

November 4, 2021

***Via Email***

Commissioner Loyzim, Department of Environmental Protection, [melanie.loyzim@maine.gov](mailto:melanie.loyzim@maine.gov)  
Chair Draper, Board of Environmental Protection, c/o [ruth.a.burke@maine.gov](mailto:ruth.a.burke@maine.gov)  
Maine Department of Environmental Protection  
17 State House Station  
Augusta, ME 04333

RE: *Request for Stay of Department Order #L-27625-26-A-N/L-27625-TB-B-N/L-276252C-C-N/L-27625-VP-D-N/L-27625-IW-E-N and transfers, amendments and revisions thereto.*

Dear Commissioner Loyzim and Chair Draper:

On November 2, 2021, the people of Maine voted resoundingly in support of Question 1, “An Act To Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region” (the “Referendum”). On November 3, 2021, NECEC Transmission LLC and Avangrid Networks, Inc. (collectively, “CMP”) filed a lawsuit in Cumberland County Superior Court in which they acknowledged that the enactment of the Referendum will prevent completion and operation of the New England Clean Energy Connect (the “NECEC Project”). Despite this acknowledgment, and the unequivocal repudiation of the NECEC Project by the people of Maine, Thorn Dickinson, President of NECEC Transmission, has vowed that CMP will continue constructing the banned corridor.

Accordingly, the Natural Resources Council of Maine (“NRCM”) requests that the Department issue an immediate stay of all new clearing and construction pursuant to the Department’s May 11, 2020 Order (“Department Order”) and its subsequent related decisions transferring, amending and revising the State environmental permits (collectively the “Department Permitting Decisions”) for the NECEC Project. NRCM acknowledges that the Commissioner is currently conducting a suspension proceeding in light of the change in circumstance created by the Superior Court’s decision in *Black v. Cutko*, but because of CMP’s insistence on continuing to construct its destructive corridor in the face of the people of Maine overwhelmingly rejecting it, and the amount of time likely before the Commissioner may issue a decision in the suspension proceeding, NRCM makes this request for an immediate stay of the Department’s Order during the pendency of NRCM’s appeal to the Board of Environmental Protection (the “Board”). Because the NECEC Project cannot be built as a result of the Referendum, an immediate stay is necessary to protect the public from the irreparable harm that will result from CMP’s continued clearing and construction of the banned NECEC Project.

## 1. Brief Procedural History<sup>1</sup>

On June 10, 2020, NRCM filed an appeal to the Board arguing, among other things, that the 2014 Lease did not meet the submission requirements for documentation of title, right or interest (“TRI”) set forth in Chapter 2 Section 11(D) of the Department’s Rules, because of its facial noncompliance with Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598 to 598-B. The Board has not yet acted on NRCM’s appeal—filed more than 18 months ago—nor determined whether it will take original jurisdiction or appellate jurisdiction, or whether it will hold a hearing on any issue. Thus, as the Department itself has represented to the Superior Court in the appeal of these very permits, there is no final agency action with respect to the permits for the NECEC Project because of NRCM’s appeal pending before the Board.

While NRCM’s appeal inexplicably continues to sit idle—it has been pending for a year and a half—the passage of the Referendum requires the Department to immediately stay the Department’s Order.

## 2. The Department Should Issue A Stay

The Department—either through the Commissioner or the Board—“may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.” 5 M.R.S.A § 11004; Me. Op. Att’y Gen. No. 80-116 (July 15, 1980) (opining that the Board of Environmental Protection can issue a stay during pendency of appeal). The showing necessary to obtain a stay pending appeal is the same showing that must be made to obtain a preliminary or permanent injunction, and the “most critical” factors are likelihood of success on the merits and a demonstration that irreparable injury will be likely absent a stay. *Nextera Energy Resources LLC, et. al. v. Dept’t of Env’l Prot., et. al.*, Dkt. Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Sup. Ct., Jan. 11, 2021).

### a. Likelihood of Success on the Merits

NRCM is likely to succeed on the merits of its appeal to the Board, including on the issue that the Commissioner’s alternatives analysis over the “Preferred Alternative” crossing the public lots was in error, as well as that the Commissioner’s reliance on its “sister agency” with regard to the BPL lease of the public lots detailed at page 8 of the Order did not satisfy the requirements of Chapter 2, that the Department must independently conclude that any “lease or easement must be of sufficient duration and terms, as determined by the Department, to permit the proposed construction and reasonable use of the property, including reclamation, closure and post closure care, where required,” 06-096 CMR ch. 2 § 11(D)(2) both because the leases were unlawful and therefore void, and because they were of insufficient duration. Specifically—CMP acknowledges in its most recent lawsuit that in “early 2018” it “entered into a series of

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<sup>1</sup> This case involves a lengthy procedural history at the Department. Rather than including the entire procedural history, NRCM has identified those portions that are particularly relevant to the instant stay request.

transmission service agreements (“TSAs”) contractually obligating CMP to provide 1,200 MW of transmission service on the NECEC to HQUS and the EDCs **for a period of forty years.**” Yet, the public lands leases, on their face, were only for 25 years—and, were void under Maine’s Constitution in any case. Because the Board can and should conduct a hearing with respect to these and other issues, particularly in light of the mandate that it exercise original jurisdiction over projects of statewide significance—which NECEC plainly is—a stay to prevent CMP/NECEC from continuing to build before the Board can act is essential.

The citizen initiative adopted by the voters on November 2 makes the need for a stay more compelling and even mandatory. It includes, among other things, a ban on high impact transmission lines in the Upper Kennebec Region, so all of Segment 1 as described in the NECEC permit is now effectively barred. Similarly, absent the approval of 2/3 of the Legislature, NECEC may not cross the public lots as currently permitted. Although CMP may assert that the law has not yet become effective, it has already filed a lawsuit challenging the constitutionality of the enacted legislation. The legislation will take effect on or about January 3, 2022. It would be more than a dereliction of duty to allow continued destruction of the North Maine Woods for another two months until the law becomes effective.

Absent a final decision in CMP’s lawsuit by the Law Court to the contrary, the Department must apply the law. It is well-established law that a statute is presumed to be constitutional. *Bouchard v. Dep’t of Pub. Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92; *State v. Letalien*, 2009 ME 130, ¶ 15, 985 A.2d 4. A party challenging the constitutionality of a statute must convincingly demonstrate that it is unconstitutional and all doubts must be resolved in favor of the constitutionality of the statute. *Id.* Accordingly, the Department—and the Board when given the opportunity—must presume the statutes enacted by the passage of the Referendum to be constitutional unless and until CMP carries its heavy burden of proving otherwise in the Law Court. Until such an event, CMP and NECEC simply cannot be allowed to continue their destructive clearing and construction for a corridor barred by statute.

*b. Irreparable Injury*

NRCM, its members, and the public will suffer irreparable injury if CMP is allowed to continue to build a project that is barred by statute while NRCM’s appeal remains pending before the Board. The Department Order concedes, as it must that the “record shows the project as originally proposed would have had substantial impacts, particularly in the 53.1-mile portion of the corridor that extends from the Quebec border to The Forks, known as Segment 1.” Department Order at 1. The Department goes on to conclude that those impacts can be minimized “through a variety of mitigation measures” that rely on the alternatives analysis supporting a “stated project purpose is to deliver up to 1,200 MW of Clean Energy Generation from Quebec to the New England Control Area via a HVDC transmission line.” Department Order at 1, 58-61. Although NRCM strongly disagrees with the Department’s conclusions about the availability of alternatives to the impacts associated with the proposed route that forms the basis of the project purpose and the adequacy of its mitigation measures, what is clear now is that the project purpose can no longer be met. Thus, any impacts—even those minimized by the Department’s conditions—are not justified under the applicable environmental statutes. Further, where CMP has refused to commit to the Department’s condition requiring off-site

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mitigation unless and until the NECEC Project becomes operational, any further clearing and construction that occurs will cause harm that will never be fully mitigated. *See* Department Order at 2, 80-81. Consequently, because the NECEC Project cannot be completed or operated, and CMP will not complete all of the required mitigation, NRCM, its members, and the public will suffer irreparable injury from any and all continued clearing and construction.

*c. Harm to CMP*

By contrast, the only harm to CMP from an immediate stay of the permits is monetary. However, economic harm is insufficient to constitute irreparable injury. *See, e.g., Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980) (explaining that an irreparable injury is one for which there is no adequate remedy at law). Any monetary harm that CMP suffers from a stay of its permits is far outweighed by the irreparable harm NRCM, its members, and the public will suffer if CMP is allowed to continue to build a project with all its negative environmental consequences, and none of its offsetting mitigation, and that cannot be completed as a result of the passage of the Referendum.

*d. Public Interest*

The public interest in protecting the environment, balanced against allowing CMP to continue to build a project it cannot complete, weighs strongly in favor of a stay. As the Law Court has explained, “[t]here can be little doubt that the Legislature has enunciated a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine.” *Francis Small Heritage Tr., Inc. v. Town of Limington*, 2014 ME 102, ¶ 20, 98 A.3d 1012. The interest in requiring compliance with state laws authorizing only that development that meets the project purpose and environmental requirements of the Site Law and the Natural Resource Protection Act has thus been understood to be an issue of public interest, not just one limited to individual litigants. *See Brennan v. Saco Const., Inc.*, 381 A.2d 656, 662 (Me. 1978).

Thus, the discussion above with regard to irreparable injury to NRCM, its members and the public establishes that it is in the public interest to prevent harm to the environment, natural resources and scenic beauty by staying all clearing and construction unless and until CMP prevails on its legal challenge to the Referendum. CMP’s current inability to complete the NECEC Project because of the Referendum (but also because of the Law Court’s Order in *Black v. Cutko* prohibiting any and all clearing and construction on the public lands) nullifies any justification for the impacts that CMP’s continued construction is wreaking. Accordingly, the public interest weighs in favor of an immediate stay.

Sincerely,

*/s/ James T. Kilbreth*

James T. Kilbreth

cc: Service List