

STATE OF MAINE
 Kennebec and Somerset, ss.

Docket No. KEN-AP-20-27 and
 SOM-AP-20-04

NEXTERA ENERGY RESOURCES, LLC)
)
 PETITIONER,)
 v.)
)
 MAINE DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION)
)
 RESPONDENT)
)
 and)
)
 CENTRAL MAINE POWER COMPANY,)
)
 PARTY-IN-INTEREST)
)
 _____)
)
 WEST FORKS PLANTATION ET AL.)
)
 PETITIONER,)
 v.)
)
 MAINE DEPARTMENT OF)
 ENVIRONMENTAL PROTECTION)
)
 RESPONDENT)
 and)
)
 CENTRAL MAINE POWER COMPANY,)
)
 PARTY-IN-INTEREST)

COMBINED ORDER ON MOTIONS

Before the Court are multiple motions. Parties in interest Central Maine Power Company (“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, and the Lewiston-Auburn Metropolitan Chamber of Commerce (the “L/A

Metro Chamber”) have moved to consolidate *NextEra Energy Resources LLC, v. MDEP* and *West Forks Plantation, et al. v. MDEP*, and transfer the cases to the Business and Consumer Docket (“BCD”). Respondent Maine Department of Environmental Protection (“DEP”) has filed motions to stay NextEra and West Forks’ 80C appeals, and to remand the appeals to the Maine Board of Environmental Protection (“BEP”) to be considered alongside the Natural Resources Council of Maine’s on-going administrative appeal.

Petitioner NextEra is represented by Attorneys Joanna Tourangeau and Emily Howe. Petitioners West Forks Plantation et al. are represented by Attorney Elizabeth Boepple. Respondent DEP is represented by Assistant Attorneys General Margaret Besinger and Scott Boak. Party-in-Interest CMP is represented by Attorney Matthew Manahan. IECG is represented by Attorneys Sigmund Schultz, Anthony Buxton, and Robert Borowski. WMRC is represented by Attorney Benjamin Smith. The Maine Chamber of Commerce, et. al. are represented by Attorney Gerald Petrucelli.

I. Respondent Maine Department of Environmental Protection’s Motion to Stay 80C Proceedings and Remand Petitioners’ Appeals to the Board of Environmental Protection

Respondent DEP has filed two motions which are now before the Court: 1) a motion to stay Petitioners’ 80C appeals, and 2) a motion to remand Petitioners’ appeals to the BEP. Despite Petitioner NextEra’s opposition to DEP’s motion, the Court grants Respondent DEP’s motion.

Generally, Rule 80C proceedings provide for the review of “final agency action” in Superior Court. In a Rule 80C proceeding, the Court may “affirm the decision of the agency; remand the case for further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such actions as the court deems necessary; or reverse or modify the decision. . .” 5 M.R.S. § 110007(4). Rather than engaging in judicial review at the

same time NRCM is appealing the DEP Commissioner's licensing decision to the BEP, Respondent DEP moves to remand NextEra and West Forks' 80C appeals to be considered by the BEP alongside NRCM's appeal. The BEP is an independent appeals board that is part of the DEP. 38 M.R.S. § 341-D(4). The BEP may affirm, amend, or reverse the Commissioner's Licensing Decision, or remand the decision to the Commissioner for further proceedings. *Id.* Absent a remand to the Commissioner, the BEP's order on appeal supersedes the Commissioner's Licensing Decision and constitutes the Department's final decision on CMP's NECEC application. *Id.*; *Champlain Wind, LLC v. Bd. Of Env'tl. Prot.*, 2015 ME 156, ¶¶ 13-14, 129 A.3d 279.

In support of its motions to remand, Respondent points to the overlapping issues raised in all three appeals. First, they all pertain to the Maine DEP Commissioner's licensing decision, granting a permit to construct the NECEC transmission line. However, the similarities do not stop there as NextEra and West Forks' 80C appeals and NRCM's current administrative appeal all allege that CMP's alternatives analysis was inadequate. More specifically, NRCM argues that CMP failed to adequately analyze the option of an underground route, the option of co-location alongside roads, and the option of using taller poles to reduce impacts. Likewise, NextEra makes the argument that CMP did not conduct an alternatives analysis of the feasibility of putting the line underground, and the West Forks Petitioners also challenge the Commissioner's findings on possible alternatives to the approved project. Further, both NRCM and NextEra raise the issue of whether a portion of the Commissioner's licensing decision which requires that for the Segment I portion of the transmission line the cleared corridor be narrowed with vegetation tapering, is a legal requirement and whether it is supported by the evidence. DEP asserts that this issue is also raised in NextEra's 80C appeal. Finally, both the West Forks petitioners, along with the NRCM,

seek review of the Commissioner's findings on the impacts of habitat fragmentation and whether the Commissioner's requirements of land conservation adequately compensate for those impacts. In light of the significant overlap between issues before this Court relating to Petitioners' 80C appeals, and the issues currently on appeal before the BEP, Respondent DEP contends that remanding the 80C appeals to the BEP would serve the interests of judicial and administrative efficiency.

Further, in addition to the significant overlap between cases, Respondent DEP points out that BEP may amend or reverse the Commissioner's licensing decision, changing the final agency action on the matter. The Commissioner's decision currently being appealed to the Superior Court by both NextEra and West Forks is a licensing decision of the DEP, which consists of both the Board and the Commissioner. 38 M.R.S. § 341-A(2). Department licenses and permits may be issued by either the Board or the Commissioner. 38 M.R.S. § 341-A(4). Because NRCM is currently in the process of an administrative appeal to the Board (BEP), it is now the Board that is the decision-making authority within the Department. The BEP may amend or reverse the Commissioner's decision, or may remand the decision back to the Commissioner. Should the BEP decide to amend or reverse the decision, the BEP's new decision will be considered the "final agency action" for the purpose of the 80C appeals. Respondent DEP argues that it would therefore be impracticable for the 80C appeals to proceed given that the final agency action on the matter may change, and that NextEra and West Forks should also be provided an opportunity to voice their concerns to the BEP.

In its opposition, NextEra asserts that the Court may not remand their 80C appeal to the BEP to be reviewed alongside the NRCM appeal, citing the language of 5 M.R.S. § 11001 (providing for judicial review of final agency action) and 38 M.R.S. § 346(1) (providing for

judicial review of orders or decisions by the board or commissioner of DEP). Specifically, NextEra points to the following language, stating that a petitioner's right to judicial review by the Superior Court is unqualified, and does not require remand to the BEP:

. . . any person who is aggrieved by **final agency action shall be entitled to judicial review thereof in the Superior Court** in the manner provided by this subchapter.

5 M.R.S. § 11001(1) (emphasis added).

. . . any person aggrieved **by an order or decision** of the board or **[Department] commissioner may appeal to the Superior Court.**

38 M.R.S. § 346(1) (emphasis added).

NextEra asserts that according to the above language, there is no qualification requiring appeal to the BEP prior to judicial review, nor is there statutory language requiring the Court to balance interests or consider judicial economy in making its decision. NextEra is certainly correct that the plain language of the statute does not *require* an appeal to the BEP prior to seeking judicial review in the Superior Court. However, the plain language of the cited statutes does not prohibit the Court from exercising its statutory authority to remand the case for further proceedings under 5 M.R.S. § 110007(4)(B). Despite NextEra's appeal being permitted by law, the Court may still remand the case to an agency, in this case the BEP, for further proceedings. 5 M.R.S. § 110007(4)(B).

In light of the significant overlap between issues, and the procedural difficulties of waiting for the BEP to render a new decision while the Rule 80C appeals move forward, the Court grants Respondent DEP's motion to stay both 80C appeals, and to remand the cases for further consideration by the BEP. Upon remand, NextEra shall be given an opportunity to submit to the BEP a more detailed written appeal statement that more fully articulates the arguments

made in its June 8, 2020 Rule 80C appeal, and that states whether it requests a public hearing or the inclusion of supplemental evidence in the record, in accordance with the BEP's procedural rules governing administrative appeals, 06-096 C.M.R. ch.2 § 24(B).

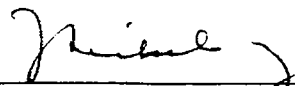
II. Parties-in-Interest's Motion to Consolidate *NextEra* and *West Forks*, and Transfer Them to the Business and Consumer Docket

Party-in-interest CMP has filed a motion to consolidate NextEra and West Forks' 80C appeals, and to transfer the cases to the Business and Consumer Docket. First, Party-in-interest CMP's request to consolidate NextEra and West Forks' 80C appeals is granted. According to M. R. Civ. P. 42, the Court may consolidate actions involving a common question of law or fact, whether in the same county or division or a different county or division. Both NextEra and West Forks contest the validity of the DEP permit granting the construction of the NECEC transmission line for many of the same reasons, and share common questions of both law and fact. The Court finds that consolidation of NextEra and West Forks' 80C appeals would be in the interest of convenience and justice, and for that reason grants party-in-interest CMP's motion.

Second, Party-in-Interest CMP moves to transfer the 80C appeals to the Business and Consumer Docket ("BCD"). Because the Court has granted Respondent DEP's motion to remand the 80C appeals to the BEP, the Court will await the results of the administrative appeal prior to deciding on whether to transfer the cases to the BCD. Should the cases return to the Superior Court after the administrative appeal, the application to transfer the cases to the BCD will be promptly acted upon.

The Clerk is instructed to enter this Order on the dockets for both Rule 80C cases captioned above by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: 8/11/2020



Justice, Superior Court