] 06-096 C.M.R. ch. 310 § 6(C) (2018).

changes to help insure the success of the project" and "mid-course correction or maintenance capability."[4] Obviously this authority is predicated on the very idea of improving projects to ensure that impacts are not unreasonable.

That then leaves ephemeral disagreements about the balancing of benefits and harms. Those judgments are unlikely to be disturbed on appeal because they are objectively sound but also because review is highly deferential. Group 3's intervention and the interests and objectives pressed by Group 3 generally involve three categories of interests and issues that sound environmental regulation must properly take into account: (1) the availability, reliability and cost of electricity on the New England electric grid and therefore in Maine: (2) taking meaningful steps toward the decarbonization of the New England grid for the greater public good; and (3) the economic benefit including good jobs and the multiplier effect of the salaries and wages to be paid for the work to be done in strengthening or mitigating the ongoing weakness of Maine's economy, rendered even more pressing by the economic consequences of the ongoing pandemic. If anything, the Department gave too little weight to those factors and a deferential review is highly unlikely to find that the Department gave too much weight to those factors to the material detriment of the countervailing environmental considerations. In short, the likelihood of success on any review of the Department's work to date is as close to zero as any such predictive judgment can be.

If the challengers have good ground to challenge the Order, they ought to get on with it promptly, either at the Department or Board or in the courts, but in no instance does it make any sense to stay the Order.

[4] *Id*. at § 8 (A) and (E) (2018).

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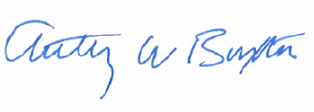
Respectfully submitted,
Spokesperson for Intervenor Group 3



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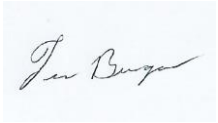

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