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Admitted in: MA, ME, NH

July 20, 2020

VIA OVERNIGHT MAIL

Susan Furbush, Clerk
Somerset County Superior Court
41 Court Street
Skowhegan, ME 04976

Re: *West Forks Plantation, et al. v. Maine Department of Environmental Protection,*
Docket No. SOM-AP-20-04

Dear Ms. Furbush:

On behalf of Party-in-Interest Central Maine Power Company, enclosed please find a Response to West Forks Petitioners' Motion to Stay and Respondent DEP's Motion for Remand.

Thank you for your attention to this matter.

Sincerely,



Matthew D. Manahan

Enclosure

cc: Elizabeth Boepple, Esq. BCM Environmental & Land Law (attorney for Petitioners West Forks Plantation, et al.)
David Kallin, Esq., Drummond Woodsum (attorney for Party-in-Interest NRCM)
Elizabeth Mooney, Esq., Drummond Woodsum (attorney for Party-in-Interest NRCM)
James Kilbreth, Esq., Drummond Woodsum (attorney for Party-in-Interest NRCM)
Joanna Tourangeau, Esq., Drummond Woodsum (attorney for Party-in-Interest NextEra)
Emily Howe, Esq., Drummond Woodsum (attorney for Party-in-Interest NextEra)
Benjamin Smith, Esq., Smith Legal LLC (attorney for Party-in-Interest Western Mountains & Rivers Corp.)
Gerald Petruccelli, Esq., Petruccelli, Martin and Haddow (attorney for Parties-in-Interest Maine State Chamber of Commerce, et al.)
Sigmund Schutz, Esq., Preti Flaherty (attorney for Party-in-Interest Industrial Energy Consumer Group)
Anthony Buxton, Esq., Preti Flaherty (attorney for Party-in-Interest Industrial Energy Consumer Group)
Robert Borowski, Esq., Preti Flaherty (attorney for Party-in-Interest Industrial Energy Consumer Group)
Peggy Bensinger, Esq. Assistant Attorney General (attorney for Respondent DEP)
Scott Boak, Esq., Assistant Attorney General (attorney for Respondent DEP)

STATE OF MAINE
SOMERSET, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-20-04

WEST FORKS PLANTATION, 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)

Petitioners)

v.)

MAINE DEPARTMENT OF)
ENVIRONMENTAL PROTECTION)

Respondent)

and)

CENTRAL MAINE POWER)
COMPANY)

Party-In-Interest)

RESPONSE OF CENTRAL MAINE POWER COMPANY
TO WEST FORKS PETITIONERS’ MOTION TO STAY AND RESPONDENT DEP’S
MOTION FOR REMAND

Central Maine Power Company (CMP) responds to Petitioners West Forks Plantation et al.’s Motion to Stay (West Forks Petitioners’ Motion), filed on June 30, 2020, and to the Motion for Remand of Respondent Maine Department of Environmental Protection (DEP) (DEP’s Motion), filed on July 6, 2020. These requests demonstrate the logic of the July 2, 2020 Application for Transfer to Business and Consumer Docket (BCD) of Parties-in-Interest

CMP, the Industrial Energy Consumer Group (IECG), Western Mountains & Rivers Corporation (WMRC), the Maine State Chamber of Commerce (the Maine Chamber), the City of Lewiston (Lewiston), and the Lewiston-Auburn Metropolitan Chamber of Commerce (the LA Metro Chamber).

Both West Forks Petitioners' Motion and DEP's Motion describe the three appeals of the same DEP decision currently pending in three venues: the instant appeal in this Court filed by West Forks Petitioners, an appeal filed in Kennebec County Superior Court by intervenor in the DEP licensing proceeding NextEra Energy Resources LLC (NextEra), and an administrative appeal to the BEP filed by the Natural Resources Council of Maine (NRCM). West Forks Petitioners' Motion at 2-3; DEP's Motion at ¶¶ 3-6. The need to coordinate the instant appeal with the related appeals, and the associated motions to remand and stay, warrants transfer to the BCD. Maine Supreme Judicial Court Administrative Order JB-07-1 (A. 11-08) (A.O. JB-07-1), § V(g). Indeed, it is precisely the interplay between the two simultaneous court appeals of the same DEP order, filed in different counties, as well as the simultaneous administrative appeal to the BEP of that DEP order, that will present novel and complex legal issues requiring "specialized and differentiated judicial management" that support transfer to the BCD. A.O. JB-07-1, § 1(b), § V(h).

Furthermore, appeals of final agency action, and specifically of orders of the DEP and Land Use Planning Commission (and predecessor Land Use Regulation Commission), are routinely transferred to the BCD. *See, e.g., Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 5, 221 A.3d 554, 556–57 (Me. 2019) (discussing transfer to BCD of complaint regarding DEP order approving a town zoning amendment); *Mallinckrodt US LLC v. DEP*, 2014 ME 52, 90 A.3d 428 (Me. 2014) (affirming BCD review of decision of BEP, which modified and affirmed a compliance order issued by the Commissioner of the DEP that required

Mallinckrodt to excavate and landfill contaminated material); *Forest Ecology Network v. LURC*, 2012 ME 36, 39 A.3d 74 (Me. 2012) (affirming in part, vacating in part, and remanding judgment on consolidated Rule 80C appeals entered in the BCD, which vacated the Maine Land Use Regulation Commission’s approval of a rezoning petition and concept plan submitted by Plum Creek Maine Timberlands, LLC, and Plum Creek Land Company for land it owned in the Moosehead Lake region); *Penobscot Energy Recovery Co., LP v. DEP*, No. BCD-AP-16-15, 2017 WL 10991627 (Me. B.C.D. Jan. 06, 2017) (BCD denial of motion to remand appeal of final agency action, concerning a DEP-issued air license, to the DEP to take additional evidence). The BCD was established to hear such cases that involve matters of significance to the operations of business entities like CMP. A.O. JB-07-1, § 1(a).

Finally, the DEP has stated that there are “detailed and complex issues” raised in these appeals. DEP’s Motion at ¶ 12. West Forks Petitioners explain in their Motion that “all of the appeals are based on a single decision on a single set of facts” and that “[t]he substance of the three appeals are functionally similar.” West Forks Petitioners’ Motion at 3-4. DEP similarly describes in its Motion the “overlapping issues raised in the three appeals.” DEP’s Motion at ¶¶ 7-11. Transfer and consolidation of the two Superior Court appeals will promote an effective and efficient process for resolving these complex and related disputes.

A.O. JB-07-1, § I, § V(d).

Regardless of whether this appeal is transferred to the BCD, if the Court denies DEP’s Motion for Remand CMP believes a stay of this proceeding is appropriate, and CMP is moving the Kennebec County Superior Court for a stay in Case No. KENSC-AP-20-27 in the event that court denies DEP’s Motion for Remand of NextEra’s appeal. In the event this court denies DEP’s Motion to Remand, CMP supports the West Forks Petitioners’ Motion to Stay pending the outcome of NRCM’s administrative appeal to the BEP. The granting of such a

stay should give BEP sufficient time first to decide the NRCM appeal for the reasons of administrative and judicial economy set forth in DEP's Motion for Remand, and to avoid potentially inconsistent results from multiple appeals. DEP Motion at ¶¶ 14-16. The instant appeal, however, as well as the related appeals in Kennebec County and before the Board, are unaffected by the action in Kennebec County Superior Court seeking injunctive relief related to a lease issued to CMP by the Maine Bureau of Parks and Lands (BPL), *Russell Black et al. v. Andy Cutko*, Case No. KENSC-CV-20-94. Any stay order issued by this Court therefore should be limited to the time needed to allow completion of NRCM's BEP appeal, and not any additional time that may be needed to allow completion of the *Black v. Cutko* lawsuit.¹

The *Black v. Cutko* lawsuit challenges the validity of BPL's lease to CMP and seeks to enjoin CMP from exercising its rights under that lease. But the DEP, in rendering its decision that is challenged in the appeal presently before this Court, had no obligation to determine, and indeed did not determine, the ultimate validity of that BPL lease. Nothing requires or authorizes DEP to act as an adjudicatory body to conclusively determine ownership rights or to resolve property disputes. See *Southridge Corp. v. Bd. of Env'tl Prot.*, 655 A.2d 345 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit). For that reason, an applicant need only make a *prima facie* showing of TRI. See *Murray v. Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (finding that an applicant need only have a "legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permit or license he seeks."). Because the DEP is not the arbiter of the validity of the lease challenged in *Cutko*, and because the

¹ An amended *Black v. Cutko* complaint, which revises the complaint upon which Petitioners rely in their Motion, was filed on Friday, July 17, 2020. The amended complaint has not yet been served on CMP.

decision West Forks Petitioners challenge here makes no such determination, the outcome of the *Cutko* case is unrelated to the instant appeal and should not inform the length of any stay that may be granted here.²

WHEREFORE CMP responds that transfer to the BCD is warranted here, and if the Court denies DEP's Motion to Remand then this proceeding should be stayed only for so long as NRCM's related administrative appeal is pending before the Board.

Dated: July 20, 2020



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² The outcome of the *Cutko* lawsuit will not affect the DEP permit in any case, because even if the Kennebec County Superior Court were to determine that the BPL lease is invalid, such determination would not result in vacating the DEP permit. The DEP's rules require that, "[p]rior to acceptance of an application as complete for processing, an applicant shall demonstrate to the Department's satisfaction sufficient title, right or interest in all of the property that is proposed for development or use. An applicant must maintain sufficient title, right or interest throughout the entire application processing period." DEP Regs. Ch. 2 § 11.D. Thus, an applicant must maintain title, right, or interest (TRI) throughout the application processing period, but the subsequent loss of TRI for a part of a project doesn't render the permit granted at the close of the processing period invalid. Instead, it may require the permittee to amend the permit.