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Admitted in: MA, ME, NH

November 12, 2021

VIA ELECTRONIC MAIL

James R. Beyer
Department of Environmental Protection
106 Hogan Road, Suite 6
Bangor, ME 04401

RE: 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

Dear Mr. Beyer:

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

Please let me know if you have any questions.

Sincerely,



Matthew D. Manahan

Enclosure

cc (email only): Service Lists
(DEP License Suspension Proceeding – updated through 10/6/21)
(BEP Consolidated Appeals – revised 8/3/21)
(DEP and LUPC Hearing – revised 9/22/20)

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)

**OPPOSITION OF CENTRAL MAINE POWER COMPANY
AND NECEC TRANSMISSION LLC
TO NRCM'S AND WEST FORKS' APPLICATIONS FOR STAY**

Long before it becomes effective, and despite its clear constitutional deficiencies, the Natural Resources Council of Maine (NRCM) and West Forks et al. (West Forks)¹ are requesting that the Commissioner hastily stop construction of this vital clean energy transmission project on the grounds that the November 2, 2021 Initiative halts the New England Clean Energy Connect (NECEC) Project. This **fifteenth**² stay request by these Project opponents is an affront to the administrative process and should be denied for the following reasons.

¹ West Forks is joined in its request by Friends of the Boundary Mountains and the Appalachian Mountain Club, and is “supported by The Nature Conservancy.” West Forks Request at 1.

² On June 5, 2020 Groups 2 and 10 (West Forks) requested that the DEP stay the DEP Order, and supplemented that request with additional filings on June 15 and June 25, 2020. On June 10, 2020 NRCM requested the same relief of the BEP, a request that West Forks joined on June 23. On June 19, 2020 NRCM filed its arguments for a stay in support of West Forks’ June 5 request to the DEP. 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 against. The Commissioner denied the stay requests on August 26, 2020. On September 25, 2020 NRCM and West Forks renewed their stay requests via filings purporting to appeal the Commissioner’s decision, which the Chair determined “are more appropriately considered as renewed motions or applications for a stay in the context of the existing Board appeals of the NECEC Order” on October 7. On October 16, West Forks untimely supplemented its renewed request and further filed a memorandum in support of NRCM’s renewed stay request. The Chair rejected these untimely filings on October 21 and denied both renewed stay requests on October 23, 2020. On November 2, 2020 NRCM moved the Kennebec County Superior Court for a stay of the DEP Order, which West Forks joined on November 19, 2020 and supplemented on January 8 and 14, 2021 (not realizing that Justice Murphy has denied those requests on January 8, 2021). On May 27, 2021, West Forks filed a stay request, which it supplemented on June 17, and which the Commissioner denied on August 4. Finally, on August 11, 2021 NRCM requested that the Commissioner or the BEP stay the DEP Order, which West Forks joined on August 18. Again, the Commissioner and Chair declined to stay the DEP Order. See August 20, 2021 Commissioner Letter, attached hereto as **Attachment A**. Licensees further note that the Board does not have authority to issue the stay NRCM and West Forks seek for the reasons stated in Licensees’ June 26, 2020, July 31, 2020, and October 16, 2020 responses to NRCM’s prior requests to the Board for a stay of the DEP Order, incorporated herein by reference.

I. The DEP has no authority to stay the DEP Order on grounds not on appeal, and Project opponents cannot show that a stay is warranted in any event.

NRCM’s “request for an immediate stay of the Department’s Order during the pendency of NRCM’s appeal to the Board of Environmental Protection” cannot be granted because the DEP has no power to stay the DEP Order on the basis of a development that is not part of any party’s appeal. NRCM Request at 1. Quite simply, the only stay authority that might exist is in the Maine Administrative Procedure Act (APA), 5 M.R.S. § 11004, which depends on the pendency of an appeal. West Forks’ allegation that “this standard is not necessarily applicable under circumstances created by CMP/NECEC’s own refusal to accept that the Order, while not stayed, is also not final” is nonsensical. West Forks Request at 2-5. Because each and every one of NRCM’s or West Forks’ multitude of prior stay requests was denied – indeed, no Project opponents could show at any point since the May 11, 2020 issuance of the DEP Order a likelihood of success on the merits of their appeals or any irreparable harm to the environment during the pendency of their appeals – Licensees plainly have every right to construct the Project notwithstanding Project opponents’ appeals of the DEP Order. Refusing to accept this “legal reality,” West Forks blusters – raising baseless vested rights arguments that demonstrate only that the complicated issues concerning the Initiative are squarely and properly before the Maine Superior Court – and is incapable of citing any other standard to support its request for a stay of the DEP Order. In fact, demonstrating their disdain for the process of law, West Forks urges the Commissioner to stay the DEP Order “without applying a legal standard” at all. West Forks Request at 5.³

³ Licensees further note that West Forks’ November 9, 2021 filing lacks the “verifiable information” it promised in counsel for West Forks’ November 5 email, in which counsel made false allegations in an effort to have the Commissioner act upon – without allowing Licensees an opportunity to respond to – NRCM’s stay request. Counsel promised that West Forks would provide this “verifiable information” in its own motion for stay, and that this information will show “that an additional week plus however many days it may take before the Commissioner and or BEP Chair issue a decision on the motion, will result in irretrievable damage.” No such information is present in

The only standard that may be applied to a stay request is that of the Maine APA, which is irrefutably dependent upon an appeal. The vote on the Initiative⁴ is not and cannot be part of any party's appeal of the DEP Order because it happened after the DEP's May 11, 2020 decision. Consequently, NRCM has no increased chance of likelihood of success on the merits in its pending appeal because any developments after the DEP's decision are not relevant to that prior decision and that appeal. West Forks fails to allege even one of the elements required for a Title 5, section 11004 stay.

Nevertheless, NRCM claims that it is likely to succeed on the merits of its appeal to the BEP on grounds already rejected by the Commissioner (the alternatives analysis and BPL lease) and also on the grounds that the Initiative is a ban on high impact transmission lines in the Upper Kennebec Region, "so all of Segment 1 as described in the NECEC permit is now effectively barred" and Licensees therefore lack TRI as NRCM alleged in its appeal. NRCM Request at 2-3. But the retroactivity of the Initiative does not render it relevant to NRCM's BPL lease issue on appeal. NRCM Request at 3. To the contrary, even though it will be retroactive if it becomes effective, the Initiative does not change the validity of the decision being challenged. And the Commissioner has already decided this issue in any event, stating in her August 20, 2021 letter that "CMP maintained sufficient TRI throughout the entire Department application processing period. The concept of sufficient TRI pursuant to the Department's rules is a distinct issue from any judicial resolution of disputes over underlying matters such as the validity of a lease issued

West Forks' November 9 filing, nor any support whatsoever for counsel's allegation that "Reliable sources, including workers on the corridor, report that they are cutting a narrower corridor to get more miles cut and that they are not laying down mats as they go." The Commissioner and Chair should take pause at such unfounded allegations, which strike at the heart of West Forks' credibility.

⁴ "An Act To Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" (Initiative).

by a separate agency.” Attachment A at 3. Quoting the Superior Court, the Commissioner acknowledged that “[t]he 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.” Attachment A at 4, citing *NextEra Energy Resources, LLC v. DEP* and *West Forks Plantation v. DEP*, Nos. KEN-AP-20-27, SOM-AP-20-04, Superior Court Order at 8 (Jan. 8, 2021). Not only are developments after the issuance of a license irrelevant to the appeal of that license, but invalidation of a possessory interest after issuance of the permit cannot even be grounds for a stay, because the DEP’s interest in whether or not construction can actually occur concludes upon issuance of the license.

What’s more, the irreparable injury that NRCM alleges has already been considered by the DEP, both in the underlying proceeding and in its rejection of each prior stay request. NRCM Request at 3-4. As the Commissioner has already determined, “NRCM’s and West Forks’ contentions regarding irrevocable harm go to evidence submitted during the licensing hearing, which was not found convincing on the issue of whether the statutory criteria have been met for the issuance of a permit.” Attachment A at 4. Clearly, allowing construction to continue pursuant to the Commissioner’s thoughtful and unprecedented environmental protections would be no “dereliction of duty,” as NRCM claims. NRCM Request at 3.⁵ The DEP has already concluded that there is no irreparable harm from continuing construction. In fact, the DEP permitted that construction.

⁵ NRCM further falsely claims as follows: “Because the NECEC Project cannot be built as a result of the Referendum, an immediate stay is necessary to protect the public from the irreparable harm that will result from CMP’s continued clearing and construction of the banned NECEC Project,” (NRCM Request at 1) and that “what is clear now is that the project purpose can no longer be met” (NRCM Request at 3). These statements are false. The Project can still be built until 30 days after the Governor certifies the Initiative, and after that certification if the court grants NECEC LLC’s request for injunctive relief.

Because the vast majority of the clearing for the Project is already complete, and Licensees expect 97% of all clearing to be complete in mid to late December 2021, a stay of the DEP Order would only harm the viability of the Project rather than serve to protect the environment from the harm NRCM claims will result from permitted clearing. There thus can be no irreparable harm from continued construction, and instead a stay would fulfill the strategy of Project opponents to delay the Project past the point of viability. And, just as the Commissioner concluded with regard to the issuance of a stay on the sole basis of an alleged procedural violation by BPL (that is subject to further appeal and potential correction before the BPL), the issuance of a stay on the sole basis of a not-yet effective Initiative (that is subject to a declaratory judgment action challenging its constitutionality and related motion for preliminary injunction) would result in unnecessary harm to the Licensees and delay of the public's benefit from the Project's enormous greenhouse gas emissions reductions. *See* Attachment A at 4. NRCM's and West Forks' request that the Commissioner halt construction is not an attempt to prevent the thoughtfully mitigated clearing impacts, but rather is another strategic attempt to delay the Project such that it cannot meet its contractual in-service date.

II. The DEP cannot stay the DEP Order on the grounds of an Initiative that is not yet effective and subject to immediate legal challenge.

On November 3, 2021 NECEC LLC and Avangrid Networks, Inc. (collectively "NECEC LLC") filed suit in Cumberland County Superior Court challenging the constitutionality of all Initiative provisions directed at the Project.⁶ Contrary to NRCM's allegation otherwise, that

⁶ *See NECEC Transmission, LLC and Avangrid Networks, Inc. v. Bureau of Parks and Lands, Maine Public Utilities Commission, Maine Senate, and Maine House*, Docket No. CV-400. The November 3, 2021 filings made in the Cumberland County Superior Court regarding the Initiative, including Plaintiffs' Motion for Preliminary Injunction with Incorporated Memorandum of Law, and related affidavits, are available at: <https://www.necleanenergyconnect.org/constitutional-challenge>. This action has since been transferred to the Maine Business and Consumer Docket (the "Business Court" or the "Court"), Docket No. BCD-CIV-2021-00058.

lawsuit does not acknowledge “that the enactment of the Referendum will prevent completion and operation of the New England Clean Energy Connect.” NRCM Request at 1. In fact, the opposite is true. The lawsuit demonstrates that the Initiative is unconstitutional and thus that the Initiative *cannot* lawfully be enforced against the Project to prevent its completion and operation. And, as NRCM admits, “[a]bsent a final decision in CMP’s lawsuit by the Law Court to the contrary, the Department must apply the law.” NRCM Request at 3. Licensees agree. Absent a decision denying injunctive relief or eventually upholding the Initiative, the DEP must apply the law, which is that the Initiative is not yet effective, and will not become effective (by NRCM’s estimate) until January 3, 2022, if it becomes effective at all. NRCM Request at 3. Without an effective new law, and with a pending lawsuit challenging that new law such that it may never actually become effective with respect to the Project, there are no grounds for a stay of the DEP Order.

Moreover, the Business Court will turn to these issues in fairly short order⁷ via NECEC LLC’s pending motion for preliminary injunction, which seeks to enjoin enforcement of the Initiative during the pendency of the case before the Court.⁸ While NECEC LLC certainly does not expect DEP to assume its Court claims will succeed, the DEP should not assume they will fail, as granting a stay would assume. Under these circumstances, DEP should steer well clear of

⁷ On November 10, 2021 the Business Court (Duddy, J.) ordered that all briefs on the preliminary injunction motion must be filed by December 8, 2021 and that the Court will hold a hearing during the week of December 13. The Court committed to issue a decision before the end of the year.

⁸ NECEC LLC’s Complaint raises serious and significant violations of the Maine and federal constitutions. The Complaint’s 142 paragraphs of allegations support challenges to the Initiative based on violations of NECEC LLC’s vested rights; transgressing the Separation of Powers principles in the Maine Constitution; and impairing NECEC LLC’s contractual rights and duties in violation of the Contract Clauses of the United States and Maine Constitutions. H.Q. Energy Services (U.S.), Inc., the Industrial Energy Consumers Group, the Maine Chamber of Commerce, and the International Brotherhood of Electrical Workers 104 have moved to intervene in support of NECEC LLC’s complaint and, in some cases, have supplemented NECEC LLC’s claims with additional challenges to the Initiative’s lawfulness. NRCM has also intervened in that proceeding.

the implications, if any, of the Initiative on the validity of the DEP Order and, instead, allow NECEC LLC's court challenge to run its course. *See Tomasino v. Town of Casco*, 2020 ME 96, ¶ 13, 237 A.3d 175; *Southridge Corp. v. BEP*, 655 A.2d 345, 348 (Me. 1995). The DEP is not the forum where the constitutionality of the Initiative can or will be adjudicated and thus it is not DEP's role to apply any presumption of the Initiative's constitutionality, as NRCM urges the Commissioner to do. NRCM Request at 3.

It would be particularly improper for the DEP to apply any presumptions and purport to resolve the constitutionality of this Initiative, as opposed to leaving that resolution to the Court, given that the statutes at issue are not statutes the DEP administers. Indeed, the Initiative is not enforced by the DEP, nor does it anywhere mention the DEP. The Initiative includes no changes to Title 38, which is administered by the DEP. Even the challenged prohibition on construction in the Upper Kennebec Region is codified in Title 35-A, which is administered by the Maine Public Utilities Commission (PUC), to which the DEP defers as to Title 35-A provisions.⁹ The DEP should not preempt the Court's determination of the preliminary injunction motion – and interfere with consideration of these issues by the Judicial Branch – by effectively enforcing the Initiative through a stay of the DEP Order before a decision by the Court regarding statutes over which the DEP has no expertise. The Commissioner is not the right authority, or even authorized, to determine the constitutionality of any Maine statute, never mind statutes that the DEP does not administer. The question of whether the Initiative will be given legal effect (and codified in the BPL's and the PUC's governing statutes) is instead squarely before the Court.

⁹ Licensees note that because the Initiative involves statutory changes that will not be enforced by the DEP nor subject to DEP rulemaking, the DEP was not named as a defendant in the Initiative litigation. Instead, and because the Initiative will be enforced by the PUC and the BPL, those two state agencies are named defendants. The Maine Senate and House are also named as defendants because the Initiative also purports to give approval authority to the Legislature over certain transmission lines.

III. No stay is needed or appropriate because the Commissioner has initiated a license suspension proceeding.

NRCM's stay request is yet another end-run around the DEP's license suspension statute and rule, which provides a procedure that ensures due process, if that procedure is properly applied. 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 a licensee to respond within 30 days (unless extended by the Commissioner), and requires that, within 21 days 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 seventh and West Forks makes its eighth request for a stay, seeking to significantly reduce Licensees' time within which to reply and seeking to deprive Licensees of the opportunity for a hearing required under the DEP's license suspension rules. NRCM continues to disregard the clear and fair process set forth in the DEP's rules and governing statutes. The Commissioner has reopened the license suspension proceeding concerning the *Black v. Cutko* litigation over the BPL lease. While Licensees object to the hurried shoe-horn of the Initiative into that proceeding, for which post-hearing briefing has already concluded, because the Initiative cannot form the basis of a stay the proper forum in which to consider the impact of the Initiative – if any – on the DEP Order is within a new license suspension proceeding.

In sum, NRCM does not meet the high bar for a stay. West Forks does not even acknowledge that there is a bar for a stay. The November 2, 2021 Initiative vote has no impact whatsoever on the likelihood of success on the merits of any appeal of the DEP Order, and Project opponents' rush to stay the Project based on a constitutionally-defective Initiative that is not yet effective and may never be effective as applied to the Project, and where clearing is nearly complete, is little more than an effort to kill this vital Project and prevent its well-

established climate benefits from reaching the people of Maine. For the foregoing reasons, Licensees request that the Commissioner should deny NRCM's and West Forks' Requests for Stay of Agency Decision.

Dated this 12th day of November, 2021.



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Lisa A. Gilbreath

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Attorneys for Licensees

ATTACHMENT A



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

August 20, 2021

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Elizabeth A. Boepple
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Re: Natural Resources Council of Maine’s and West Forks’ Renewed Requests for a Stay

Dear Mr. Kilbreth and Ms. Boepple:

This letter serves as my decision on your clients’ renewed requests for a stay of the May 11, 2020, Order conditionally approving the application to construct the New England Clean Energy Connect project (NECEC Order) and additional Orders transferring and amending the NECEC Order.

I. Procedural Background

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guides Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pillsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting the Commissioner stay the NECEC Order. West Forks filed supplements to its motion on June 15, 2020 and June 25, 2020.

On June 10, 2020, the Natural Resources Council of Maine (NRCM) separately filed a request for a stay of the NECEC Order with the Commissioner.

On August 26, 2020, then Commissioner Gerald Reid issued his decision denying the stay requests filed by West Forks and NRCM. Commissioner Reid determined that West Forks and NRCM had failed to demonstrate that any of the three criteria necessary to obtain a stay had been met.

On November 2, 2020, NRCM filed a motion in Superior Court to stay the NECEC Order. West Forks joined in NRCM’s motion.

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On January 8, 2021, following a hearing, the Superior Court denied the NRCM and West Forks stay request.

On May 27, 2021,¹ West Forks filed a renewed request for stay of the NECEC Order with the Commissioner. West Forks filed a supplement to that request on June 17, 2021. By letter dated August 4, 2021, I denied West Forks' May 27, 2021 renewed request for a stay of the NECEC Order and also addressed additional issues.

On August 11, 2021, NRCM filed another renewed request for a stay of the NECEC Order following a Maine Superior Court decision dated August 10, 2021 in the case of *Black v. Cutko*, No. BCD-CV-2020-29. In that decision the Superior Court reversed the decision of the Bureau of Public Lands (BPL) to enter into a lease with Central Maine Power Company (CMP) for public lands in Johnson Mountain Township and West Forks Plantation. The lease covered a stretch of land over which approximately .9 miles of the transmission line would be built.

On August 12, 2021, I notified the licensees and the other parties to the pending Board appeals that I was initiating a proceeding to consider a suspension of the permit issued in the NECEC Order.

On August 18, 2021, West Forks joined in NRCM's August 11, 2021 renewed stay request, raising similar arguments with respect to the Superior Court's August 10, 2021 decision in *Black v. Cutko*. Additional responses to NRCM's August 11, 2021 renewed stay request were filed by the licensees, CMP and NECEC Transmission LLC, and by Trout Unlimited and Friends of the Boundary Mountains.

II. Stay Criteria

The criteria for obtaining a stay of an agency's decision during an appeal are set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 11004. As petitioners seeking a stay, NRCM and West Forks bear the burden of demonstrating that: (1) the failure to obtain a stay would result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits of the petitioners' appeals, and (3) the issuance of a stay would result in no substantial harm to adverse parties or the general public. A petitioner must satisfy all three parts of this test to obtain a stay.

III. Analysis and Conclusion

In this renewed request for a stay, NRCM and West Forks argue that CMP no longer has title, right, or interest (TRI) for all property proposed for development as contemplated by Chapter 2, § 11(D) of the Department's rules and that therefore they have a strong likelihood of success on the merits of their appeals to the Board. NRCM and West Forks base their latest renewed requests for a stay of the NECEC Order on the Maine Superior Court's recent August 10, 2021 decision in *Black v. Cutko*, which NRCM asserts "materially alters" the stay factors that former

¹ West Forks' May 27 filing was mistakenly dated 2020, as opposed to 2021.

Commissioner Reid assessed in issuing his August 2020 stay denial and is “dispositive” with respect to TRI, and which West Forks asserts is “fatal” to CMP’s application and the NECEC Order due to a lack of TRI. (NRCM Aug. 11, 2021 Stay Request, pp. 2, 4; West Forks Aug. 18, 2021 Response, pp. 1 & n.3, 2-5). I disagree.

NRCM contends throughout its request that, as a result of the Superior Court’s August 10, 2021 decision in *Black v. Cutko*, NRCM’s appeal to the Board will ultimately be successful because “the NECEC cannot be built along the route permitted by the Department.” (NRCM Aug. 11, 2021 Stay Request, p. 1); *see also* p. 4 (discussing irreparable injury with reference to a project CMP “can’t complete” and a project purpose that “can no longer be met with the proposed route”) and p. 6 (discussing public interest with respect to a project CMP “can’t complete”). West Forks adopts all of these contentions. (West Forks Aug. 18, 2021 Response, p. 1 n.2). These assertions overstate the Superior Court’s decision, which does not find that CMP cannot obtain a BPL lease or build the NECEC project on the proposed route permitted by the Department. Rather, the Superior Court found that the process used by the BPL in issuing a lease for an approximately 0.9 mile portion of the permitted route was legally insufficient and that the BPL must make certain findings and determinations before issuing such a lease. The Superior Court’s decision has since been appealed to the Maine Law Court by both the BPL and CMP and the ultimate result of that legal challenge to the decision is uncertain. More fundamentally, the Superior Court did not rule on the merits of the BPL’s lease decision with respect to the 0.9 mile portion of the proposed and permitted route, and even if the Law Court were to affirm the Superior Court’s decision, CMP may re-apply for such a lease.²

In any case, NRCM and West Forks have also not demonstrated that they will succeed on the appeal issue of whether CMP’s permit application demonstrated sufficient TRI for purposes of the processing of its application, and maintained TRI throughout the processing period.³ Chapter 2, § 11(D) requires an applicant to maintain sufficient TRI throughout the application processing period. Chapter 2, § 1(Q) defines the processing time as “the time established by the Department to process an application, as published pursuant to 38 M.R.S. § 344-B(1) or otherwise provided by law.” For this Chapter 2 purpose, the Department’s processing time ends upon issuance of the permit or license. In this case, the processing time ended on May 11, 2020, with the issuance of the NECEC Order, and does not extend beyond that date and encompass the period of any appeals of such licensing decision to either the Board of Environmental Protection or courts.

With the BPL lease that had been issued, CMP maintained sufficient TRI throughout the entire Department application processing period. The concept of sufficient TRI pursuant to the Department’s rules is a distinct issue from any judicial resolution of disputes over underlying matters such as the validity of a lease issued by a separate agency. As the Superior Court Justice who issued the August 10, 2021 decision in *Black v. Cutko* stated in her January 8, 2021 decision

² NRCM and West Forks also contend the Department should have conducted its own analysis of whether the BPL process leading up to the lease between the BPL and CMP was proper. (NRCM Aug. 11, 2021 Stay Request, p. 3; West Forks Aug. 18, 2021 Response, pp. 2-3). That adjudicatory function is not part of the Department’s role in reviewing a permit application before it.

³ NRCM Aug. 11, 2021 Stay Request, p. 4; West Forks’ Aug. 18, 2021 Response, pp. 1-3, 4-5.

denying the prior requests by NRCM and West Forks to stay the Department's NECEC Order, "[t]he 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." *NextEra Energy Resources, LLC v. DEP and West Forks Plantation v. DEP*, Nos. KEN-AP-20-27, SOM-AP-20-04, Superior Court Order, Jan. 8, 2021, at 8.⁴

The reasoning above also applies to arguments on the remaining prongs of the test a petitioner must meet to obtain a stay. The issuance of a stay on the sole basis that the sister agency's procedure was ruled invalid may result in unwarranted harm to the licensees or the public. NRCM and West Forks have not established that a stay based solely on such a procedural violation by BPL, which is subject to further appeal and potential correction before the BPL, would result in no substantial harm to adverse parties or the general public. NRCM's and West Forks' contentions regarding irrevocable harm go to evidence submitted during the licensing hearing, which was not found convincing on the issue of whether the statutory criteria have been met for the issuance of a permit. I concur with Commissioner Reid's prior determination that these arguments do not demonstrate irrevocable harm will occur to NRCM or West Forks members if a stay is not granted.

While I am denying NRCM's and West Forks' renewed requests for a stay because the criteria for a stay have not been met, I recognize that the Superior Court's August 10, 2021 decision in *Black v. Cutko* has created some uncertainty with respect to the affected portion of the project. In response, I have already initiated a proceeding to consider the suspension of the NECEC Order in accordance with 38 M.R.S. § 342(11-B) and Chapter 2, § 25(A) of the Department's rules, as more fully described in my August 12, 2021 letter to representatives of CMP and NECEC Transmission LLC, Mr. Dickinson and Mr. Mirabile. That proceeding, rather than NRCM's and West Forks' renewed requests for a stay of the NECEC Order, is the appropriate Department mechanism to consider the change in circumstance represented by the Superior Court's decision.

Based on all of the above, I am denying NRCM's renewed request for a stay of the NECEC Order dated August 11, 2021, and West Forks joinder of that renewed stay request in its filing dated August 18, 2021.



Melanie Loyzim, Commissioner

cc: Service List

⁴ West Forks' reliance on a prior Department case, *Southridge Corp. v. Bd. of Env'tl. Prot.*, 655 A.2d 345 (Me. 1995), in support of its TRI argument is misplaced. (West Forks' Aug. 18, 2021 Response, p. 2). That decision upheld the Department's processing of a permit application where the applicant did not have deeded ownership of a small portion of the land on which the project was located but was involved in a separate court action to resolve a dispute over the applicant's ownership of that parcel.