

By Email and Overnight Mail

July 2, 2020

Maine Board of Environmental Protection
Attn: Mark Draper, Chair
c/o Ruth Ann Burke
17 State House Station
28 Tyson Drive
Augusta, ME 04333

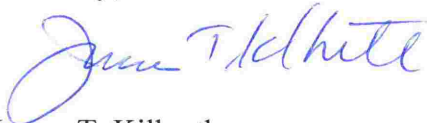
RE: *NRCM Application to Vacate or Stay Department Order #L-27625-26-A-N/L-27625-TB-B-N/L-276252C-C-N/L-27625-VP-D-N/L-27625-IW-E-N*

Board Chair Draper and Board Members:

Enclosed please find NRCM's reply to CMP's opposition to our request to vacate or stay the Order in the above-captioned matter. We believe that the jurisdictional issue is of major concern not only to this case but also to the Legislature, which carefully crafted 38 M.R.S. §341-D(2) to ensure Board review of all projects of statewide significance. Accordingly, we request that we be given an opportunity to address the Board about (i) the legislative history of 38 M.R.S. §341-D(2), and (ii) how we might structure a hearing to accommodate the need for the Board to act as the actual permitting authority while making use of the evidence already developed.

Thank you for your attention to this matter.

Sincerely,



James T. Kilbreth

cc: Service List (by email only)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY
Application for Site Location of Development
Act Permit and Natural Resources Protection
Act Permit for the New England Clean Energy
Connect (NECEC)

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

**REPLY IN SUPPORT OF
APPLICATION FOR STAY OF
AGENCY DECISION**

The Natural Resources Council of Maine (NRCM) submits this reply in support of its request that the Board of Environmental Protection (Board) vacate or stay the May 11, 2020 Order (Order) issued by the Department of Environmental Protection (Department or DEP) conditionally approving applications for state environmental permits for the New England Clean Energy Connect (NECEC or Corridor). The Legislature’s mandate is clear: if a project of statewide significance is involved, the Board must decide all related licensing applications. 38 M.R.S. §§ 341-D(2); 344(2-A). When CMP first submitted its application, the Commissioner in the first instance—on his own initiative and irrespective of any action or inaction by NRCM or any other party—should have referred it to the Board. And the Board, either on referral from the Commissioner or on its own initiative, should have asserted jurisdiction. This is not a “novel interpretation,” as CMP asserts. Rather, it is the plain mandate of the statute. The Board must

now assert jurisdiction and must vacate or, alternatively, stay the Order while it reviews CMP's applications anew.

ARGUMENT

I. **The Board Must Exercise Its Jurisdiction Over This Project of Statewide Significance and Vacate the Commissioner's Order**

CMP's argument that NRCM waived Board jurisdiction is a red herring. CMP focuses (at 6) on the language of Ch. 2 § 17(A) of the Department's Rules, which provides the mechanism by which a party may request that the Board assume jurisdiction. Although that is one route to Board jurisdiction, it is not the only one. 38 M.R.S. §§ 341-D(2). Paragraphs B and C of DEP Rules Ch. 2 § 17 govern when the Board must assert jurisdiction, and they place the onus on the Commissioner and on the Board to determine and assert that jurisdiction. These legislatively mandated jurisdictional requirements are not waivable by NRCM or any other party and can be raised at any time. *See, e.g., Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 20, 122 A.3d 947, 95 ("Just as a court may notice and act on issues of jurisdiction at any time, so may a court notice and act on issues relating to its authority at any time."); *Hearts With Haiti, Inc. v. Kendrick*, 856 F.3d 1, 3 (1st Cir. 2017) (affirming dismissal for lack of jurisdiction where defendant did not raise jurisdictional defect until after trial had concluded and appeal had been filed). The Legislature clearly intended the Board to assume jurisdiction over projects of statewide significance like the one now before it, and the Board should have done so from the outset. *See* 38 M.R.S. §§ 341-D(2). Simply put, the Commissioner does not have the authority to make a permitting decision on a project that meets the statutory definition of a project of statewide significance.

First, under Ch. 2 § 17(B), the Commissioner "shall" determine whether the Board should assume jurisdiction of an application and "shall" provide a recommendation to the Board for those

applications.¹ *See also* 38 M.R.S. § 344(2-A(A)). This is a jurisdictional requirement imposed on the Commissioner—not on any party—by statute and the Department’s own rules, yet there is no evidence that the former Commissioner ever made this mandatory threshold determination. Where, as here, the Corridor clearly meets at least 3 of the 4 criteria identified in Ch. 2 § 17(C) and 38 M.R.S. § 341-D(2), the Commissioner did not have jurisdiction to review CMP’s license applications and erred by failing to recommend that the Board assume jurisdiction over this project of statewide significance. The Commissioner compounded this error by failing to recommend that the Board assume jurisdiction during the pendency of CMP’s applications. *See* 38 M.R.S. § 344(2-A) (“If at any subsequent time during the review of an application the commissioner decides that the application falls under section 341-D, subsection 2, the commissioner **shall request** that the board assume jurisdiction of the application.”).

Second, under Ch. 2 § 17(C), the Board “shall assume jurisdiction over and decide each license application” that represents a project of statewide significance. CMP’s claim (at 5, n. 3) that the Corridor is not a project of statewide significance is preposterous. If this is not a project of statewide significance, what is? CMP’s read of the Department Rules and related documents, including the BEP Information Sheet re: Guidance on Requests for Board Jurisdiction Over an Application (Attachment II to CMP’s Opposition, hereinafter “Jurisdiction Guidance Sheet”), defies logic. Consistent with Ch. 2 §17(C) and 38 M.R.S. § 341-D(2), the Jurisdiction Guidance Sheet states that Maine “law *requires* that the Board decide each application for approval of

¹ As outlined in NRCM’s stay application, a project is of statewide significance if it meets at least 3 of the 4 statutorily defined criteria:

1. Will have an environmental or economic impact in more than one municipality, territory or county;
2. Involves an activity not previously permitted or licensed in the State;
3. Is likely to come under significant public scrutiny; and
4. Is located in more than one municipality, territory or county.

38 M.R.S. § 341-D(2); *accord* 06-96 CMR Ch. 2 § 17(C).

permits and licenses” that relate to a project of statewide significance (emphasis added). The Board may not have to affirmatively decide whether every application relates to a project of statewide significance, but it does have an affirmative duty to correctly identify those projects (like the Corridor) that rise to that level, and take jurisdiction accordingly. CMP’s interpretation of this framework would render it meaningless. If the Board fails to identify projects of statewide significance, then it likewise fails to exercise its legal duty to decide applications related to those projects. This cannot be what Maine’s Legislature intended when it vested jurisdiction over projects of statewide significance in the Board. *See* 38 M.R.S. §§ 341-D(2); 06-96 CMR. Ch. 2 § 17(C).

The Legislature spoke clearly: The Commissioner *must* refer matters of statewide significance to the Board and, even if the Commissioner fails to do so, the Board *must* assert original jurisdiction over and decide applications relating to those matters. *See* 38 M.R.S. §§ 341-D(2); 344(2-A); 06-96 CMR. Ch. 2 § 17(C). The Corridor is a project of statewide significance. The Board is therefore the only entity with jurisdiction to hold a public hearing and complete review of Corridor compliance with NRPA and the Site Law.²

II. The Board Is Authorized to Stay the Department’s Order and Should Do So

CMP argues (at 1) that the Board cannot stay the Order because Department rules provide that “[t]he filing of an appeal to the Board does not stay the license decision.” DEP Reg. Ch. 2 § 24A. This sweeping interpretation is overbroad and unsupported by the text or common sense. This provision stands for the proposition that an appeal to the Board does not automatically stay the license decision. Nowhere does it say that the Board lacks the authority to institute a stay. As

² NRCM recognizes that a substantial record exists that can and should be utilized as part of the Board process. But the scope of the required Board proceedings is a separate question from whether the Board must conduct these proceedings.

an initial matter, the Board is part of the Department. 38 M.R.S. § 341-A. The Commissioner, on behalf of the Department, granted the Order, and the Board, as part of the Department, can stay it. Second, CMP's reading would render the Department's review and appeal process nonsensical. The Board's stated purpose is to "provide informed, independent and timely decisions on the interpretation, administration, and enforcement of the laws relating to environmental protection and to provide for credible, fair, and responsible public participation in Department decisions," and one of the ways it does this is by rendering "decisions on appeals of the commissioner's licensing actions." 38 M.R.S. § 341-B. Where, as here, the Board has appellate jurisdiction over the Commissioner's licensing actions, the power to stay any such action is inherent in the Board's authority.

CMP's additional arguments against a stay are similarly unsupported. As outlined in greater detail in NRCM's stay application, NRCM evidenced that it will be irreparably injured if the Board does not stay the Order, that it has a strong likelihood of success on the merits, and that a stay will not substantially harm CMP or the general public.

Taking each of CMP's arguments in turn, CMP first contends that NRCM failed to show irreparable injury because the Department determined that the Corridor will not unreasonably impact the land at issue. The Department was wrong, and that is precisely why NRCM is appealing. The deleterious environmental effects of the Corridor will irreparably injure NRCM and its members, many of whom earn their living as guides in the affected area or use the area for recreational purposes. CMP's flippant contention (at 10) that "any vegetation cut will regrow" reveals its lack of understanding of the true harm of this project. NRCM is not objecting to minor clearing of vegetation that will simply regrow in short order. The Corridor cuts a swath through Maine's North Woods with devastating impacts to cold water fisheries and unfragmented forest

habitat that sustain a significant portion of the economy of the area. The Corridor's cascading negative effects are enumerated in greater detail in NRCM's appeal, which lays bare the irreparable injury that will result if the Board does not stay the Order.

CMP next argues that NRCM failed to show that it has a strong likelihood of success on the merits. As CMP admits (at 11), the Board is not bound by the Commissioner's findings of fact or conclusions of law, and there is a strong likelihood that the Board will not agree with the Commissioner's determinations, which are based on numerous errors of fact and law. Moreover, for the reasons detailed above, the Commissioner did not have authority to issue the Order in the first place, and the Board must assume jurisdiction and review CMP's applications *de novo*. For these and the reasons stated in NRCM's stay application, NRCM is likely to succeed on the merits.

Finally, CMP admits (at 9) that it cannot begin construction because it has yet to obtain multiple necessary permits. This admission makes clear that CMP will not be harmed by a stay, and its efforts to argue otherwise are unpersuasive. The Order is just one of the many permits necessary for CMP to proceed, and CMP does not—because it cannot—contend that it will obtain all required approvals prior to the conclusion of this appeal. CMP will not be harmed by a stay of the Order.

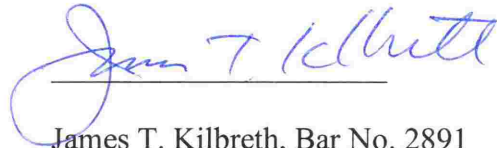
CMP's arguments (at 14) that a stay will harm the general public similarly fail. As NRCM will show before the Board, the Corridor will not result in the climate benefits that CMP claims. It is particularly galling for CMP, after resisting any discussion of climate change during the proceedings, to seek now to rely on climate change as an argument for denying a stay. Moreover, it defies logic to think that staying a license for a hotly contested transmission line that will forever scar Maine's landscape while bringing power to Massachusetts—not Maine—residents will harm the general public. The opposite is true; staying the Order will benefit Maine residents, many of

whom are strongly opposed to the Corridor, as evidenced by the tens of thousands of Mainers who signed petitions in support of a citizen's initiative that will declare the Corridor against the public interest. A Superior Court judge recently rebuffed the latest attempt by CMP (through its parent company, Avangrid Networks, Inc.) to mute Mainers opposed to this project by declaring that the initiative—which, like NRCM here, has a strong likelihood of success—must proceed to a vote in November. *Avangrid Networks, Inc., et al. v. Dunlap, et al.*, No. CV-2-206 (Me. Sup. Ct. Cum. Cty. June 29, 2020). CMP cannot therefore seriously contend that a stay will harm the public.

CONCLUSION

For the foregoing reasons, NRCM respectfully requests that the Board vacate or, in the alternative, stay the Order until the full Board completes its review.

Dated at Portland, Maine
this 2nd day of July 2020



James T. Kilbreth, Bar No. 2891
David M. Kallin, Bar No. 4558
Elizabeth C. Mooney, Bar No. 6438
DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
Tel: (207) 772-1941
jkilbreth@dwmlaw.com
dkallin@dwmlaw.com
emooney@dwmlaw.com

From: [Christopher M. Hunter](#)
To: [Burke, Ruth A](#); [Bertocci, Cynthia S](#); [Reid, Jerry](#); [Landry, Andrew](#); ["Anthony Buxton"](#); ["Ashli Coleman"](#); [Hobbins, Barry](#); [Hinkel, Bill](#); ["Bob Haynes"](#); [Stratton, Robert D](#); ["Brian Murphy"](#); ["Carrie Carpenter"](#); ["Cathy Johnson"](#); ["City of Lewiston"](#); ["David Publicover"](#); ["Ed Buzzell"](#); ["Elizabeth Boepple, Esq."](#); ["Emily Green"](#); [Emily T. Howe](#); ["Eric Sherman"](#); ["Gerry Mirabile"](#); ["Gerry Petrucelli"](#); ["International Brotherhood of Electrical Workers"](#); [DEP, NECEC](#); ["Jay Clement"](#); ["Jeffrey Reardon"](#); ["Jeffrey Talbert"](#); [Joanna B. Tourangeau](#); ["Kathy Barkley"](#); ["Kennebec River Angler"](#); ["Kim Lyman"](#); [Puryear, Kristen](#); [Parker, Lauren](#); ["Maine Guide Service"](#); ["Maine State Chamber of Commerce"](#); ["Mandy Farrar"](#); ["Mark Goodwin"](#); ["Matt Wagner"](#); [Rideout, Megan M](#); [Melanie Sturm](#); ["Melissa Pauley"](#); ["Mike Pilsbury"](#); ["Nick Bennett"](#); ["Nick Leadley"](#); [Livesay, Nick](#); ["Noah Hale"](#); ["NRCM"](#); [Bensinger, Peggy](#); ["Peter Dostie"](#); ["Phelps Turner"](#); ["Rob Wood"](#); ["Robert Borowski"](#); ["Robert Weingarten"](#); ["Sean Mahoney"](#); ["Steven Zuretti"](#); [Miller, Susanne](#); ["Taylor Walker"](#); ["Tony DiBlasi"](#); ["Town of Caratunk"](#); ["Trout Unlimited"](#); ["Wagner Forest Management"](#); ["Western Maine Mountains"](#); ["Matt Manahan"](#); ["Lisa A. Gilbreath"](#); ["shanna@lametrochamber.com"](#)
Cc: [James T. Kilbreth](#); [Elizabeth C. Mooney](#); [David M. Kallin](#)
Subject: Natural Resources Council of Maine's Reply in Support of Application for Stay of Agency Decision
Date: Thursday, July 2, 2020 12:18:54 PM
Attachments: [image001.jpg](#)
[2020-07-02 Cover letter to Maine Board of Environmental Protection.pdf](#)
[2020-07-02 NRCM Reply in Support of Application for Stay of Agency Decision.PDF](#)

EXTERNAL: This email originated from outside of the State of Maine Mail System. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Good Afternoon,

Attached please find a copy of the cover letter and the Natural Resources Council of Maine's Reply in Support of Application for Stay of Agency Decision that will be sent overnight FedEx to the Maine Board of Environmental Protection. Should you have any questions and concerns, please do not hesitate to contact our office.

Thank you,

Christopher M. Hunter
Legal Assistant

207.771.9215 Direct
CHunter@dwmlaw.com

84 Marginal Way, Suite 600, Portland, ME 04101-2480
800.727.1941 | 207.772.3627 Fax | dwmlaw.com

[DrummondWoodsum](#)



The information transmitted herein is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Unintended transmission shall not constitute waiver of any privilege, including, without limitation, the attorney-client privilege if applicable. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the e-mail and any attachments from any computer.