



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

August 20, 2021

James T. Kilbreth
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

Elizabeth A. Boepple
Murray Plumb & Murray
75 Pearl Street
PO Box 9785
Portland, ME 04104-5085

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.

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 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 Envtl. 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.