

By Email and Overnight Mail

September 25, 2020

Mark C. Draper, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: NRCM's Appeal of Commissioner Reid's Stay Decision

Dear Chair Draper:

Enclosed please find the Natural Resources Council of Maine's ("NRCM") appeal of Commissioner Reid's August 26, 2020 decision denying NRCM's request for a stay of permits relating to the New England Clean Energy Connect transmission line.

Please do not hesitate to contact me with any questions or concerns.

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

**APPEAL OF COMMISSIONER REID'S
AUGUST 26, 2020
DENIAL OF STAY REQUEST**

The Natural Resources Council of Maine (“NRCM”) hereby appeals Commissioner Reid’s denial of its request to vacate or stay the May 11, 2020 Order¹ conditionally approving the application of Central Maine Power Co. (“CMP”) to construct the New England Energy Connect project (“NECEC” or “Corridor”).² There exists a substantial question regarding whether the Commissioner had the authority to issue the Permit Order in the first place, and that Order at a minimum should be stayed while the Board addresses that question.³ If, as the relevant statutes

¹ NRCM will refer to the Commissioner’s May 11, 2020 Order as the “Permit Order” and his August 26, 2020 denial of NRCM’s stay request as the “Stay Order.”

² NRCM brings this appeal pursuant to 06-96 CMR. Ch. 2 § 24.

³ NRCM has already detailed why a stay is appropriate in its Application to the Board for a Stay of Agency Decision and supporting Reply, as well as its objection to Board Chair Draper’s decision to refer this request to Commissioner Reid. Rather than submitting another memorandum, NRCM instead incorporates its Application and Reply herein by reference and uses this appeal to address points specifically raised in Commissioner Reid’s August 26, 2020 Stay Order.

make clear, he did not, then the Permit Order is null and ought to be vacated or, at the very least, stayed during the pendency of proceedings before the Board.⁴

I. The Commissioner’s Order Is Invalid and Must Be Stayed Because Only the Board Has Jurisdiction to Decide Applications Involving Projects of Statewide Significance

In his order denying NRCM’s stay request, the Commissioner gives sleight of hand to NRCM’s argument that the Board alone has jurisdiction over projects of statewide significance. The Commissioner writes that, “[i]n 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.” Stay Order, 5. In support of this proposition, the Commissioner cites 38 M.R.S. § 341-D(2), which states that the Board “may vote to assume jurisdiction” over projects of statewide significance.

The Commissioner ignores the use of “shall” elsewhere in the statute: “the board shall decide each application for approval of permits and licenses that in its judgment represents a project of statewide significance.” *Id.* The Legislature revised this statute to include this directive—“the board *shall* decide . . . project[s] of statewide significance—in 2011.⁵ The “may vote to assume jurisdiction” language cited by the Commissioner is a holdover from an earlier

⁴ NRCM recognizes that a substantial record exists and believes that record can and should be utilized as part of the Board process. In requesting that the Board assume jurisdiction over CMP’s permit applications, as the statute dictates it must, NRCM understands that the Board may review the record developed before the Commissioner in the course of conducting its own review and hearing process.

⁵ The language of 38 M.R.S. § 341-D(2) from April 7, 2010 to June 12, 2011 was:

Permit and license applications. Except as otherwise provided in this subsection, the board shall decide each application for approval of permits and licenses that in its judgment:

- A. Involves a policy, rule or law that the board has not previously interpreted;
- B. Involves important policy questions that the board has not resolved;
- C. Involves important policy questions or interpretations of a rule or law that require reexamination; or
- D. Has generated substantial public interest.

The board shall assume jurisdiction over applications referred to it under section 344, subsection 2-A, when it finds that the criteria of this subsection have been met.

The board may vote to assume jurisdiction of an application if it finds that one or more of the criteria in this subsection have been met.

version of the statute. *See id.* The Legislature has been very clear that, when used in laws enacted after December 1, 1989, the words “‘shall’ and ‘must’ are terms of equal weight that indicate a *mandatory* duty, action or requirement.” 1 M.R.S. 71(9-A) (emphasis added). Here, the Board’s mandatory duty is clear: the Board, not the Commissioner, *shall* assume jurisdiction over projects of statewide significance like the CMP Corridor.

Moreover, under the clear language of the statute, the onus is on the Commissioner himself—not on NRCM or any other party, as the Commissioner seems to imply—to refer projects of statewide significance to the Board. Pursuant to 38 M.R.S. § 344(2-A)(A), the “commissioner *shall* decide as expeditiously as possible if an application meets [the criteria for a project of statewide significance] and *shall* request that the board assume jurisdiction of that application” (emphasis added). It does not matter, as Commissioner Reid seems to argue (Stay Order, 5), how extensive the application review process was or how long it lasted because the burden remains on the Commissioner throughout the process to transfer projects of statewide significance to the Board. The statute is clear: “[i]f 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.” 38 M.R.S. § 344(2-A)(A) (emphasis added). Here, the Commissioner did not initially or during the course of the proceedings determine that the CMP Corridor—an enormous transmission line that will traverse the State affecting thousands of Mainers and acres—is a project of statewide significance. This failure constitutes clear error. Having failed to transfer the application as required, the Commissioner issued the Permit Order without jurisdiction and it must be vacated or, at the very least, stayed while the Court assesses this jurisdictional issue.⁶

⁶ Without a stay, this jurisdictional issue is not a “harmless error” as the Commissioner contends, Stay Order, 5, for all the reasons outlined in Section II, *infra*.

II. NRCM Has Demonstrated Irreparable Harm

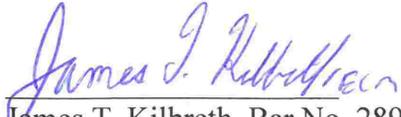
The Commissioner contends in the Stay Order that NRCM has not shown irreparable harm in part because CMP does not yet have all the permits it needs to begin construction. Stay Order, 4. Yet with every day that passes, CMP moves closer to obtaining those permits. Indeed, the Army Corps of Engineers recently announced that it expects to issue permits to CMP imminently. *See Exhibit A* (Army Corps Letter). There is no doubt that CMP will begin construction as soon as it has all necessary permits, and such construction, which includes clearing trees and other vegetation, building passageways for equipment, etc., will have irreparable harmful effects on the environment, local Mainers who live and work in the area, and on the recreational opportunities available on the affected lands.⁷ The Board must stay the Permit Order to prevent these harms. CMP should not be permitted to commence construction on a project of statewide significance that will cause irreparable harm to the land it traverses based on jurisdiction-less DEP permits.

CONCLUSION

For the foregoing reasons, NRCM respectfully requests that the Board reverse Commissioner Reid's Stay Order and vacate or, in the alternative, stay the Permit Order until the full Board completes its review of the matter.

⁷ NRCM has outlined these harms in detail in its Application to the Board and supporting papers, incorporated here by reference, and will not belabor the point by restating here arguments already before the Board.

Dated at Portland, Maine
this 25th day of September 2020



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DEPARTMENT OF THE ARMY
US ARMY CORPS OF ENGINEERS
NEW ENGLAND DISTRICT
696 VIRGINIA ROAD
CONCORD MA 01742-2751

EXHIBIT A

August 19, 2020

Regulatory Division
Corps File No. NAE-2017-01342

Chief Kirk E. Francis
Penobscot Indian Nation
12 Wabanaki Way
Indian Island, Maine 04468

Dear Chief Francis:

Thank you for your recent comments concerning the application by Central Maine Power Company for a Department of the Army permit to construct an electrical transmission line, known as the New England Clean Energy Connect (NECEC).

Your letter requests that the U.S. Army Corps of Engineers (Corps) prepare an Environmental Impact Statement (EIS) and you draw comparisons to other transmission line proposals in New England where an EIS was prepared. The two projects you reference in Vermont and New Hampshire were submitted in response to Massachusetts' Request for Proposals, but were ultimately not selected. For New Hampshire's Northern Pass project and Vermont's TDI project, the U.S. Department of Energy (DOE) determined under its independent authority that an EIS was the appropriate means of analyzing the effects of these project under the NEPA. The DOE is also reviewing the NECEC project under its authority to evaluate a Presidential Permit for the border crossing at Beattie Township.

The Corps of Engineers (Corps) conducts an individual review for each standard individual permit application. The regulated activities within the Corps' authority for the NECEC project are limited to impacts to waters of the U.S. and immediately surrounding upland areas within the transmission line corridors, at two of the eight stations, and at one Horizontal Directional Drill (HDD) termination station adjacent to the Kennebec River, totaling 1.9% of the project corridor.

The Corps has completed its environmental review for this project by preparing an Environmental Assessment (EA) and Finding of No Significant Impact. The Corps utilizes an EA to determine the need for an EIS in accordance with CEQ regulations and Corps' National Environmental Policy Act (NEPA) implementation procedures, 40 CFR 1508.9(a)(1) and 33 CFR Part 325 Appendix B ¶ 7(a). Based on an analysis of the environmental effects within the Corps' federal control and responsibility, the Corps has

determined the decision on this application is not a major federal action significantly affecting the quality of the human environment. Therefore, an EIS is not required.

The Corps has also completed its public interest review of the project, including all factors relevant to the proposal as required by 33 C.F.R. § 320.4(a). After weighing favorable and unfavorable effects, it has been determined the project is not contrary to the public interest. The Corps has also determined the proposed discharges comply with the 404(b)(1) guidelines, with inclusion of appropriate and practicable special conditions to minimize pollution or adverse effects to the affected ecosystem. The Corps also completed consultation with the USFWS, evaluating the project's potential impacts on threatened and endangered species and their designated critical habitat.

The Corps has completed its evaluation for this project and determined compliance with all applicable Executive Orders, statutes, and regulations. Accordingly, the Corps has determined that a Department of the Army permit should be issued. I have transmitted an initially proffered permit to the applicant with a specific set of special conditions. The applicant may accept these conditions by signing the initially proffered permit, or object to those conditions within 60 days. If the applicant accepts the permit conditions and returns to me, I plan to sign without delay, validating the authorization.

We appreciate your interest in the Corps Regulatory program. If you have any further questions concerning this matter, please contact Jay Clement at 207-623-8367 at our Augusta, Maine Project Office.

Sincerely,

ATILANO.JOHN.ANTHONY.II.1172226082

Digitally signed by
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Date: 2020.08.19 18:11:13 -04'00'

John A. Atilano II
Colonel, Corps of Engineers
District Engineer

Copies Furnished:
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Penobscot Nation
12 Wabanaki Way
Indian Island, ME 04468

Melissa Pauley, Policy Analyst DOE