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August 18, 2021

VIA ELECTRONIC MAIL

Mr. James R. Beyer
Maine Department of Environmental Protection
Bureau of Land Resources Regulation
106 Hogan Road
Bangor, ME 04401

RE: Central Maine Power Company, NECEC Transmission LLC, New England Clean Energy Connect, L-27625-26-A-N, L-27625-TG-B-N, L-27625-2C-C-N, L-27625-VP-D-N, L-27625-IW-E-N, L-27625-26-K-T, L-27625-26-V-M, L-27625-TB-W-M, L-27625-2C-X-M, L-27625-VP-Y-M, L-27625-IW-Z-M

Dear Mr. Beyer:

On behalf of Licensees Central Maine Power Company and NECEC Transmission LLC, please find enclosed an Opposition to NRCM's Application for Stay.

Please let me know if you have any questions.

Sincerely,

Matthew D. Manahan

Enclosure
cc (via email): BEP Service List (August 3, 3021)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NEW ENGLAND CLEAN ENERGY CONNECT	)
L-27625-26-A-N/L-27625-TG-B-N/	)
L-27625-2C-C-N/L-27625-VP-D-N/	)
L-27625-IW-E-N/ L-27625-26-K-T/	)
L-27625-26-V-M/L-27625-TB-W-M/	)
L-27625-2C-X-M/L-27625-VP-Y-M/	)
L-27625-IW-Z-M	)

OPPOSITION OF CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC TO NRCM'S APPLICATION FOR STAY

The Natural Resources Council of Maine (NRCM), yet again, contorts the Department's rules to serve its parochial purposes – to stop a vital clean energy transmission project, one which will utilize energy from existing dams that are currently spilling unused renewable energy due to a lack of transmission to carry that energy where it is needed, simply because NRCM has a distaste for hydropower. NRCM's strategy of obfuscation must end. As made frighteningly clear in the recent United Nations Intergovernmental Panel on Climate Change report,[1] the last decade was hotter than any period in 125,000 years. The New England Clean Energy Connect Project (NECEC or Project) is essential to reducing the greenhouse gas emissions driving this climate change. NRCM's August 11, 2021 Request for Stay of Department Order (Request), which requests that the DEP Commissioner or the Board of Environmental Protection[2] stay the Commissioner's May 11, 2020 Order (DEP Order) licensing the Project should be denied.

[1] Available at: https://www.ipcc.ch/report/ar6/wg1/.

[2] On August 12, 2021 the Board Chair declined to hear NRCM's Request, and NRCM's request therefore is no longer is before the Board. Licensees note, however, that the Board does not have authority to issue the stay NRCM seeks in any event for the reasons stated in Licensees' June 26, 2020, July 31, 2020, and October 16, 2020 responses to NRCM's prior requests for a stay of the DEP Order, incorporated herein by reference.

NRCM's continued distortion of the DEP's rules and procedures in an attempt to fatally delay the Project grows exhausting. As NRCM admits, its arguments for a stay of the DEP Order are largely unchanged in this, its *fifth* request for a stay of the DEP Order.[3] NRCM Request at 1-2. NRCM now vaunts a recent Superior Court decision[4] vacating the 2014 and 2020 Bureau of Parks and Lands (BPL) leases for Project,[5] arguing that this decision is game changing, and demonstrates its likelihood of success on the merits of its appeals to the Board. What remains firmly the same, however is the irrelevance of the leases to the Department now that the DEP Order has issued.

First and foremost, title, right, or interest (TRI) has not been pertinent to the Department since the date it concluded processing the permit applications and issued the DEP Order, on May 11, 2020. In fact, TRI is not needed at all for the DEP Order to remain valid. Instead, the DEP's rules require a showing of TRI during the application processing period only, a requirement intended to limit the use of DEP's resources for only those developments that have a cognizable property interest. NRCM cannot expand a prudential standard meant to conserve Department resources into a continuing obligation that would consume Department resources during ongoing litigation.

Second, and even if Licensees' TRI were relevant here, where the application processing period has concluded, Licensees have not lost TRI. On August 13, 2021 both the BPL and

[3] On June 10, 2020 NRCM requested that the BEP stay the DEP Order. On June 19, 2020 NRCM filed its arguments for a stay in support of the Groups 2 and 10 request that the DEP stay the DEP Order. On July 16, 2020 the BEP Chair referred NRCM's June 10 stay request to the DEP. On July 22, 2020 NRCM appealed to the full Board referral of its stay request to the DEP, which the Chair ruled is not appealable to the full Board. The Commissioner denied NRCM's stay requests on August 26, 2020. On September 25, 2020 NRCM renewed its request for a stay of the DEP Order to the BEP, which the Chair denied on October 23, 2020. Finally, NRCM moved the Kennebec County Superior Court for a stay of the DEP Order on November 2, 2020, which Justice Murphy denied on January 8, 2021.

[4] Decision and Order, Docket No. BCDWB-CV-2020-29 (Murphy, J.) (Aug. 10, 2021).

[5] The 2020 BPL lease amends and restates the 2014 BPL lease, and thus is now the operative lease.

Licensees appealed the Superior Court's August 10, 2021 decision. Maine Rule 62(e) provides that the August 10, 2021 Superior Court decision is stayed pending the appeal, which means **the BPL lease is still in effect**. Accordingly, and contrary to NRCM's assertion, the Project can be built along the route approved by the DEP. NRCM Request at 1.

Third, NRCM's post-issuance stay request, after its prior requests already have been denied by the Commissioner and by the Maine Superior Court, is an end-run around the DEP's license suspension statute and rule, which sets forth the required procedure that includes a hearing and therefore provides the constitutionally-required due process NRCM seeks to sidestep here. In fact, on August 12, 2021 the Commissioner initiated just such a proceeding.

Accordingly, NRCM cannot meet the high bar for a stay, driven even higher by NRCM's demand that the Department act within five days (effectively transforming its request for a stay into a request for a temporary restraining order). NRCM Request at 1 ("respectfully" asking that the Department act on the Request by August 16, and threatening "judicial recourse" if it does not do so). The August 10, 2021 Superior Court decision has no impact whatsoever on the likelihood of NRCM's success on the merits of its appeal of the DEP Order, and any harm that could theoretically arise out of the loss of TRI in the BPL lands is mitigated by the license suspension proceeding that has been initiated by the Commissioner.

I. Any loss of TRI after the DEP has processed an application is irrelevant.

NRCM jury-rigs disparate provisions of the Department's Chapter 2 rules to create out of whole cloth its argument that Licensees must maintain TRI throughout the entire appeals period. This is patently false. The Chapter 2, Section 11(D) rule governing TRI nowhere states that TRI must be maintained past issuance of the license. In fact, the rule governing TRI – which falls within the Chapter 2 section governing "Application Requirements" – is expressly limited to the

"application processing period." DEP Regs. Ch. 2 § 11.D.

NRCM ignores these clear provisions, and instead foists the broad language on the scope and effectiveness of the entirety of Chapter 2 on the limited application requirement provisions of that chapter. Section 2 of Chapter 2, titled "Scope of Rule" describes, fittingly, the scope of the Chapter 2 rules:

> This rule applies to processing of license applications, appeals of Commissioner license decisions to the Board, petitions and motions to modify, revoke or suspend licenses, petitions for corrective action orders, and other determinations on specific matters as described in this rule, except as noted in section 2(B) or elsewhere in this rule. This rule applies in the absence of procedural requirements imposed by statute or rule. Where other specific procedural requirements apply, those requirements control.

DEP Regs. Ch. 2 § 2.A. Accordingly, Chapter 2 sets forth the individual rules such as "Application Requirements" (Section 11), "Decisions" (Section 19), "Appeal to the Board of Commissioner License Decisions" (Section 24), and "Revocation or Suspension of a License" (Section 25). Notably, license applications and appeals are separate "specific matters" governed by separate sections of Chapter 2. *Compare* DEP Regs. Ch. 2 § 11 *with* DEP Regs. Ch. 2 § 24.

The "Effect" provision of section 2 that forms the basis of NRCM's argument is merely a statement of the result that adoption of Chapter 2 will produce: where there exist "on or after the effective date of this rule" applications accepted as complete, appeals of license decisions, or petitions to modify, revoke, or suspend a license, the rule will govern those matters, as specified therein. DEP Regs. Ch. 2 § 2.C; *see also* Black's Law Dictionary 235 (3rd ed. 2006) (defining the noun "effect" as "[t]he result that an instrument between parties will produce on their relative rights, or that a statute will produce on existing law"). NRCM Request at 3-4. That does not mean that all of the rule applies to all those various proceedings, and certainly not where portions of the rule apply on their face only to one type of those proceedings. NRCM's claim that the "effect" of Chapter 2 imposes on the DEP the duty to monitor TRI until all appeals of license

decisions, and all litigation concerning the TRI itself, is exhausted is contrary to the specific language in the rule itself. NRCM Request at 4.

Imposing such an obligation also would make no sense, as the Law Court has affirmed that TRI is a prudential standard intended to protect state resources, not to subject the Department to *additional* proceedings after it has issued a license. *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (TRI as a principle of administrative standing "is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit that he would have no legally protected right to use."). NRCM's discussion of *Southridge* and *Tomasino* is beside the point because those cases concern whether an applicant has sufficient standing to seek a permit in the first instance. *Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345 (Me. 1995) (establishing that an applicant does not need to establish more than a *prima facie* claim of TRI); *Tomasino v. Town of Casco*, 237 A.3d 175 (Me. 2020) (determining that a developer may not rely on an easement that may not have been broad enough in scope to permit the activity and that was disputed by the owner of the land subject to the easement).

Here, Licensees made the requisite *prima facie* showing by providing the DEP with the 2014 BPL lease, and the DEP appropriately accepted that lease as establishing TRI. *See* Order at 8 (accepting "the decision of its sister agency to enter into the leases" and concluding that the leases established sufficient TRI). The 2014 Lease remained in effect throughout the entirety of the DEP application process. Developments after May 11, 2020 – the date of issuance of the permit – are quite simply irrelevant to the validity of the permit. Indeed, what happens after the DEP issues its decision is outside the record before DEP and therefore not relevant. Consequently, even if it turns out DEP was wrong about TRI, the Commissioner's decision to

issue the DEP Order was made based on the record at that time, and the fact that a judge later invalidated that TRI does not mean DEP should have ruled that way based on the evidence before it when it processed the applications. It further makes no sense for the Department to extend its review of TRI past the issuance of a permit, when any number of outcomes "might" occur – be it a decision not to exercise an option, amendment of a leasehold, or a final judicial adjudication of property rights. NRCM Request at 4. Those eventualities are beyond the DEP's purview, and are not part of the DEP's statutorily authorized review criteria for the applications DEP reviewed and approved.

Accordingly, whatever the outcome of the BPL lease litigation, which is ongoing, NRCM cannot make a showing that it has a strong likelihood of success on the merits of its TRI claim because, as the Superior Court has already found,

> 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. Because of this, movants have not demonstrated they have a strong likelihood of success on the merits of this issue.

Order on NRCM's Motion to Stay DEP Commissioner's Order at 8, KEN-AP-20-27, SOM-AP-20-04 (Murphy, J.) (Me. Super. Jan. 11, 2021), citing *Southridge*, 655 A.2d at 348. NRCM's request for a stay must be denied.

II. The BPL lease is still in effect.

Even if Licensees' TRI after issuance of the DEP permit were relevant to the DEP's post-license rules and the pending appeals, which it is not, Licensees have not lost TRI. Pursuant to Maine Rule of Civil Procedure Rule 62(e), "the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal." On August 13, 2021 both the BPL and Licensees appealed the Superior Court's August 10, 2021 decision. That decision therefore is stayed pending a decision on that August 13, 2021 appeal, the BPL

lease is still in effect and, contrary to NRCM's assertion, the Project can be built along the entire route approved by the DEP. NRCM Request at 1, 3. NRCM's emphatic allegation that Licensees have "*no interest* in a critical portion of property at issue" is manifestly false, as is its conclusion that it "is likely to prevail in establishing that CMP does not have TRI." NRCM Request at 3.[6] Licensees do have TRI.

III. The Commissioner has ordered a license suspension proceeding.

Even if TRI were relevant to the DEP's post-license rules and procedures, which it is not, and even if Licensees had lost a portion of TRI in the Project, which they have not, NRCM's stay request is an end-run around the DEP's license suspension statute and rule, which provides a substantive process pursuant to the Maine Administrative Procedure Act intended to provide due process. 38 M.R.S. § 342(11-B); DEP Regs. Ch 2 §§ 25, 27. That process allows any person to petition the Commissioner to initiate proceedings to revoke or suspend a license, allows licensees to respond within 30 days (unless extended by the Commissioner), and requires that, within 21days of the licensee's response, the Commissioner must dismiss the petition or initiate a hearing proceeding.

Rather than initiate such a proceeding, however, NRCM makes its fifth request for a stay, significantly reducing Licensees' time within which to reply (due, as ordered by the Commissioner, within 7 days of NRCM's Stay Request) and seeking to deprive Licensees of the opportunity for a hearing required under the DEP's license suspension rules. While there has not been any change in circumstances that would require suspension of the DEP Order – again, TRI is a prudential standard relevant to an applicant's standing, not a licensee's standing, and

[6] Licensees note that even if the loss of TRI were grounds for staying a permit, the TRI at issue here is located in Project Segment 1, for which NECEC LLC holds the license. Accordingly, if a stay were appropriate here, a stay could only apply to the permit transferred to and held by NECEC LLC and not the portion of the DEP Order that concerns network upgrades held by CMP.

Licensees have not lost TRI in any event – the Commissioner on August 12, 2021 initiated proceedings to suspend the DEP Order, the suspension of which would be effective until: (a) the Superior Court's decision is reversed on appeal and the lease is reinstated; (b) a new lease is entered into for the portion of the corridor in Johnson Mountain Township and West Forks Plantation that is at issue; or (c) the licensees obtain Department approval of an amendment to the Order rerouting this portion of the transmission line. *See* Commissioner letter to Licensees (Aug. 12, 2021). No stay is necessary or appropriate.

IV. NRCM cannot meet the high burden for a stay.

Because TRI is not relevant to the DEP's post-issuance rules, and because Licensees made a *prima facie* showing of TRI during the relevant period – the processing of the license applications – the Superior Court's August 10, 2021 decision on the BPL leases has no bearing whatsoever on the merits of NRCM's appeals of the DEP Order and subsequent orders related to the Project. Even if it did, the operative BPL lease is still in effect, as the Licensees' and BPL's appeal of the Superior Court decision stays that court's vacatur. The DEP's analysis begins and ends there "because a stay cannot be obtained without a showing of a strong likelihood of success on the merits."[7]

As to the remaining elements of a stay, NRCM grounds each in its errant argument that Licensees' cannot complete the Project as permitted. NRCM Request at 4-7. Wedding its

[7] Order on NRCM's Motion to Stay DEP Commissioner's Order at 3, KEN-AP-20-27, SOM-AP-20-04 (Murphy, J.) (Me. Super. Jan. 11, 2021). Little time need be spent on the standard of review here, as the Department and Superior Court have already addressed and dismissed NRCM's prior stay requests. As the Department is aware, NRCM bears the burden of showing that a stay is appropriate – a burden that is quite heavy, because injunctive relief is "an extraordinary remedy only to be granted with utmost caution when justice urgently demands it" and no adequate remedy at law exists. *Bangor Historic Track, Inc. v. Dep't of Agriculture*, 2003 ME 140, ¶ 12, 837 A.2d 129; *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980); *Vafiades v. Me. State Harness Racing Comm'n*, 2016 WL 4151506, at * 2 (Me. Super. Ct. June 8, 2016). NRCM must affirmatively demonstrate: (1) a strong likelihood of success on the merits, (2) immediate and irreparable injury to the petitioner, and (3) no substantial harm to adverse parties or the general public. 5 M.R.S. § 11004; *Bangor Historic Track*, 2003 ME 140, ¶ 9, 837 A.2d 129 ("A temporary restraining order may be granted only if it clearly appears from specific facts shown

alleged injury to the benefits of the Project – benefits that NRCM has consistently and continuously debated – NRCM makes the bare argument that if the Project cannot actually connect power to the New England Control Area "the project purpose can no longer be met with the proposed route" and any Project impacts are no longer justified. NRCM Request at 4. But NRCM makes no showing as to how continued construction in commercial forestland in compliance with the conditions in the Order – designed to reduce or eliminate impacts to habitat and existing uses – would cause it or its members any concrete and specific injury. Just as with its prior stay requests, NRCM has "provided . . . no factual analysis of whether and how any such construction would actually cause them harm." Commissioner decision on stay at 4 (Aug. 26, 2020). As former Commissioner Reid noted, NRCM's "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." *Id.* at 5. NRCM's scant argument of harm here does not amount to a concrete showing of immediate and irreparable harm.[8]

Similarly, NRCM's ostensible showing of lack of harm to Licensees or the general public is grounded in the falsity that "CMP can no longer demonstrate that it has the rights to complete the project." Request at 6-7. That is not the showing required here. Rather than allege facts demonstrating "no substantial harm to adverse parties or the general public," 5 M.R.S. § 11004,

by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant," quoting M.R. Civ. P. 65(a)). The first two criteria are the most critical, and require a showing of more than "mere possibility." *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). **Failure to demonstrate any one of these criteria, however, requires that injunctive relief must be denied.** *See Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 A.2d 129.

[8] Additionally, even if NRCM had pled any concrete and specific injury it would not be irreparable, given that any vegetation cut will regrow, and given the appeals process available to and utilized by NRCM and the Commissioner's ordered license suspension proceeding.

NRCM dismisses what it dubs "pocketbook harm to CMP"[9] and waxes generally on the policy behind the Natural Resources Protection Act and the Site Location of Development Act. *Id.* Notably, NRCM ignores entirely the harm to the general public that would result from delay or cancellation of the Project.

The loss of economic benefits of the Project alone are substantial.[10] Crucial, however, is the impact of the DEP Order in the fight against climate change. As the Commissioner explained in that Order, climate change "is the single greatest threat to Maine's natural environment":

> It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts.[11]

Combating climate change is perhaps the greatest public benefit of the Project, and Mainers cannot afford to await the outcome of appeals, potentially several years down the road, for the Project to reduce "overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region."[12] As recent climate change reporting has made abundantly clear, this Project cannot wait.

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[9] The harm to Licensees that would result from a stay pending the outcome of the BPL litigation is clear and has been well-established in the numerous stay proceedings concerning the Project. Because Licensees need to continue construction well before this appeal is resolved in order to meet the required in-service date, Licensees would be harmed by a stay of the DEP Order to the extent that they would not be able to continue construction where otherwise fully authorized. More than mere "pocketbook harm," the attendant delay and possible cancellation (pursuant to contractual in-service obligations) of the Project would inflict incalculable injury on Licensees.

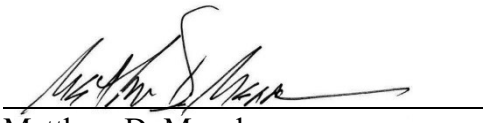
[10] The Project will create an average of more than 1,600 jobs per year in Maine; will increase tax revenues; will increase Maine's gross domestic product by an average of $94-98 million during construction; and will reduce wholesale electricity costs. *See NextEra*, 2020 ME 34, ¶ 30 & n.14, 227 A.3d 1117; Order Granting CPCN, Docket No. 2017-00232, 2019 WL 2071571, at *1 (Me. P.U.C. May 3, 2019).

[11] DEP Order at 105.

[12] *Id.; see NextEra*, 2020 ME 34, ¶ 30, 227 A.3d 1117.

For the foregoing reasons, Licensees request that the Commissioner deny NRCM's Request for Stay of Agency Decision.

Dated this 18th day of August, 2021.



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