



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



GERALD D. REID
COMMISSIONER

August 26, 2020

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Dear Ms. Boepple and Mr. Kilbreth:

This letter serves as my decision on your clients' pending requests for a stay of the May 11, 2020, Order conditionally approving the application of Central Maine Power (CMP) to construct the New England Clean Energy Connect project (NECEC Order).

PROCEDURAL BACKGROUND

On June 5, 2020, Intervenor West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawkes Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Mike Pilsbury, Matt Wagner, Mandy Farrar, and Carrie Carpenter (collectively West Forks) filed a motion requesting that the Commissioner stay the NECEC Order. West Forks subsequently filed supplements to its motion on June 15, 2020, and June 25, 2020. The following intervenors and intervenor groups filed supporting, opposing, and neutral responses to the West Forks Motion: Old Canada Road, Friends of Boundary Mountains, Industrial Energy Consumer Group, the Natural Resources Council of Maine (NRCM), Wagner Forest, and Western Maine Mountains & Rivers Corp. CMP filed a response in opposition to the West Forks Motion.

NRCM filed a separate application for a stay of the NECEC Order with the Board of Environmental Protection (Board) on June 10, 2020 (NRCM Motion) in conjunction with its appeal to the Board of the Commissioner-issued NECEC Order. The following intervenors and intervenor groups filed supporting and opposing responses to the NRCM Motion: Friends of

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

Boundary Mountains, Industrial Energy Consumer Group, AMC, Trout Unlimited, and Western Maine Mountains & Rivers. CMP filed a response in opposition to the NRCM Motion.¹

On July 16, 2020, Board Chair Mark Draper referred the NRCM Motion to the Commissioner to allow for a single, consolidated Departmental decision with respect to both the West Forks and NRCM Motions. NRCM objected to Chair Draper's decision and filed an appeal to the full Board. Chair Draper ruled that such a decision is not appealable to the full Board.

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. The filing of an appeal does not operate to stay a permit issued by the Department. Petitioners seeking a stay (here West Forks and NRCM) bear the burden of demonstrating that: (1) the failure to obtain a stay will result in irreparable harm to the petitioners, (2) there is a strong likelihood of success on the merits on the petitioners' appeals, and (3) the issuance of a stay will result in no substantial harm to adverse parties or the general public. Petitioners must satisfy all three parts of this test to obtain a stay. Importantly, the burden of demonstrating that the criteria are met rests with the petitioners.

ARGUMENTS

In support of its stay request, West Forks argues that several appeals were likely to be filed and any one of them could result in an ultimate denial of the permit application, that a citizen referendum could negate the Maine Public Utilities Commission's (PUC) approval of the project, and that the project will cause irreparable harm through the destruction of "pristine" forests and the disruption of wildlife corridors. With regard to the likelihood of success on the merits of their appeal, West Forks argues that the evidence in the record does not support the Commissioner's decision on the impacts of forest fragmentation and impacts to scenic resources, and that the conditions on the permit requiring the conservation of 40,000 acres of land are inadequate. West Forks' first supplement to its motion adds discussion of the challenges to the Commissioner's factfinding in the NRCM Board appeal and NextEra's Superior Court appeal. In its second supplemental filing, West Forks argues that a lease CMP relies upon to show title, right, or interest (TRI) in the land proposed for development is legally defective – an issue NRCM raises in its Board appeal. West Forks also states that a stay of the NECEC Order would not cause substantial harm to CMP as it has not yet received its federal approvals for the project and, in any case, an additional delay to begin construction would not cause substantial harm. Finally, West Forks asserts that a stay would cause no harm to the general public; rather, it would benefit the public if a stay were in place until the appeals are resolved and the referendum decided.

¹ West Forks filed an appeal of the NECEC Order in Somerset County Superior Court, Docket No. SOM-AP-20-04. NextEra Energy Resources, LLC (NextEra) also filed an appeal of the NECEC Order in Kennebec County Superior Court, Docket No. KEN-AP-20-27. NRCM filed an administrative appeal of the NECEC Order before the Board. By a combined order dated August 11, 2020, the Superior Court consolidated and remanded the West Forks and NextEra judicial appeals to the Board for consideration with NRCM's pending administrative appeal.

NRCM's Motion focuses primarily on the argument in its appeal that the Board should have decided this permit application on the basis that the NECEC project meets the definition of a project of statewide significance. NRCM also argues that it is likely to succeed on its claims that the Commissioner insufficiently addressed impacts of the project and that CMP's lease of two public reserve lots lacks requisite approval. NRCM contends there will be irreparable harm if the stay is not granted, citing as support testimony it provided at the hearing about the significance of the forest and aquatic habitat that will be affected, and the impacts to its members who are outdoor guides in the area. NRCM also argues that the initiation of construction would limit its ability to address potential alternatives to the proposed project during the appeal. On the question of harm to CMP, other parties, or the public if a stay is granted, NRCM states that no harm will ensue because CMP has not obtained federal approvals and a state-wide vote on whether the PUC approval should be reversed is scheduled for November 2020.

CMP argues that West Forks has failed to meet the high bar for the issuance of a stay. CMP states that vegetation that will be cut in the construction of the transmission line would grow back if the permits are ultimately vacated. CMP further argues that the harm alleged by West Forks involves impacts to existing recreational uses, which was a topic considered during the licensing proceeding, with the Commissioner finding no unreasonable harm to those uses resulting from the NECEC project. On the likelihood of success on the merits of the West Forks appeal, CMP contends that the evidence in the record, and the analysis and conclusions in the NECEC Order, demonstrate that there will be no irreparable harm in the form of forest fragmentation and visual impacts.

In response to both the West Forks and NRCM Motions, CMP states that a stay would harm CMP because construction must begin well before any appeals are resolved in the Maine Law Court in order to meet a required in-service date. CMP contends that such a delay would risk possible cancellation of the project pursuant to its contractual in-service obligations, and a cancellation would result in harm to the general public with the loss of economic benefits of the NECEC project.

DISCUSSION

Petitioners have not carried their burden of satisfying any of the three parts of the standard for granting a stay, each of which is independently required.

I. Irreparable Harm to Petitioners

There is a contradiction at the heart of the Petitioners' arguments that undercuts their stay request. On the one hand they argue that a stay is essential to forestall the project's environmental impacts, and on the other they argue a stay will not harm CMP because construction cannot begin until two additional federal permits have been issued. Petitioners cannot have it both ways: either a stay is urgently needed or it will have no immediate, real-world impact, but both things cannot be true.² The Petitioners have provided no legal analysis of what, if any, construction CMP can perform before it receives its federal permits, and no factual analysis of whether and how any such construction would actually cause them harm. Without satisfactorily answering these questions, Petitioners did not carry their burden of showing irreparable harm.

The Petitioners' underlying claims of irreparable harm are also unpersuasive. They assert that the cutting of trees and other vegetation in a pristine and significant forest will harm their economic and recreational interests as users of the area. The evidence in the record supports a finding that the project would pass through an ecologically significant forest, but contradicts the claim that this forest is "pristine." The evidence shows that the project area is largely within a commercial forest that is harvested periodically and rather intensely. My observations from a visit to several locations within the proposed project site are consistent with the evidence presented. Segment 1 of the corridor (that segment with no pre-existing transmission line) would run through an area that has been harvested significantly and contains a patchwork of clearcuts, both fresh and in various stages of regeneration. It is remote, but certainly not pristine. The question is whether Petitioners would suffer irreparable harm if clearing of the corridor in this area were to begin while an appeal is pending.

CMP argues that the area cleared would regenerate as it does when it is commercially harvested, and therefore, even if the appeals were successful, any harm to Petitioners would not be irreparable. This theory, by itself, is not a full answer to the Petitioners' claim of harm. The cutting of trees and clearing of vegetation during an appeal could very well cause irreparable harm depending on the circumstances, because such activity will have immediate effects where it takes place, and those effects cannot quickly be reversed. But Petitioners have failed to explain how clearing that occurs through commercial forestland and in compliance with the numerous conditions set forth in the NECEC Order – many of which are designed to reduce or eliminate

² The NECEC Order approves both a Site Location of Development Act permit and a Natural Resources Protection Act permit. Both permits require, in Standard Conditions C and B respectively, as follows: "The applicant shall secure and comply with all applicable federal, state, and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation, as appropriate." When Petitioners filed their stay requests, both a Presidential Permit and a permit from the U.S. Army Corps of Engineers were still required. The Army Corps of Engineers issued an initial proffered permit while the stay requests were pending. A Presidential Permit has not yet been issued.

the environmental and aesthetic impacts of concern to Petitioners – would cause them any concrete and specific injury. Their argument amounts to the conclusory assertion that any such clearing or construction activity would inherently cause them irreparable harm. That is not enough to justify the issuance of a stay.

II. Likelihood of success on the merits of the Petitioners' appeals

Both Petitioners have likewise failed to show a strong likelihood of success on the merits of their appeals. As to the significant portions of West Forks' and NRCM's appeals that are challenges to the factual findings made in the NECEC Order, I find that the likelihood of success with respect to those arguments is low. West Forks and NRCM challenge the findings on the practicability of the underground option and alternative routes, the impacts to brook trout habitat and forest fragmentation, and the conservation land. Petitioners made these same arguments during the processing of the application, and the evidence of potential harm to the environment received great scrutiny. The terms and conditions of the NECEC Order are supported by extensive evidence in the record, and are the product of thorough analysis by the Department's professional staff. The order's factual findings are therefore likely to be upheld on appeal.

Petitioners' argument that a November 2020 referendum vote might effectively strip the project of a required PUC approval is not relevant to the likelihood of success on the merits of the two appeals of the Commissioner's NECEC Order, and consequently to these stay requests. In any event, I take notice of a recent Maine Law Court decision addressing whether the question is within the citizens' referendum authority, and the Secretary of State's response, which together make clear the question will not be appearing on the ballot.

NRCM's Motion also argues that it has a strong likelihood of success on the merits of its claim that the Board was required to assume original jurisdiction pursuant to Chapter 2, §17 of its regulations, and 38 M.R.S. §§ 341-D(2) and 344(2-A), and that the NECEC Order is therefore invalid. The record reflects that neither NRCM nor any other party requested that the Board assume jurisdiction of the permit applications during the 20-day period for filing such a request set forth in Ch. 2, §17(A). Similarly, no party ever attempted to raise this issue in the two and a half years the applications were pending. In a proceeding where neither the Commissioner nor any party requests Board jurisdiction, the Board has discretion as to whether to assume jurisdiction, but is not required to do so. *See* 38 M.R.S. § 341-D(2) ("The board may vote to assume jurisdiction of an application if it finds that at least 3 of the 4 criteria of this subsection are met."); Chapter 2, §17(B) ("The board may assume jurisdiction over any application on its own initiative if it finds that at least 3 of the 4 criteria in section 17(C) are met."). In any event, all appeals of the NECEC Order are now before the Board, *see* fn. 1 above, and in its review of the NECEC Order the Board "is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify, or reverse findings of fact or conclusions of law established by the commissioner." 38 M.R.S. § 341-D(4)(A). Even if NRCM could show that the Board was required to assume jurisdiction over the application at the outset, which they cannot, it is difficult to see how the Board's current involvement would not render that harmless error. Accordingly, I find that there is not a strong likelihood of reversal of the NECEC approval on the basis of this argument.

NRCM also makes the argument, echoed by West Forks, that CMP failed to show adequate TRI over two lots leased from the Maine Bureau of Public Lands, and that this argument has a strong likelihood of success. NRCM contends that the lease relied on was void because it was issued by the Bureau of Public Lands in violation of statutory and Constitutional requirements. NRCM challenged the validity of the lease in the hearing record, and as I understand it is now separately challenging an amended and restated version of the lease in litigation that is pending against the Bureau of Public Lands in Kennebec County Superior Court, Docket No. CV-2020-94. If NRCM's argument indeed has merit, it presumably could pursue judicial remedies in its pending litigation to enjoin CMP's reliance on the lease. It is, however, outside the purview of this Department to determine the merits of those claims. Courts have recognized that the Department has discretion in making its determinations of TRI, and the Department's determination that a lease that on its face gives the lessee the right to construct the proposed project, absent a court ruling otherwise, is likely to be upheld. *See* Chapter 2, §11(D) (“[A]n applicant shall demonstrate to the Department’s satisfaction sufficient title, right or interest in all of the property proposed for development or use.”). Accordingly, I find that there is not a strong likelihood of success on the merits of this TRI argument.

Overall, I find that the Petitioners have not demonstrated a strong likelihood of success on the merits of their respective arguments and appeals.

III. Harm to adverse parties or the general public

The parties make competing claims of harm to their interests and the general public depending on whether a stay is granted or denied. As noted above, Petitioners' failure to analyze whether and to what extent construction activities may begin before required federal permits have been issued makes it difficult to assess these claims. Putting that aside, and noting that full analysis of this issue is not necessary in light of my conclusions regarding irreparable harm and likelihood of success on the merits, I find that these considerations do not, on balance, weigh in favor of a stay of the NECEC Order.

CONCLUSION

For all the reasons set forth above, Petitioners have not made the showings necessary to justify a stay of the NECEC Order. Petitioners have failed to establish a strong likelihood of success on the merits of their respective appeals, and this criterion alone warrants denial of their stay requests. The grounds for this denial are bolstered when all three of the stay criteria, as discussed above, are considered and weighed together. Accordingly, the stay requests of the Petitioners West Forks and NRCM are denied.

Sincerely,



Gerald D. Reid
Commissioner

cc: Cynthia Bertocci, Executive Analyst BEP

Peggy Bensinger, Asst. Attorney General