

By Email

August 11, 2021

Commissioner Loyzim, Department of Environmental Protection
Chair Draper and Board of Environmental Protection
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: *Request for 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 and transfers, amendments and revisions thereto.*

Commissioner Loyzim and Chair Draper:

Enclosed is a decision of the Maine Superior Court reversing the Bureau of Parks and Lands grant of a lease to Central Maine Power and NECEC Transmission LLC (together “CMP”) over the Johnson Mountain and West Forks Public Reserved Lots for a 300 foot wide transmission corridor, and declaring that the Bureau Director was without authority to enter the 2014 Lease (that served as title, right or interest—TRI—for the original permits) and the 2020 Lease (that served as TRI for the revisions and amendments thereto).

In light of this decision, the Natural Resources Council of Maine (“NRCM”) requests that the Department issue a stay halting all new clearing and construction pursuant to the Department’s May 11, 2020 Order (“Department Order”) and its subsequent related decisions transferring, amending and revising the State environmental permits (collectively the “Department Permitting Decisions”) for the New England Clean Energy Connect (“NECEC” or “Corridor”). Because the NECEC cannot be built along the route permitted by the Department, a stay is justified so that the public is not irreparably harmed by the continued clearing and construction along this route.

We respectfully ask that the Department act on this request by Monday, August 16. The Department is familiar with these issues and should be in a position to act expeditiously on this request. If the Department has not taken action on this request by that date, we may seek further judicial recourse on these issues.

1. Procedural Background

On June 10, 2020, NRCM requested that the Board of Environmental Protection (“Board”) issue a stay of the permits, arguing in part that it was likely to prevail before the Board on the issue that CMP failed to show adequate TRI over these two public lots because the 2014 Lease was void under Me. Const. art. IX, § 23, and further alerting the Department that it and others had recently filed a lawsuit seeking a declaration to that effect. NRCM explained that CMP failed to adequately demonstrate there were not available alternatives with lesser adverse impacts to protected natural resources as required by the relevant statutes and rules, and that allowing CMP

to begin construction along the existing route would foreclose NRCM's ability to obtain meaningful review of those alternatives on appeal because the impacts would be a fait accompli. The Board never ruled on NRCM's request, which was instead referred to the Commissioner who issued a decision on August 26, 2020 denying the request (the "Stay Denial"). The grounds for that denial included that the stay was not urgent because CMP still had not obtained all of the necessary permits for the project and therefore there was no imminent irreparable harm (Stay Denial at 4), and that NRCM was unlikely to prevail on the merits of its TRI argument (Stay Denial at 6).

Also on June 10, 2020, NRCM filed its appeal with the Board arguing that the 2014 Lease did not meet the submission requirements for documentation of TRI set forth in Chapter 2 Section 11(D) of the Department's Rules, because of its facial noncompliance with Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598 to 598-B. NRCM pointed to the Department's troubling disparate treatment of two functionally identical, facially void, leases. With regard to a lease with the Passamaquoddy presented to the Department by CMP, but which was not yet signed by the Bureau of Indian Affairs ("BIA"), the Department's draft Order conditioned approval on CMP obtaining the requisite approval.¹ Logically, this would require the same condition with regard to the lease over Public Reserved Lands: that the permit be conditioned on CMP obtaining the requisite legislative approval. NRCM argued that there is no rational basis for the Department to treat the 2014 Lease any differently than it proposed for the Passamaquoddy lease. NRCM further argued that:

The Board should initiate its review (including a hearing) only after NECEC LLC obtains TRI (including a valid lease from BPL) and submits all necessary information for the Department to determine whether the proposed owner and operator of NECEC can comply with NRPA and the Site Law. At a minimum, however, were the Board to consider the application prior to a Legislative vote, the Board should impose a condition, similar to the condition originally proposed by the Department for the BIA lease, that NECEC LLC obtain the necessary legislative approval pursuant to Me. Const. art. IX, § 23; 12 M.R.S. §§ 598 to 598-B for the BPL lease of State Public Reserved Land in Johnson Mountain and West Forks Plantation Northeast.

NRCM Appeal, filed June 10, 2020. The Board has not yet acted on this request, nor determined whether it will hold a hearing or impose this condition. In addition to, but separate from, this request for the Department to issue a stay, NRCM hereby requests that the attached Superior Court decision be provided to the Board as intervening authority in support of the above requests which remain pending before the Board.

The enclosed decision materially alters each of the factors the Commissioner assessed in issuing the August 2020 Stay Denial—clearing and construction has already begun, and NRCM has now

¹ The Final Order eliminated this proposed condition likely due to NRCM's comments pointing out that the CMP's revisions to the NECEC route meant that the Passamaquoddy land was no longer part of the project, and arguing that the Department's proposed treatment of the 2014 Lease should be no different than its proposed treatment of that lease.

established a high likelihood of success before the Board on the issues of TRI and failure to adequately assess alternatives. Consequently, the Board should stay the NECEC.

2. The Department should issue a stay

The Department—either through the Commissioner or 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; 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). The showing necessary to obtain a stay pending appeal is the same showing that must be made to obtain a preliminary or permanent injunction, and the “most critical” factors are likelihood of success on the merits and a demonstration that irreparable injury will be likely absent a stay. *Nextera Energy Resources LLC, et. al. v. Dept’t of Env’l Prot., et. al.*, Dkt. Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Sup. Ct., Jan. 11, 2021).

a. Likelihood of success on the merits

The Law Court recognizes that a judicial declaration invalidating rights in the land subject to a permit means that the permit “might be revoked.” *Southridge Corp. v. Bd. of Env’t Prot.*, 655 A.2d 345, 348 (Me. 1995). Furthermore, the Law Court upheld the decision of an appellate administrative tribunal to reverse the decision of the administrative tribunal with original jurisdiction for failure of TRI. *Tomasino v. Town of Casco*, 2020 ME 96, 237 A.3d 175. In *Tomasino*, the Code Enforcement Officer granted a building permit, but the appellate administrative tribunal—the zoning board of appeals—subsequently reversed that decision. *Id.* ¶ 3. In upholding the ZBA’s reversal of the decision of the CEO, the Law Court held that “even assuming that the Tomasinos demonstrated that they had *some* interest in the particular portion of property at issue, they failed to demonstrate that they have the kind of interest that would allow them to cut the trees if they were granted a permit to do so.” *Id.* ¶ 15.

That is even more true where, as here, the Commissioner declined to engage in its own TRI analysis regarding the 2014 Lease and the 2020 Lease, instead stating about the 2014 Lease:

That lease decision was never appealed and is therefore final. The Department accepts the decision of its sister agency to enter into the leases and the fully executed leases as sufficient title, right, or interest in that portion of the proposed corridor to apply for permits for the project.

May 20, 2020 Commissioner Order at 8. The Superior Court declared this sister agency decision unlawful under Me. Const. art. IX § 23 and thus not final. Consequently, the fundamental factual underpinning of the Commissioner’s original analysis is no longer true and the original decision is not based on substantial evidence.

Given that CMP has *no interest* in a critical portion of property at issue, NRCM is likely to prevail in establishing that CMP does not have TRI. Indeed, such a result is expressly required by the Department rules: “An applicant must maintain sufficient title, right or interest throughout the entire application processing period.” 06-096 CMR Ch. 2, § 11(D). This expressly includes

“sufficient title, right or interest *in all of the property that is proposed for development or use.*” *Id.* (emphasis added). “This rule applies to all license applications accepted as complete, appeals of Commissioner license decisions to the Board, and petitions to modify, revoke or suspend a license filed on or after the effective date of this rule, or any amendments to this rule.” *Id.* § 2(C). Furthermore, regardless of whether the Board assumes original or appellate jurisdiction, “[t]he 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). Despite NRCM filing its appeal to the Board *more than a year ago*, the Department has failed to take any substantive action on that appeal. Yet the rules are plain that while a permit remains before the Department, including “appeals of Commissioner license decisions to the Board,” the license applicant “must maintain” sufficient title, right or interest “in all of the property that is proposed for development or use.” 06-096 CMR Ch. 2, §§ 11(D) & 2(C). The attached Superior Court decision is dispositive. CMP does not have TRI in the entirety of the NECEC project, and NRCM is therefore likely to prevail on the merits of this issue when the Board does finally act.

b. Irreparable injury

NRCM and the public will suffer irreparable injury if CMP is allowed to continue to build a project it can’t complete. The Department Order concedes, as it must that the “record shows the project as originally proposed would have had substantial impacts, particularly in the 53.1-mile portion of the corridor that extends from the Quebec border to The Forks, known as Segment 1.” Department Order at 1. The Department goes on to conclude that those impacts can be minimized “through a variety of mitigation measures” that rely on the alternatives analysis supporting a “stated project purpose is to deliver up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Area via a HVDC transmission line.” Department Order at 1, 58-61. Although NRCM strongly disagrees with the Department’s conclusions about the availability of alternatives to the impacts associated with the proposed route that forms the basis of the project purpose and the adequacy of its mitigation measures, what is clear now is that the project purpose can no longer be met with the proposed route. Thus, any impacts—even those minimized by the Department’s conditions—are not justified under the applicable environmental statutes, and NRCM and its members will suffer irreparable injury if those impacts are allowed to occur in Segment 1 and elsewhere absent any ability of NECEC Transmission LLC to actually connect “from Quebec to the New England Control Area.”² Thus, the Department should stay the Department Permitting Decisions until the Board takes final action on NRCM’s appeal.

² As you’ve previously been informed, the clearing going on in segment one demonstrates that the Department’s statement that its “Order limits the width of the cleared corridor in Segment 1 – originally proposed to be 150 feet – to 54 feet at its widest point” Department Order, at 1, simply isn’t true. The Department was informed of the fact that the corridor is effectively being cleared to 150 feet, yet issued a determination dated August 2, 2021 that this type of clearing was in full compliance with the Order. Thus, regardless of the adequacy of the conditions to address the regulatory requirements, there are substantial environmental impacts that are simply not justified where, as here, CMP lacks the ability to complete the line on the permitted route.

As further evidence establishing irreparable harm, NRCM expressly incorporates testimony it sponsored during the permitting proceedings. This testimony is not here offered to suggest that Department was compelled to reach a different result on the regulatory requirements when the stated project purpose could be met, but is instead offered to support the claim of irreparable injury if CMP is allowed to continue clearing and construction on additional areas of land when the project purpose cannot be met:

- 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."³ 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 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.⁴
- NRCM and its members will also suffer economic harm if the Department does not stay the Department Permitting Decisions. 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 clearing and construction continues, 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.⁵

³ 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>.

⁴ Jeff Reardon Direct Testimony, 6, *available at* <https://www.maine.gov/dep/ftp/projects/necec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%201%20-%20Group%204%20J%20Reardon%20Direct%20Testimony%20with%20Exhibits%201-7.pdf>.

⁵ Todd Towle Direct Testimony, 3-6, *available at* <https://www.maine.gov/dep/ftp/projects/necec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%202%20-%20Group%204%20T%20Towle%20Direct%20Testimony%20with%20Exhibits%208-13.pdf>.

- NRCM and its members will suffer the loss of critical wildlife habitat. 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.⁶ He noted that “continued loss of our remaining deer yards has a significant economic impact on traditional Maine sporting lodges and rural communities that depend on income from deer hunters.”⁷ 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.⁸

Regardless of whether or not the Department was correct that such harm complied with the applicable environmental standards given the stated project purpose and the complete absence of any alternatives analysis supporting that purpose, such harm can no longer be justified where, as here, the project can no longer connect “from Quebec to the New England Control Area.”

c. *Harm to CMP*

Because CMP can no longer demonstrate that it has the rights to complete the project whose stated purposes is to connect “from Quebec to the New England Control Area,” any harm to CMP is caused by that failure, not by any stay of the Department Permitting Decisions. Regardless, the harm to NRCM and the public of allowing CMP to continue to build a project they can’t complete far outweighs any pocketbook harm to CMP.

d. *Public interest.*

The public interest balancing of allowing CMP to continue to build a project they can’t complete weighs strongly in favor of a stay. As the Law Court explains, “[t]here can be little doubt that the Legislature has enunciated a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine.” *Francis Small Heritage Tr., Inc. v. Town of Limington*, 2014 ME 102, ¶ 20, 98 A.3d 1012, 1020. The interest in requiring compliance with state laws authorizing only that development that meets the project purpose and environmental requirements of the Site Law and the Natural Resource Protection Act has thus been understood to be an issue of public interest, not just one limited to individual litigants. See *Brennan v. Saco Const., Inc.*, 381 A.2d 656, 662 (Me. 1978). Thus, the discussion above with regard to irreparable injury to NRCM and its members establishes that it is in the public interest to prevent harm to the environment, natural resources and scenic beauty by requiring CMP to document rights to complete the project compliant with the project purpose before allowing such consequential adverse impacts to protected natural resources. CMP’s lack of TRI means that they

⁶ Ron Joseph Direct Testimony, 2, available at <https://www.maine.gov/dep/ftp/projects/necec/hearing/pre-filed-testimony/Intervenor%20Group%204/2019-02-28%205%20-%20Group%204%20R%20Joseph%20Direct%20Testimony.pdf>.

⁷ *Id.* at 3.

⁸ *Id.* at 4.

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cannot complete the NECEC as permitted and therefore that there is not a clear justification for the impacts the ongoing construction is wreaking. Accordingly, the public interest weighs in favor of a stay until the Board can take final action on NRCM's appeal.

Sincerely,

A handwritten signature in blue ink that reads "James T. Kilbreth". The signature is written in a cursive style with a large initial "J".

James T. Kilbreth

cc: Service List (by email only)
Bill Hinkel