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Sent by email
Commissioner Loyzim
Department of Environmental Protection
17 State House Station
Augusta, Maine 04333

Re: *Request for Stay of Department Order #L-27625-26-A-N/L-27625-TB-B-N/L-276252C-CN/L-27625-VP-D-N/L-27625-IW-E-N, as transferred, amended and revised.*

Commissioner Loyzim,

Please allow this letter to serve as the response of West Forks Plantation *et al.* ("West Forks")[1] to NRCM's Request for a Stay of the Department of Environmental Protection's ("DEP" or the "Department") May 11, 2020 Order (the "Order") authorizing CMP/NECEC to construct the New England Clean Energy Connect ("NECEC").

For the reasons set forth below, West Forks joins NRCM[2] in requesting that the DEP issue a stay of the Order until their appeal to the Board of Environmental Protection ("BEP") is adjudicated given that the Business and Consumer Court ("BCD") found in *Black v. Cutko* (Docket No. BCDWB-CV-2020-29) (Murphy, J.) that CMP's lease of a critical stretch of public land on which the NECEC was to be constructed is *void ab initio*, thereby dealing a fatal blow to the NECEC as proposed and licensed by the DEP.[3]

I. The Department should issue a stay in light of the BCD's finding that CMP lacks the requisite title, right or interest to construct the NECEC.

A. The DEP cannot even review CMP's application if it lacks title, right or interest in property across the entire length of the NECEC corridor.

[1] This firm represents the following parties to the underlying appeal for whom "West Forks" will continue to serve as a useful short-hand: West Forks Plantation; the Town of Caratunk; Kennebec River Anglers; Maine Guide Services, LLC; Hawks Nest Lodge; Ed Buzzell; Kathy Barkley; Kim Lyman; Noah Hale; Eric Sherman; Matt Wagner; Mike Pilsbury; Mandy Farrar; and Carrie Carpenter.

[2] West Forks agrees fully and adopts without reservation the arguments set forth in NCRM's Request for a Stay. The fact that West Forks declines to restate all of the facts and arguments contained in NCRM's request should not be interpreted as a lack of support therefore.

[3] CMP's lack of title, right and interest in the entire area over which the corridor will be cut and the NECEC will be constructed as proposed is fatal because, as the DEP conclusively found, there are no viable alternatives available. Order at 2 ("The hearings also focused on whether a practicable alternative exists to the applicant's chosen route and proposed design that would be less damaging to the environment. The evidence shows it does not.")

Under DEP rules, an applicant to the department is obligated to "maintain sufficient title, right or interest" ("TRI") in "*all* of the property that is proposed for development or use" for not only the entirety of the application processing period, 06-096 CMR ch. 2, § 11(D) (emphasis added), but also for the duration of any appeal, *see* 06-096 CMR ch. 2, § 2(C) (clarifying that the "DEP Rules Concerning the Processing of Applications and Other Matters" apply to, among other procedures, "appeals of Commissioner license decisions to the Board").

The DEP cannot even *review* an application if the applicant fails to demonstrate the requisite TRI in the property the applicant proposes to develop—let alone issue an order approving such an application.[4] *See Southridge Corp. v. Bd. of Envtl. Prot.*, 655 A.2d 345, 348 (Me. 1995) ("The DEP will review an application for a permit only when the applicant has demonstrated 'sufficient title, right or interest in all of the property which is proposed for development or use.'" (quoting 06-096 CMR ch. 2, § 11(D))). Therefore, if CMP is found to lack TRI in *any* portion of corridor through which it plans to construct the NECEC, the DEP cannot approve CMP's application and should, at an absolute minimum, institute a stay of the Order under which CMP has proceeded to date.

As the Commission is fully aware, the Department did not conduct an independent review of whether CMP had the requisite TRI to complete the NECEC; instead, the DEP deferred its obligation to assess the validity of CMP's claim of sufficient TRI in at least a portion of the route to its sister agency, the Bureau of Parks and Lands ("BPL"). Specifically, the Department failed to question the validity of the lease into which CMP entered with the State of Maine in 2014 and then again in 2020 for public land in the West Forks Plantation and Johnson Mountain Township. Order at 8.

Now, the BCD has expressly found that the BPL director exceeded his authority and violated Article IX, Section 23 of the Maine Constitution when he unilaterally executed both the 2014 and 2020 lease with CMP without involving the Maine Legislature in the process. *Black v. Cutko,* Docket No. BCDWB-CV-2020-29 at 22-23, 29–30.

The consequences of this decision are manifold and critical to adjudicating NCRM's request for a stay:

1. CMP, as a matter of fact, lacks the TRI it needs to complete the NECEC because the lease upon which it relied for the public land portions of West Forks Plantation and Johnson Mountain Township is *void ab initio*;

2. The record is devoid of *any* substantial evidence to support a finding that CMP possesses the requisite TRI;

3. The DEP erred by relying on BPL's decision to enter into the leases, reviewing CMP's application in the absence of TRI, and issuing its order on an application

[4] In the analogous context of appeals of municipal action under Maine Rule of Civil Procedure 80B, the Law Court has found without fail that the absence of TRI is fatal to an application. *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 15, 237 A.3d 175 (finding no error in the trial court's denial of a Rule 80B appeal for want of TRI); *Rancourt v. Town of Glenburn*, 635 A.2d 964, 965 (Me. 1993); *Walsh v. City of Brewer*, 315 A.2d 200, 207 (Me. 1974) (announcing that TRI is an "indispensable and valid condition for 'applicant' eligibility"); *see Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (clarifying that the RTI requirement "is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit or license that he would have no legally protected right to use").

it did not have the authority to even consider, *see Southridge Corp,* 655 A.2d at 348; and

Therefore, the grounds upon which the DEP approved CMP's application have shifted, leaving the DEP with little choice but to either issue a stay of the Order, 5 M.R.S.A. § 11004; Me. Op. Att'y Gen. No. 80-116 (July 15, 1980), or suspend or revoke CMP's license, 38 M.R.S.A. § 342(11-B); 06-096 CMR ch. 2, § 25(A).

B. CMP cannot rely on mitigation measures that will only result if it can complete the NECEC.

The sudden demise of CMP's TRI in the public land portions of the West Forks Plantation and Johnson Mountain Township that it *needs* to construct the NECEC is fatal to the corridor for another reason—viz., it precludes CMP from relying on mitigation measures that will only result if CMP completes the NECEC, which the DEP expressly found would be necessary to counterbalance the enormous environmental damage the NECEC will inflict on the State of Maine.

It is indisputable that the construction of the NECEC will decimate the complex and vulnerable ecosystems in Segment 1 and inflict serious economic harm on West Forks and the other parties to the underlying appeal.

The NECEC—the clearing of the hundreds of acres necessary to carve out the corridor itself and the ancillary cutting and clearing to provide the needed materiel to erect the transmission line—will result in, among many other injuries, the following:

1. Fragmentation of the largest remaining intact forest east of the Mississippi by eliminating nearly 1,000 acres of habitat for forest dwelling species and splintering the Jack Pine Forest;

2. Elimination of innumerable wildlife corridors;

3. Disruption of cold-water streams, wetlands and other aquatic habitats; and

4. Substantial harm to a wide swath of species, including birds such as the scarlet tanager, the black-throated blue warbler and the great blue heron and mammals like the pine martin and Canada lynx.

The cumulative, ecological effects of the NECEC, then, will be devastating not only on Segment 1, but also on the habitats inexorably linked to and reliant upon the untouched wilderness of the area. These damages, which are both certain and irreparable, are not a parade of horribles based on mere speculation; the considerable and permanent impact of the NECEC on wildlife habitats and environmental resources of Segment 1 is well documented and has been reiterated across the testimony of multiple expert witnesses.

A direct consequence of this environmental damage is the substantial disruption to the economy of Segment 1, which is heavily dependent on this portion of wilderness to make a living. The scarring of this area will forever destabilize the economic base of this region, leading to the collapse of business and the flight of persons directly harmed by CMP's actions.

In light of these harms, CMP has proposed—and the DEP has endorsed—that CMP can rely on the purported environmental benefits that will result *if* the NECEC is completed and energy is, in fact, transmitted from Quebec to the New England grid as a mitigation measure.

> Although not relevant under Chapter 375, § 2, the issue of GHG emission reductions is material to the Department's review of this project because its stated purpose is to provide clean, renewable energy to the regional energy grid. The Department considers a project's purpose in the context of evaluating whether the totality of its adverse environmental effects is reasonable. As described in detail above, construction and maintenance of the project will cause some adverse environmental effects on habitat, scenic character, and existing uses. Climate change, however, 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. . . . . The Department reviewed documents in the PUC's proceeding . . . [and] accepts the PUC's finding on this issue and weighs the NECEC project's reductions in GHG emissions against the project's other impacts in its reasonableness determination. In doing so, the Department finds the adverse effects to be reasonable in light of the project purpose and its GHG benefits, provided the project is constructed in accordance with the terms and conditions of this Order.

Order at 105. But this supposed countervailing benefit[5] will *never* materialize if CMP lacks the TRI it needs to complete the NECEC. A corridor to nowhere serves no one; the clearing of wilderness for no discernable purpose will lead to needless destruction, a blight on the landscape and a testament to the substantial harm CMP has been willing to inflict in search of profits for itself and its partners—not the people of Maine.

C. The DEP should grant NRCM's request for a stay because BCD's finding that CMP lacks TRI to critical portions of the corridor changes the calculus as to whether the appellants are likely to succeed and the harm that will result will prove irreparable.

As NCRM set forth in greater detail in its letter, the factors the DEP must consider in instituting a stay parallels the four-factor test for injunctive relief, with the likelihood of success on the merits and irreparable injury as the most important criteria.[6] 5 M.R.S.A. § 11004; Me. Op. Att'y Gen. No. 80-116 (July 15, 1980); *see Ingraham v. University of Maine*, 441 A.2d 691, 693 (Me. 1982) (outlining the contours of the test for the issuance of an injunction).

In light of the BCD's decision, the appellants can "show a clear likelihood of success on the merits" that goes beyond a "reasonable likelihood" given the fact that CMP does not possess the requisite

[5] West Forks does not concede the point nor agree with the presumption that the power generated by Hydro-Quebec to be delivered to Massachusetts via the NECEC will in fact result in a reduction in green-house gas emissions. However, using that presumption further illustrates why CMP's inability to now complete the project cannot provide any purported countervailing benefit.

[6] Because West Forks has nothing to add to NRCM's argument regarding the third criteria (the harm to appellants outweighs harm to CMP) and fourth criteria (the stay will not adversely affect the public), this letter will only elaborate on the position advanced by NCRM in its request as to the first two criteria.

TRI to complete the NECEC. *Dep't of Envtl. Prot. V. Emerson*, 563 A.2d 762, 768 (Me. 1989) (indicating that the moving party must "show a clear likelihood of success on the merits, not just a reasonable likelihood"). Without a lease to public lands in West Forks Plantation and Johnson Mountain Township, CMP lacks the TRI it is required to demonstrate to the DEP for the department to even consider CMP's application, *Southridge Corp,* 655 A.2d at 348, and runs afoul of the requirement that it abide by the applicable department procedures during the pendency of this appeal, 06-096 CMR ch. 2, §§ 2(C), 11(D). Furthermore, as the DEP has found, CMP lacks *any* viable alternative route to complete the corridor, which means the absence of TRI to these public lands will preclude CMP from fixing its application through an amendment thereto. Because the BCD's decision invalidates an essential portion of CMP's application, the BEP will likely be left with no choice but to side with West Forks and NRCM on their appeal. Therefore, appellants have satisfied their burden in showing a sufficient likelihood of success on the merits for the Department to issue a stay.

Justice Murphy's ruling in *Black v. Cutko* also shifts the calculus for measuring irreparable injury in favor of appellants. As explained above, there is a general consensus that the construction of NECEC will cause substantial environmental harm, but the DEP has found that harm to be acceptable if—and only if—CMP is able to deliver on its promise of providing additional clean energy to the New England grid. Because CMP cannot complete the corridor as proposed as a result of the BCD decision, *any* additional injury inflicted on the environment is not only senseless but also irreparable because CMP has no means to mitigate the damage. The department's Order represents a Faustian bargain, trading the potential, yet speculative, environmental benefits CMP claims will result from the transmission of energy from Quebec to New England in the long-run for the short-term destruction of a precious resource and the economic harm caused to appellants. The logic that animates that deal evaporates if CMP can never deliver on its promises. Appellants, then, can satisfy this element of the test for whether the Department should issue a stay under these circumstances.

II. The DEP should issue a stay regardless of whether CMP appeals the BCD's decision.

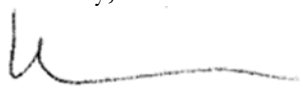
When the Department denied the initial requests for a stay by West Forks and NRCM by letter dated August 26, 2020 ("Denial Letter"), it explained that it found the lease upon which CMP relied to be sufficient to satisfy the TRI requirement "*absent a court ruling otherwise.*" Denial Letter at 6 (emphasis added). Now that a court has conclusively invalidated this lease, a factual predicate for the DEP's denial has disappeared, thereby obligating the Department to reconsider its original decision in light of the BCD's ruling. A stay, then, is proper, even if CMP opts to challenge Justice Murphy's decision on the validity of its public land lease.

While it is possible that CMP may exercise its right to appeal the BCD decision, the arguments set forth in NCRM's request for the stay and this letter should nevertheless be considered in deciding whether to exercise your authority to revoke or suspend CMP's license. *See* 38 M.R.S.A. § 342(11-B); 06-096 CMR ch. 2, § 25(A). CMP's reliance on the public land leases which the BCD found to be void, to complete the project is tenuous at best. It is in the interest of justice and the people of Maine to suspend CMP's license for the duration of any appeal given that it would be utterly senseless for the Department to authorize CMP to cause additional damage to the environment in the interim when there is a very real chance that CMP will *never* be able to complete the NECEC.

III. Conclusion

For the reasons set forth above and in light of the BCD's decision in *Black v. Cutko*, the DEP should grant NRCM's Request for a Stay and/or suspend or revoke CMP's license. CMP cannot complete the NECEC as permitted by the Department for want of Title, Right or Interest, thereby rendering *any* additional harm to the environment and the livelihood of Mainers who rely on the wilderness of Segment 1 to survive indefensible until the Board takes final action on the appeal pending before it.

Sincerely,



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