

By Email and Overnight Mail

July 22, 2020

Mark C. Draper, Chair
c/o Ruth Ann Burke
Board of Environmental Protection
17 State House Station
Augusta, Maine 04333

RE: NRCM's Appeal to the Full Board of the Chair's referral
to the Commissioner of its Request to Vacate or Stay

Dear Chair Draper:

NRCM hereby appeals to the full Board your decision to refer to the Commissioner our request to vacate or stay the Commissioner's NECEC Order. As required by Maine statute and Chapter 2 of the Department's Rules, only the full Board can decide NRCM's motion.

First, your letter substantially misapprehends the nature of NRCM's motion. That motion is not a typical stay motion, but rather it seeks compliance with the statute requiring that only the Board may make permitting decisions with respect to projects of statewide significance. Accordingly, it points out that the Commissioner's Order is a nullity because only the Board possesses authority to make decisions regarding projects of statewide significance like the Corridor. The only authority the Commissioner has in these circumstances is to refer the matter to the Board. *See* 38 M.R.S. § 344(2-A)(A) ("If at any subsequent time during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner shall request that the board assume jurisdiction of the application.")

Moreover, the assertion underlying your letter – that the Commissioner may make a decision regarding a project of statewide significant for both the Board and the Department--

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lacks any statutory or regulatory authority. There is no statute that authorizes the Board Chair, acting alone, to delegate Board responsibilities to the Commissioner. Nor is there anything in either Chapter 2 or 3 of the Department's rules that authorizes either the Board Chair to act unilaterally in this circumstance or to cede the Board's role to the Commissioner.

The Legislature made it very clear in the 2011 legislation that it wanted the Board to take jurisdiction over projects of statewide significance. The only possible basis for a claim that the Board can avoid deciding NECEC—or any issue relating to it—is the single sentence in section 341-D(2) that the Board “*may*” take jurisdiction of applications when it finds 3 out of the 4 criteria have been met and that that sentence somehow trumps the earlier sentence requiring that the Board (“*shall*”) take jurisdiction over projects of statewide significance. 38 M.R.S. § 341-D(2). The problem with that argument is two-fold:

First, the sentence making Board jurisdiction mandatory was enacted after the sentence containing the “*may*” language, which was in the statute before the 2011 amendments. When there is a conflict between two statutes or sections of a statute, the later-enacted one controls. *See, e.g., Petition of Dunlap*, 604 A.2d 945, 955 (N.H. 1991) (“When a conflict exists between two statutes, the later statute will control, especially when the later statute deals with a subject in a specific way and the earlier enactment treats that subject in a general fashion.” (internal quotes omitted)); *Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 824 F.2d 1258, 1278 (1st Cir. 1987) (“Using familiar statutory interpretation, when there is such a conflict, the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute.”); *see also Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 20, 183 A.3d 749, 757 (“When a more recent amendment to a Maine statute directly conflicts with an older provision, we must, as always, determine the intent of the Legislature, and the question becomes whether the older provision has

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been repealed ‘by implication.’” (quoting *Blair v. State Tax Assessor*, 485 A.2d 957, 959 (Me. 1984)). “We apply this method of statutory construction when a later enactment encompasses the entire subject matter of an earlier act, or when a later statute is inconsistent with or repugnant to an earlier statute. When a later statute does not cover the earlier act in its entirety, but is inconsistent with only some of its provisions, a repeal by implication occurs to the extent of the conflict. (internal quotes omitted)).

Second, to the extent there is any conflict between these provisions, the most that can be said is that the second sentence creates an ambiguity or inconsistency with the first sentence. In that case, legislative intent and legislative history controls. *Lyle v. Mangar*, 2011 ME 129, ¶ 11, 36 A.3d 867, 870 (noting courts “will construe a statute based on its plain meaning in the context of the statutory scheme, and only if the statute is ambiguous will [courts] look to extrinsic indicia of legislative intent such as relevant legislative history”). There are several honorable Legislators on the Board who undoubtedly remember this legislation, but in any case the legislative history is absolutely clear: Part H of the Committee Amendment to An Act to Ensure Regulatory Fairness and Reform “[m]akes the commissioner responsible for the granting of all licenses and permits, *except that the board is responsible for licenses and permits that either meet at least three of the four criteria for projects of statewide significance*” Joint Select Committee on Regulatory Fairness and Reform, Legislative Digest of Bill Summaries and Enacted Laws, at 1-2 (July 2011) (emphasis added). *See also* Report to the Joint Standing Committee on Environmental and Natural Resources, Board of Environmental Protection Program Evaluation Report, at 5-6 (November 2017) (noting “[t]he Board issues license decisions on applications of statewide significance” and describing the .Juniper Ridge Landfill as

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a project of statewide significance requiring the Board to take jurisdiction); other BEP Reports also acknowledged that Board jurisdiction was required over projects of statewide significance.

Finally, contrary to the suggestion in your letter, sending NRCM's motion to vacate or stay to the Commissioner is also deeply inefficient. Whatever the Commissioner decides, his decision will be appealed to the Board by the aggrieved party. As noted above, no authority exists for the proposition that the Commissioner can make a decision of this nature and eliminate Board review. It would be far more efficient, accordingly, in addition to legally required, for the Board to make the decision in the first instance. Indeed, that is precisely the argument counsel for the Board has made in Superior Court in seeking a remand to the Board of the court appeals.¹

For all these reasons, we request that this matter be brought to the attention of the full Board. The Board Chair does not have the authority unilaterally to refer NRCM's motion to the Commissioner, nor does the Commissioner have the authority to consider it, except to refer it to the Board. This matter should be presented to the full Board and the parties afforded an opportunity to be heard.

Very Truly Yours,



James T. Kilbreth

cc: Service List (by email only)

¹ To the extent your referral relates only to the alternative in the NRCM motion to stay the Commissioner's Order and not to the principal ground of that motion—that the Commissioner has no authority to issue the Order and that it must be vacated—to that extent it underscores the inefficiency of the referral, since the Board will already be considering one aspect of the NRCM motion.