



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

August 4, 2021

Elizabeth Boepple  
BCM Environmental & Land Law, PLLC  
2 Union St., Suite 402  
Portland, ME 04101

Dear Ms. Boepple:

This letter serves as my decision on your clients’ pending, May 27, 2021, renewed request for a stay of the May 11, 2020, Order conditionally approving the application to construct the New England Clean Energy Connect project (NECEC Order). This letter also addresses additional issues raised along with the renewed request for stay, as well as a separate request to “put a halt to CMP/NECEC’s construction work anywhere along the NECEC line,” included in your letter dated July 14, 2021.

**RENEWED REQUEST FOR STAY**

**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 stay of the NECEC Order with the Commissioner.

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

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

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

AUGUSTA  
17 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0017  
(207) 287-7688 FAX: (207) 287-7826

BANGOR  
106 HOGAN ROAD, SUITE 6  
BANGOR, MAINE 04401  
(207) 941-4570 FAX: (207) 941-4584

PORTLAND  
312 CANCO ROAD  
PORTLAND, MAINE 04103  
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE  
1235 CENTRAL DRIVE, SKYWAY PARK  
PRESQUE ISLE, MAINE 04769  
(207) 764-0477 FAX: (207) 760-3143

On May 27, 2021,<sup>1</sup> West Forks filed a renewed request for stay of the NECEC Order with the Commissioner. West Forks filed a supplement to its request on June 17, 2021.

## **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. The filing of an appeal does not operate to stay a permit issued by the Department. A petitioner seeking a stay (here West Forks) bears the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioner, (2) there is a strong likelihood of success on the merits on the petitioner's appeal, and (3) the issuance of a stay will 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. The burden of demonstrating that the criteria are met rests with the petitioner.

## **III. Analysis and Conclusion**

The most recent analysis of a request for a stay of the NECEC Order was conducted by the Superior Court in which the court noted: "Because a stay cannot be obtained without a showing of a strong likelihood of success on the merits, the Court begins and ends the analysis there." *NextEra Energy Resources, LLC v. DEP and West Forks Plantation v. DEP*, Superior Court Order, Jan. 8, 2021 at 3. I will do the same here.

In the request for a stay before the Superior Court, West Forks (along with NRCM) argued "the record overwhelmingly demonstrates the NECEC [transmission line] will result in devastating environmental effects and the Commissioner's conditional approval is based on several untried and open-ended mitigation measures that do not compensate for the adverse impacts." Superior Court Order at 8-9. The court rejected this assertion as insufficient to demonstrate a likelihood of success on the merits, noting that West Forks and NRCM "have not pointed to the absence of competent evidentiary support for the Commissioner's factual findings; instead, they have pointed to evidence in the record that conflicts with the factual findings. This is not enough, and they have not demonstrated that they have a strong likelihood of success on the merits of this issue." Superior Court Order at 10. I find the same is true of the renewed request.

In the renewed request for a stay, West Forks points to the vegetation clearing completed prior to June 1<sup>2</sup> in Segment 1 and argues:

Given the now clear impact, Petitioners are likely to succeed on the merits of their appeal. The evidence in the record does not support the DEP's decision to approve this project in light of how much wider the corridor's impact is. Evidence and witness testimony made it clear that the NECEC would fragment the largest remaining unfragmented forest east of the Mississippi. CMP/NECEC's cutting makes the disrupting effects of forest fragmentation

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<sup>1</sup> West Forks' May 27 filing is mistakenly dated 2020, as opposed to 2021.

<sup>2</sup> Pursuant to the terms and conditions of the permit issued by the Army Corps of Engineers authorizing the NECEC project, tree clearing in Segment 1 of the project is prohibited in the months of June and July.

completely clear on the ground. Petitioner's observations of corridor cutting in Segment 1 show the negative impact on wildlife habitat. It is now obvious that a 54-foot to more than 90-foot clear-cut is a chasm for small mammals and other wildlife to cross and completely separates the plant communities. It is also evident now how much visual impact will be on scenic roads, ponds, trails, and other recreational resources. No impact is acceptable here and it has become obvious and unavoidable how dramatic the impact will be.

#### Renewed Request for Stay at 6.

The concerns expressed here by West Forks about habitat fragmentation and the visual impact of the NECEC project are concerns that were raised by West Forks and others during the multi-year permitting process. Parties who participated in the public hearing submitted written and oral testimony on these topics and many members of the public submitted comments on these topics, as well. The Department thoroughly reviewed and considered this information, including conflicting testimony, as demonstrated in the final NECEC Order. More than 65 pages of the order are devoted to the analysis of the evidence in the record on potential impacts of the project on scenic character and natural resources, including habitat fragmentation.

The renewed request for stay is similar to the original request in that West Forks asserts that the record evidence supports their position, but does not acknowledge the evidence to the contrary. West Forks' filing does not show an absence of competent evidentiary support for the Commissioner's factual findings; such an absence would be necessary for West Forks to succeed on this claim in its appeal. What distinguishes the renewed request are statements about the clearing completed in Segment 1 pursuant to the NECEC Order and West Forks' assessment that the clearing demonstrates the project will result in a significant impact. See e.g., Renewed Request for Stay at 4 (stating the vegetation clearing that has occurred "is hugely damaging to the natural environment"). These statements and accompanying photos, however, are not part of the record associated with the pending appeal and, therefore, do not bear on West Forks' likelihood of success on the merits in the appeal.<sup>3</sup>

In pointing to the clearing in Segment 1 of the corridor where tapered vegetation is required and describing the vegetation removal as having a "dramatic impact," West Forks states this impact cannot be what the Department intended in issuing the NECEC Order. Tapering is required to minimize impacts of the project by requiring the Licensees to retain, and allow to regrow following construction, as much vegetation at the tallest height reasonably possible within a corridor with energized transmission lines. As originally proposed, the full 150-foot wide

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<sup>3</sup> West Forks also points to two changes to the transmission line project that the Licensees proposed after issuance of the NECEC Order and subsequently withdrew as supporting its request for stay because of the impact these could have. Consideration of these potential impacts is well beyond the record on appeal and does not bear on West Fork's likelihood of success on the merits in the appeal. These two changes cannot occur without the filing of an amendment application and subsequent approval by the Department. The Licensees stated in their response to the renewed stay request the changes "have not and will not be proposed as amendments to the Project." CMP and NECEC Transmission, LLC's Response at 6.

corridor would have been cleared and vegetation would have been maintained at height of less than 10 feet. In areas along Segment 1 where tapering is required, the vegetation retained during construction necessarily depends on the height of the vegetation that existed at each location, within each taper, at the time of construction. This is recognized by the Department. Tapering is one of several types of vegetation management requirements included in the order and vegetation management is one of many requirements that address various potential impacts of the project. For example, the order also requires 40,000 acres of permanent conservation as compensation for habitat fragmentation impacts and \$1,875,000 of funding for culvert replacements to improve stream connectivity and enhance habitat for cold water fish, such as brook trout.

I cannot consider the information presented that is outside the record on appeal in my analysis of the likelihood of the success on the merits of the pending appeal because neither the Board nor the Court will consider evidence outside of the record in the appellate review. I find West Forks has not demonstrated a strong likelihood of success on the merits their appeal. Therefore, West Forks has not made the showing necessary to justify a stay of the NECEC Order. The renewed request for a stay is denied. Additionally, even taking into account the information outside of the record that West Forks has presented, this information does not demonstrate the NECEC Order should be reversed by the Board or a court, or otherwise provide a basis for requiring the Licensees to stop the construction authorized by the order.

#### **ADDITIONAL ISSUES**

The May 27, 2021 filing with the renewed request for stay also includes what is titled a “request for review of order violations.” West Forks includes a link to a video in which someone measures the width of the cleared portion of the corridor at the intersection with Judd Road where tapering is required, along with measurements taken by another individual at additional locations along the corridor where tapering is required. The Department previously learned of these measurements through the media and has followed up with site visits by DEP staff, as well as by third party inspectors. I also have visited the corridor as part of the Department’s monitoring of the project.

As stated in the NECEC Order: “Tapering’ refers to a form of vegetation management along the transmission line corridor where increasingly taller vegetation is allowed to grow as the distance from the wire zone increases.” NECEC Order at C-5. Within the 54-foot wide center area, the “wire zone,” vegetation approximately 10 feet tall will be allowed to regenerate after being cut to the ground during construction. In each 16-foot wide taper on each side of the wire zone, vegetation will be allowed to grow up to the following approximate heights: 15 feet for the first taper, 25 feet for the second taper, and 35 feet for the third taper. During construction, the Licensees may not cut vegetation that is shorter than the maximum height in each taper. Vegetation exceeding these heights may be cut during construction within the entire 150 foot width of the corridor. When vegetation regenerates after construction it must be allowed to grow up to the maximum vegetation height within each taper and the Licensees must make reasonable efforts to avoid the growth of even-aged stands within each taper. NECEC Order at C-6.

Letter to Elizabeth Boepple  
August 4, 2021  
Page 5

The Department has not observed cutting violations, including when investigating the measurements referred to in West Forks' filing. Department staff examined cut trunks within the taper zones, compared cut trunk diameters to remaining trees in the area, and searched for cut trees shorter than permitted in each taper zone. We found no evidence of trees cut in each taper zone smaller than permitted to be cut during construction. We observed that some lengths of cut corridor have more remaining vegetation in the first taper zone than others, particularly through areas with tall pines.

More specifically, we measured the greatest identifiable distances between cut tree trunks approximately perpendicular to the corridor. DEP staff measured distances up to 98 feet between cut trees, but could not find any cut trees that were less than 15 feet or 25 feet tall within the relevant taper zones. Therefore, we have confirmed that some cutting has been conducted in the second taper zone and that the cutting observed within both the first and second taper zones is consistent with the NECEC Order.

In a letter dated July 14, 2021, West Forks requests that the Department "put a halt" to the NECEC project. The basis for this request was an email sent by a concerned citizen to the Department alleging violations of the permit, specifically with regard to erosion control. These allegations were promptly investigated by a third-party inspector and reviewed by Department staff. As explained to the concerned citizen on July 7, no evidence of soil material having eroded beyond the project boundary was observed. Additionally, no issues warranting a notice of violation were observed, however, as Department staff explained to the concerned citizen, the Department asked for additional erosion and sedimentation control measures and these were implemented.

None of these alleged violations bear on the standards for issuing a stay, nor do they otherwise support suspension of the NECEC Order.

Regards,

A handwritten signature in blue ink, appearing to read "Melanie Loyzim", with a stylized flourish at the end.

Melanie Loyzim, Commissioner

cc: Service List