

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF:)
)
CENTRAL MAINE POWER COMPANY)
NEW ENGLAND CLEAN ENERGY CONNECT)
)
L-27625-26-A-N)
L-27625-TB-B-N)
L-27625-2C-C-N)
L-27625-VP-D-N)
L-27625-IW-E-N)
)
CENTRAL MAINE POWER COMPANY)
NEW ENGLAND CLEAN ENERGY CONNECT)
SITE LAW CERTIFICATION SLC-9)
)

**REQUEST FOR IMMEDIATE REVOCATION OR STAY OF AGENCY DECISION and
REPLY BRIEF IN SUSPENSION PROCEEDING**

West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrar and Carrie Carpenter, (“West Forks”) by and through their attorneys Murray Plumb & Murray, joined in this request by Friends of Boundary Mountain (“Friends”), Appalachian Mountain Club (“AMC”) and supported by The Nature Conservancy, all intervenors in the underlying permit process, request an immediate revocation or stay of the above referenced permits issued to Central Maine Power (“CMP”) for the New England Clean Energy Connect project (“NECEC”) by the Department of Environmental Protection (the “Order”). West Forks combines this request with a brief reply to

CMP/NECEC's Post-hearing brief in the License Suspension Proceeding initially instituted to determine whether to revoke or suspend the Order due to the changed circumstance related to the Superior Court's decision in Kennebec County Superior Court *Black v. Cutko*, NO. BCD-CV-2020-29 invalidating the public land lease.

CMP/NECEC's Unlawful and Blatant Disregard for the Rule of Law Regarding Vested Rights Should Not Be Rewarded By Allowing Construction Activities to Continue

The proceedings related to the NECEC are well documented and oft repeated in the myriad of filings since the Commissioner issued the Order. Without wasting the Department's time reciting the entire regulatory process, the following brief recitation is included to highlight the procedural posture most relevant to this request and to make clear that the Order is not in fact final while CMP/NECEC cuts the trees and clears the corridor with no plan for restoration.

On May 11, 2020, the Commissioner issued the Order. On June 5, 2020 West Forks timely filed an appeal of the Order to the Somerset County Superior Court pursuant to M.R.C.P. 80C. On June 8, 2020, NextEra Energy Resources, LLC timely filed an appeal of the Order to the Kennebec County Superior Court pursuant to M.R.C.P. 80C. On June 10, 2020 Natural Resources Council of Maine ("NRCM") timely filed an appeal of the Order to the Board of Environmental Protection ("BEP"). After consolidation of West Forks' and NextEra's appeals, on August 11, 2020, the Superior Court granted DEP's request to remove the appeals to the BEP where they were joined with NRCM's appeal before the BEP. Now fifteen months later, the BEP has yet to schedule the appeals for hearing. Throughout this time, CMP/NECEC has proceeded as if the Order is final and not subject to change. Contrary to CMP/NECEC's actions and stated legal opinion, the Order on licenses is emphatically not final. As the Department argued in its motion to remand to the BEP: "The Board is an independent appeals board that is part of the Maine Department of Environmental Protection. (citations omitted). The Board may

affirm, *amend or reverse* the Commissioner’s Licensing Decision, or *remand* the Licensing Decision to the Commissioner for further proceedings. Absent a remand to the Commissioner, the *Board’s order on appeal supersedes* the Commissioner’s Licensing Decision and constitutes the Department’s final decision on CMP’s NECEC Application. If the Board remands to the Commissioner for further proceedings, that too will eventually result in a Commissioner order and constitutes final agency decision on the application ” *Respondent’s Motion For Remand and Opposition To Petitioners’ Motion to Stay*, Docket No Ap-20-04, dated July 2, 2020, pg. 3-4 (emphasis added). And again, further in the Department’s motion: “Any Board order on the merits of the appeals will *then* constitute the Department’s final decision on CMP’s NECEC Applications and, as such, may be appealed to the Superior Court pursuant to 5 M.R.S. § 11001 *et seq.* and Rule 80C. Should the Board remand to the Commissioner for further proceedings, that process, too, will eventually result in a new final agency decision that may be appealed to the court.” *Id.* At pg. 6 (emphasis added).

In short, regardless of whether a stay issued at any time during the pendency of the appeals, or as a result of the referendum vote on Tuesday, November 2, 2021 in which the citizens of Maine definitively voted to prohibit projects of this size in the upper Kennebec Valley – at no time since the appeals were filed more than 18 months ago, has the Order been final. But that has not stopped or slowed CMP/NECEC’s cutting and clearing. *See West Forks Exhibit A.* It is past time for the Department to stop CMP/NECEC.

The relevant legal standard when a request for stay is made in the context of an appeal is stated in 5 M.R.S.A. § 11004 where the Department, “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 the adverse parties or the general public.” We support NRCM’s efforts to

accomplish a stay pursuant to this legal standard per their submission on Thursday, November 4, 2021, but the Parties to this request believe this standard is not necessarily applicable under circumstances created by CMP/NECEC's own refusal to accept that the Order, while not stayed, is also not final.

CMP/NECEC's refusal to accept the legal reality that the Order is not final is tantamount to misrepresentations of law and fact to a Court. In seeking a preliminary injunction in the Cumberland County Superior Court to prevent the citizen vote from becoming law, CMP/NECEC and its parent company Avangrid Networks, Inc., argued application of the vested rights doctrine: "NECEC possessed all necessary land rights and permits and began construction with the intent to complete it."¹ And in the accompanying Verified Complaint: "NECEC LLC and CMP have all state and federal permits and approvals needed for construction of the Project." At no point in CMP/NECEC's Motion and in its Verified Complaint does it acknowledge that the settled law regarding permit finality and vested rights rests on the principle that a recipient of a permit may rely *on all elements and conditions of that permit* such that it may act under the permit. Here, that is simply not true. The Order is still subject to amendment, reversal and remand. Moreover, the many permit conditions in the current permits and Order make this massive project less harmful to the environment *only if all* are actually implemented. There is no finality here since the outcome of the appeal to the Board could include findings that the permit conditions are not adequate, the alternative analysis was deficient, or that it should have exercised original jurisdiction over the application. Any of these outcomes illustrate exactly why the licenses issued under the Order are not final and why any construction begun or completed thereunder does not convey vested rights to CMP/NECEC. They did not act in good

¹ NECEC Transmission LLC and Avangrid Networks, LLC Motion for Preliminary Injunction with Incorporated Memorandum of Law, November 3, 2021, pg. 16.

faith but made business based decisions to proceed regardless of the ongoing appeals, the Suspension Proceeding or the overwhelming rejection of this project by the citizenry of Maine. Such bad behavior should no longer be rewarded and the Department should immediately revoke or at a minimum, stay the Order.

For all of the above reasons the Parties to this request strongly urge the Department to take immediate action to revoke or at least stay the Order without applying a legal standard inapplicable to actions being taken that clearly flaunt the general rule of law: permits are not final until all appeals are resolved.

West Forks Reply to CMP/NECEC's Post Hearing Brief

West Forks reiterates all arguments made in its Post Hearing Brief which are not rebutted by anything submitted by CMP/NECEC. In summary, CMP/NECEC has failed to provide any proof that it can or will protect the environment if it continues construction. It will not implement mitigation measures, like conservation of other lands, until the project is complete and online. The public lands lease is not valid and it is far from a certainty that it ever will be. CMP/NECEC has no viable alternate route around the public lands. The recent vote by the citizens of Maine overwhelmingly rejecting this project only further supports a change in circumstance that demands suspension if not revocation.

CONCLUSION

For all of the foregoing reasons, the Parties respectfully request that the Department or the Board Immediately Stay or Revoke the Order.

Respectfully Submitted,

West Forks Plantation, Town of Caratunk, Kennebec River
Anglers, Maine Guide Service LLC, Hawks Nest Lodge,
Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric
Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrar and
Carrie Carpenter

By their attorneys,

Murray Plumb & Murray

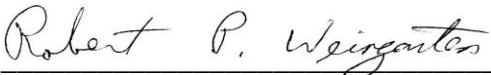
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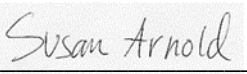
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Friends of Boundary Mountain

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By: 
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