STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
DOCKET NO. BCD-21-257

RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

**OPPOSITION TO APPELLEES/CROSS-APPELLANTS' MOTION TO LIFT AUTOMATIC STAY PENDING APPEAL**

Appellants/Cross-Appellees Central Maine Power Company ("CMP") and NECEC Transmission LLC (together "NECEC LLC") oppose Appellees/Cross-Appellants' ("Plaintiffs") Motion to Lift Automatic Stay Pending Appeal (the "Motion") concerning the Superior Court's August 10, 2021, judgment in these proceedings (the "Judgment").

The Court should deny this request for two primary reasons:

**The Superior Court's Judgment must be reversed or vacated**. The litigation concerns a non-exclusive lease of a small portion of two adjacent lots of public land found within Johnson Mountain Township and West Forks Plantation.[1]

[1] The Johnson Mountain Township and West Forks Plantation public lots trace their history back to the Commonwealth of Massachusetts. Massachusetts reserved the lots for beneficial and public uses, an obligation Maine inherited upon its formation as an independent state in 1820. *See Opinion of the Justices*, 308 A.2d 253, 254 (Me. 1973). Today, Maine Legislature has deemed the lots to be of "average quality, situation and value as to timber and minerals as to

As a threshold matter, Plaintiffs enjoy no property interest in the leased land, the public lots, any neighboring land, or even in the two municipalities where the leased land lies. The Superior Court accordingly erred when it ruled Plaintiffs had standing to challenge the Bureau's decision to grant NECEC LLC the leasehold interest at issue. Substantively, the Superior Court erred in numerous ways. The Superior Court erred when it ruled that decisions to grant leases under 12 M.R.S. § 1852 may be subject to legislative approval, a ruling at odds not only with the relevant legal authority but with decades of settled practice between the executive and legislative branches of Maine government. The Bureau never has sought legislative approval for a lease of public reserved lands in its decades of operation and the Legislature never has objected to that practice, despite being well aware of it. The Superior Court also erred when, applying no stated legal standard, it ruled the Bureau did not determine whether NECEC LLC's intended use of the lease "substantially altered" the uses of the land at issue. The infirmity of the Superior Court's ruling can be illustrated in numerous additional ways, many of which NECEC LLC discusses below, but the Court primarily may observe that, under the Judgment's reasoning, every single lease of public reserved land ever issued by the Bureau must be null and void. That such a significant outcome may obtain from the Superior Court's ruling, unsettling the

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other land in the township or plantation," 12 M.R.S. § 1858(1), and has authorized them to be leased to private parties for a wide variety of uses, *see* 12 M.R.S. § 1852.

property interests of hundreds of third-party lessees, alone merits maintaining a stay until the Court can give the Judgment due consideration.

**The automatic stay does not irreparably harm Plaintiffs**. Plaintiffs premise their claim of irreparable harm on NECEC LLC's alleged intent to begin "clearcutting" the land at issue to build the New England Clean Energy Connect project ("NECEC Project"). Motion at 5. Plaintiffs' argument is erroneous in several respects and marks the first time Plaintiffs ever have sought preliminary or immediate relief with respect to the leasehold interest. First, NECEC LLC has no right to "clearcut" the land at all but, instead, may engage only in limited vegetation removal on only a portion of the leased land—land, again, in which Plaintiffs hold no property interest. Second, even if the Court were to conclude the foregoing vegetation removal may cause Plaintiffs' some irreparable harm, the Court only need order NECEC LLC to refrain from engaging in that removal pending the appeal, rather than lifting the automatic stay and immediately terminating all of NECEC LLC's rights under the lease. As explained further below, enjoining the effectiveness of the entire lease may give rise to significant collateral consequences, including a wave of litigation challenging the Bureau's other existing leases, which will not serve the public interest.

## BACKGROUND

### A. The NECEC Project.

NECEC LLC has begun constructing the NECEC Project, a 145-mile electricity transmission line that will bring clean, hydro-generated energy from Quebec, Canada, into Maine and New England's energy grid. *See* Affidavit of Thorn C. Dickinson ("Dickinson Aff.") at ¶ 3. To date, the NECEC Project has received necessary permits and approvals from all relevant state and federal administrative agencies. *Id.* at ¶ 4.

Specifically:

- On May 3, 2019, the Maine Public Utilities Commission ("PUC") issued a Certificate of Public Convenience and Necessity ("CPCN") for the project, over the objections of Plaintiffs Natural Resources Council of Maine ("NRCM"), Ed Buzzell, and Robert Haynes (as Director of Old Canada Road National Scenic Byway), which decision the Law Court affirmed. *See NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117.

- On June 25, 2019, the Massachusetts Department of Public Utilities ("DPU") approved the long-term contracts for energy and transmission service over the NECEC Project, *see Petition of Nstar Elec. Co. d/b/a Eversource Energy for Approval by the Dep't of Pub. Utilities of A Long-Term Contract for Procurement of Clean Energy Generation*, No. 18-64, 2019 WL 2717778, at *77 (June 25, 2019), which decision the Massachusetts Supreme Judicial Court affirmed. *See Nextera Energy Res., LLC v. Dep't of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48 (2020).

- On January 8, 2020, the Land Use Planning Commission of the Department of Agriculture, Conservation & Forestry issued a Site Location of Development Law Certification, over the objections of Plaintiffs Edwin Buzzell, Old Canada Road, and NRCM. *See* Dept. of Agric., Conservation & Forestry, *In re Request of Maine Dept. of Envtl. Prot.*

*For Site Location of Development Law Certification Cent. Me. Power Co. New England Clean Energy Connect*, at 40-41.

- On May 11, 2020, the DEP issued a Site Location of Development Act permit, Natural Resources Protection Act permit, and Water Quality Certification (together the "DEP Permits"), over the objection of Plaintiffs NRCM, Buzzell, Towle, and Haynes. *See* Dept. of Envtl. Prot., *In re Cent. Me. Power Co. New England Clean Energy Connect*, Findings of Fact and Order ("DEP Order") at 1. Plaintiff NRCM appealed DEP's permitting decision and asked the Kennebec County Superior Court to stay the DEP permit pending that appeal, which request the Superior Court denied after finding Plaintiffs unlikely to succeed on the merits of their challenge. *See Nextera Energy Res., LLC v. Dept. of Envtl. Prot.*, KEN-AP-20-27, SOM-AP-20-04 at *10 (Me. Super. Ct., Kennebec Cty., Jan. 11, 2021).

- On November 6, 2020, the United States Army Corps of Engineers ("USACE") issued a permit for the NECEC Project under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. *See Sierra Club v. United States Army Corps of Eng'rs*, No. 2:20-CV-00396-LEW, 2020 WL 7389744, at *2 (D. Me. Dec. 16, 2020). This permit relied upon the Environmental Assessment and Finding of No Significant Impact ("EA/FONSI") the USACE had previously issued on July 7, 2020 for the NECEC Project, as supplemented on November 6, 2020. *Id.* Plaintiff NRCM's challenge to that USACE permit and EA/FONSI remains on-going in the United States District Court for the District of Maine, although the United States Court of Appeals for the First Circuit affirmed the District Court's denial of a preliminary injunction with respect to the Corps' issuance of the EA/FONSI, finding NRCM unlikely to succeed on the merits of its challenge. *See Sierra Club v. United States Army Corps of Eng'rs*, 997 F.3d 395, 405-406 (1st Cir. 2021).

- On January 14, 2021, the United States Department of Energy issued its own EA/FONSI for the NECEC Project as well as a Presidential Permit. *Id.* at 403. Plaintiff NRCM has added a challenge to that decision to its on-going challenge to the USACE permit.

The foregoing permits and approvals remain in full force and effect today. *See* Dickinson Aff. at ¶¶ 4-5.

**B. The Bureau's leasing decision.**

The Maine Legislature has authorized the Bureau to lease a variety of public lands to individuals and entities who seek to make productive use of that land. *See* 12 M.R.S. §§ 1814, 1838, and 1852 (authorizing leases of parks and historic properties, nonreserved public lands, and public reserved land for a variety of uses including electric power transmission facilities). In the decades following the Bureau's establishment in 1997, as a successor to the Bureau of Public Lands and previous agencies, the Legislature has not enacted legislation requiring the Bureau to follow any specific procedure before issuing leases of public reserved lands or to adopt any rules concerning its consideration of lease requests for such lands. *See* 12 M.R.S. §§ 1845-1859. The Legislature has not required the Bureau to administer an adjudicatory proceeding before making leasing decisions, nor required the Bureau even to give public notice of a lease request or decision. *Id.* In short, the Legislature has left the Bureau wide discretion with respect to how, whether, and on what terms to grant requests for leasehold interests in public reserved lands. This arrangement has proceeded unchallenged for decades.

In 2014, pursuant to its broad authority under 12 M.R.S. § 1852, the Bureau granted CMP a non-exclusive leasehold interest (the "2014 Lease") in 32.39 acres of public reserved land, approximately .9 miles long by 300 feet wide, located within two

lots of public reserved lands in Johnson Mountain Township and West Forks Plantation, together totaling 1,241 acres and over which an existing transmission line already runs. Pursuant to 12 M.R.S. § 1853 ("Annual report dealing with public reserved lands"), the Bureau reported the lease to the Legislature's Committee on Agriculture, Conservation, and Forestry ("ACF Committee") in the Bureau's next annual report, issued in March 2016. *See* ARVII0158 (report).[2] At that time, Plaintiff Black served on the ACF Committee and received the Bureau's report. *See* https://ballotpedia.org/Russell_Black (last visited Sep. 2, 2021) (setting forth Plaintiff Black's previous committee assignments). The lease subsequently arose in the Bureau's public proceedings around the adoption of a land management plan for the surrounding region, which began in 2016 and in which Plaintiffs Grignon and Towle participated. *See* ARII0093, 129. CMP itself disclosed the lease at the commencement of the PUC's CPCN proceedings on September 27, 2017, in which proceedings Plaintiffs NRCM, Buzzell, and Haynes participated as parties. *See* Administrative Record Addendum ("Add.") at *31-32, 78. And CMP again disclosed the lease in the DEP permitting proceedings beginning on September 27, 2017, in which Plaintiffs NRCM, Buzzell, and Haynes also participated as parties. *See* DEP Order at 8-10. Notwithstanding these numerous disclosures to multiple of the Plaintiffs over the

[2] Because no appendix has been filed, NECEC LLC cites to materials in the Administrative Record before the Superior Court using the initials "AR" for Administrative Record, Roman numeral indicating the volume, and the following digits representing the page number within the specific volume.

course of several years, no Plaintiff took any steps to challenge the 2014 Lease until commencing this litigation on June 23, 2020.

The same day Plaintiffs initiated this lawsuit, the Bureau issued CMP an "Amended and Restated Transmission Line Lease" (the "2020 Lease"), which terminated the 2014 Lease and amended various terms governing the leasehold interest, including the rent amount, but which made no alteration to the physical scope of the leased land or to CMP's authorized uses of the land. *See* ARI0001-60. CMP assigned its interest in the 2020 Lease to NECEC LLC on January 4, 2021.

**C. The Superior Court proceedings**.

After the issuance of the 2020 Lease, Plaintiffs amended their initial complaint to add a challenge to that lease. Plaintiffs characterized their action against the Bureau and CMP as a traditional civil claim seeking declaratory and injunctive relief, while pleading a Rule 80C administrative appeal to the Bureau's decision to issue the 2020 Lease only as an "alternative" theory, with Plaintiffs expressly stating their view that Rule 80C and the APA did not govern their challenge. *See* First Amended Complaint ("FAC") at ¶ 80. At no point during the Superior Court proceedings did Plaintiffs request any preliminary relief with respect to the 2020 Lease, nor have Plaintiffs ever requested a stay of the Bureau's leasing decision pursuant to 5 M.R.S. § 11004.

The Bureau moved to dismiss Plaintiffs' civil claims and for the Court to characterize Plaintiffs' challenge as one governed exclusively by Rule 80C and the APA. CMP moved for the same relief, and also argued that, once properly

characterized as an APA challenge to the Bureau's final agency action, Plaintiffs' claim should be dismissed on the grounds Plaintiffs lack standing because they are not persons "aggrieved" by the agency's decision to grant the 2020 Lease. 5 M.R.S. § 11001(1) (APA standing requirement). Plaintiffs opposed both motions and, in doing so, asked the Superior Court to clarify that their claim should proceed only as a civil claim and not as an administrative appeal.

The Superior Court ruled Plaintiffs had standing without first resolving the threshold question whether the APA exclusively governed their challenge. *See* Order on Cent. Me. Power Co.'s Motion to Dismiss for Lack of Standing at 7-8 (Oct. 30, 2020). In highly unusual fashion, the Superior Court then ordered the Bureau to file its administrative record, explaining that it wished to review the administrative record in the course of determining whether the APA applied in the first place. *See* Order on Defendants' Motions to Dismiss Counts 1 and 2 at 1-2 (Dec. 21, 2020). Notwithstanding all parties' agreement that the Superior Court should treat Plaintiffs' challenge as *either* a civil claim *or* an administrative appeal, but not both at the same time, the Superior Court ultimately declined to dismiss Plaintiffs' civil claim but also proceeded to consider Plaintiffs' administrative appeal as live. *Id.* at 11. In short, the Superior Court proceeded to adjudicate the case both as a trial court and as an appellate court, over the parties' objections.

The Court then *sua sponte* ordered the parties to brief whether, under Article IX, section 23 of the Maine Constitution and subsequent implementing legislation, the

2020 Lease was subject to legislative approval under any circumstances. *See* Order for Briefing and on The Course of Future Proceedings at 1 (January 19, 2021). Consistent with its decades-long and unchallenged practice of issuing leases of public reserved lands without seeking legislative approval, the Bureau argued it had the authority to issue the 2020 Lease without seeking legislative approval. CMP argued the same. The Superior Court ultimately sided with Plaintiffs, holding that Article IX, section 23 required the Bureau to determine on a case specific basis whether the leased land might be "substantially altered" by CMP's proposed use of the land and, if so, to have submitted the lease to the Legislature for approval before granting it. *See* Order on the Application of Art. IX, § 23 of the Maine Constitution to the Bureau of Parks and Lands' Authority to Lease Public Reserved Lots at 15-16 (Mar. 17, 2021).

The Superior Court next considered whether the Bureau in fact decided the substantial alteration question, concluding the Bureau failed to do so, after first striking from the record a memorandum prepared by the Bureau to articulate in writing its basis for granting the 2014 and 2020 Leases. *See* Decision and Order (14 M.R.S.A. § 5953 & M.R. Civ. P. 80C) ("Judgment") at 11, 25-26. Accordingly, the Superior Court found the Bureau exceeded its authority in granting the 2020 Lease.[3] *Id.* at 25-26. Rather than remand the matter to the Bureau to fix its procedural error,

[3] The Superior Court also held the Bureau exceeded its authority when it issued the 2014 Lease, despite that lease having been terminated. *See* Judgment at 23-24. This decision was error as well, but Plaintiffs' motion does not argue they will suffer harm if this aspect of the Judgment remains stayed, so NECEC LLC does not address it further in this memorandum.

the Superior Court took the unprecedented step of simply reversing the Bureau's decision. *Id.* at 29. NECEC LLC is unaware of any reported Maine case where, absent a claim of bias, a Superior Court failed to remand an administrative decision to the relevant agency after finding a procedural defect in the agency's administration of the matter.

**D. Subsequent and on-going DEP proceedings.**

The day after the Superior Court issued the Judgment, Plaintiff NRCM wrote to DEP Commissioner Melanie Loyzim and Board of Environmental Protection Chair Mark Draper requesting an immediate stay of the DEP Permit. *See* Dickinson Aff. at ¶ 8, Ex. D. Plaintiff NRCM requested DEP halt the entire NECEC Project, not just the portion lying on the leased land. *Id.* In support of its request, Plaintiff NRCM argued that, as a result of the Judgment, NECEC LLC now lacks title, right, and interest ("TRI") in the full length of the NECEC Project. DEP denied the request, but has opened a new administrative proceeding to consider whether the permit should be suspended in light of the Judgment. *See id.* at ¶¶ 9-10, Exs. E and F. That proceeding has just commenced, with a September 13, 2021, deadline for petitions to intervene and a public hearing scheduled for October 19, 2021.

The Court should consider closely the relationship between the on-going DEP proceedings, the instant appeal, and Plaintiffs' motion to lift the automatic stay. The premise of Plaintiffs' argument before DEP is that NECEC LLC lacks TRI because of the Judgment; obtaining the immediate effectiveness of the Judgment through the

instant motion serves as a predicate to that argument.[4] Accordingly, the Court should consider the instant motion not as one that merely seeks to prevent NECEC LLC from building on the leased land, which forms a miniscule portion of the entire NECEC Project, but as one that effectively seeks to enjoin the construction of the NECEC Project in its entirety for the duration of this appeal. The Court should not accept Plaintiffs' invitation to so expand the scope of this litigation.

## ARGUMENT

The Court should deny the motion because Plaintiffs are not likely to succeed in defending the Judgment on appeal, have not shown irreparable harm, and because the harm to NECEC LLC and the public of lifting the automatic stay far outweighs any harm to Plaintiffs should the status quo be maintained. Plaintiffs' motion also does not serve the public interest as lifting the automatic stay will open the Bureau and numerous third parties to multiple lawsuits relating to other leases issued by the Bureau, which such leases must be void under the reasoning of the Judgment.

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[4] Plaintiffs' purported alternative request that the Court "lift the automatic stay until the DEP makes a determination as to whether CMP's permits are still valid," Motion at 9 n.3, is disingenuous and a clear effort to whipsaw NECEC LLC between two forums. The premise of Plaintiffs' current position before DEP rests on the immediate effectiveness of the Judgment. Giving that Judgment effect "until" DEP determines whether to suspend the permit will have the same effect before DEP of giving the Judgment effect for the duration of the appeal.

### A. The Judgment suffers from numerous defects and is likely to be reversed or vacated.

The Superior Court's Judgment and prior interlocutory orders erred in numerous respects, both substantive and procedural, and must be reversed or vacated accordingly. Specifically, and among other points:

*First*, the Superior Court erred when it denied NECEC LLC and the Bureau's respective motions to dismiss the civil claims set forth in Plaintiffs' First Amended Complaint, a decision which paved the way both for the Superior Court's erroneous declaratory judgment ruling concerning the status of the 2014 Lease, *see supra* n.3, and which, by situating the Superior Court as both a trial court and an appellate court at the same time, injected considerable confusion into the proceedings concerning procedure and the applicable standard of review. This Court has been clear: where a party may obtain relief from a municipal or state administrative decision through a Rule 80B or 80C challenge, such process provides the exclusive means of obtaining such relief and requires the dismissal of accompanying claims for declaratory judgment. *See, e.g., Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 21 & n.7, 252 A.3d 504 (affirming trial court's dismissal of independent claims as "duplicative of the Rule 80B appeal" and therefore failing "under our exclusivity rule"); *Kane v. Comm'r of Dep't of Health & Hum. Servs.*, 2008 ME 185, ¶ 32, 960 A.2d 1196 (collecting cases for the principle that a plaintiff may not maintain an independent action on the same factual allegations and seeking the same relief as a

Rule 80C appeal). The Superior Court accordingly erred when it failed to dismiss Plaintiffs' civil claims.

*Second*, the Superior Court erred when it ruled Plaintiffs enjoyed standing to challenge the Bureau's decision. Plaintiffs can be classified into three groups: private individuals who premise their claim to standing on a purported connection to the leased land; NRCM, which claims to enjoy standing derivatively and by virtue of certain of the foregoing private individuals who are NRCM members; and current and former legislators who premise their claim to standing merely on their status as legislators. None of these groups enjoy standing. The private plaintiffs, and derivatively NRCM, alleged no sufficient legal interest in or connection to the leased land. None of them alleged having sought the same leasehold interest from the Bureau, holding any property interest in the leased land, holding any property interest in any land either abutting the leased land, or even living in either of the municipalities containing the leased land. *See* FAC ¶¶ 7-26. The private plaintiffs' alleged generalized appreciation of Maine's woods or their vague allegations concerning use of land in the general area does not suffice to grant them standing. *See, e.g., Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984) (harms "experienced by the public at large" do not give rise to standing"). The legislator plaintiffs similarly have no claim to standing as no court, Maine or federal, ever has ruled that a current or former legislator may challenge executive action merely by virtue of holding office. *Cf. Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 25, 183 A.3d 749 (observing the open

question whether the Maine Senate *as a body—i.e.*, not individual legislators—has standing to pursue a declaration that the Secretary of State exceeded his constitutional authority); *Arizona State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800-01 (2015) (holding individual members of legislature lack standing to challenge institutional injury suffered by all members of a legislative body). The Superior Court should have dismissed the entirety of Plaintiffs' challenge for lack of standing, and the Court should vacate the Judgment on these grounds on appeal.

*Third*, the Superior Court erred in holding that the Bureau's leasing decisions may have required legislative approval pursuant to Article IX, section 23. The briefing over this issue spanned dozens of pages below and is too voluminous to reproduce here. Nevertheless, since its inception in 1997, the Bureau never has sought legislative approval for any lease it issued and consistently has taken the position, including in testimony before the Legislature itself, that leases never require such approval based on the operative Constitutional and statutory provisions. The Bureau has issued dozens of leases over the past 25 years and regularly reports the existence of those leases to the Legislature,[5] without any objection from the Legislature or demand that such leases be submitted for a vote. Indeed, the Legislature's own Revisor of Statutes previously issued a legal opinion holding that applying the 2/3 legislative approval threshold set forth in Article IX, section 23 to

[5] Since 2009, Plaintiffs Black, Ackley, O'Neill, and Pluecker each served at least one term on the ACF Committee to which the Bureau's Annual Reports are addressed, and there is no record of their ever having challenged the Bureau's authority to issue any prior leases.

leases of public reserved land would *violate* the Maine Constitution. *See An Act to Require Legislative Approval to Lease Land to the Federal Government: Hearing on L.D. 2092 Before the Committee on State and Local Government*, 119th Legis. 1 (1999) (Testimony of Herb Hartmann, Director of Bureau of Parks and Lands, Maine Department of Conservation). The Superior Court's order concerning the applicability of Article IX, section 23 is a novel one that upsets decades of Bureau practice, the settled constitutional arrangement between the executive and legislative branches, and the leasehold interests of dozens of third parties.

*Fourth*, as a consequence of the foregoing ruling, the Superior Court proceeded to consider whether the Bureau failed to make the substantial alteration determination the Superior Court held to be required by Article IX, section 23, but did so only after excluding from the record a written memorandum summarizing the Bureau's findings on that issue. *See* Judgment at 11, 25-26. Notwithstanding clear and recent Law Court precedent, the Superior Court declined to remand the case to the Bureau to further express its findings and declined to infer those findings from the record. *See Fair Elections Inc.*, 2021 ME 32, ¶ 38, 252 A.3d 504 (ordering remand given absence of articulated basis for decision in order "to enable the City Council to rectify the omission"); *Chapel Road Assocs., LLC v. Town of Wells*, 2001 ME 178 ¶¶ 13, 30, 787 A.2d 137 (explaining a court should not "embark on an independent and original inquiry" as doing so creates a "danger of judicial usurpation of administrative functions"); *Appletree Cottage, LLC v. Town of Cape Elizabeth*, 2017 ME 177, ¶ 9, 1689

A.3d 396 (same); *Mills v. Town of Eliot*, 2008 ME 134, ¶ 19, 955 A.2d 258 (same). In short, the Superior Court proceeded to review the agency's action without considering any statement from the agency concerning its position. This error also merits vacating the Judgment.

*Fifth*, in its ultimate review of the record, the Superior Court erroneously concluded the Bureau failed to make the substantial alteration determination the Superior Court held was required. *See* Judgment at 25. In reaching this conclusion, the Superior Court failed to state, let alone follow, the standard of review governing administrative appeals. *See* 5 M.R.S. § 11007 (explaining that a court "shall not substitute its judgment for that of the agency on questions of fact" and that a court must review whether "substantial evidence on the whole record" supports an agency's decision); *Kroeger v. Dep't of Envt'l Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566 (explaining an appellant challenging the sufficiency of evidence in an 80C appeal must show "the record compels contrary findings"). In fact, substantial record evidence, more than sufficient to meet the relevant standard, confirms the Bureau thoroughly considered whether NECEC LLC's proposed use of the leased land would substantially alter that land. Specifically, prior to issuing the leasehold interest, the Bureau considered in detail the appropriate routing for the NECEC Project, so that the leased premises would avoid including sensitive habitats or wildlife areas. *See* ARIV0001-9. Bureau staff physically walked the parcel, observing its characteristics and suitability for the lease, and conferred with staff at the Department of Inland Fisheries and Wildlife

about the impact of the proposed transmission line on the leased lands. *See* ARIV0003-4. If, as according to Plaintiffs, the Bureau made no determination concerning whether NECEC LLC's proposed use of the premises would "substantially alter" that land, then none of the foregoing efforts would have been required or necessary. In fact, the foregoing efforts demonstrate the Bureau thoroughly considered whether the proposed use of the land would "substantially alter" that land. The Superior Court erred when it held otherwise.

### B. Plaintiffs will not suffer irreparable harm from the maintenance of the automatic stay.

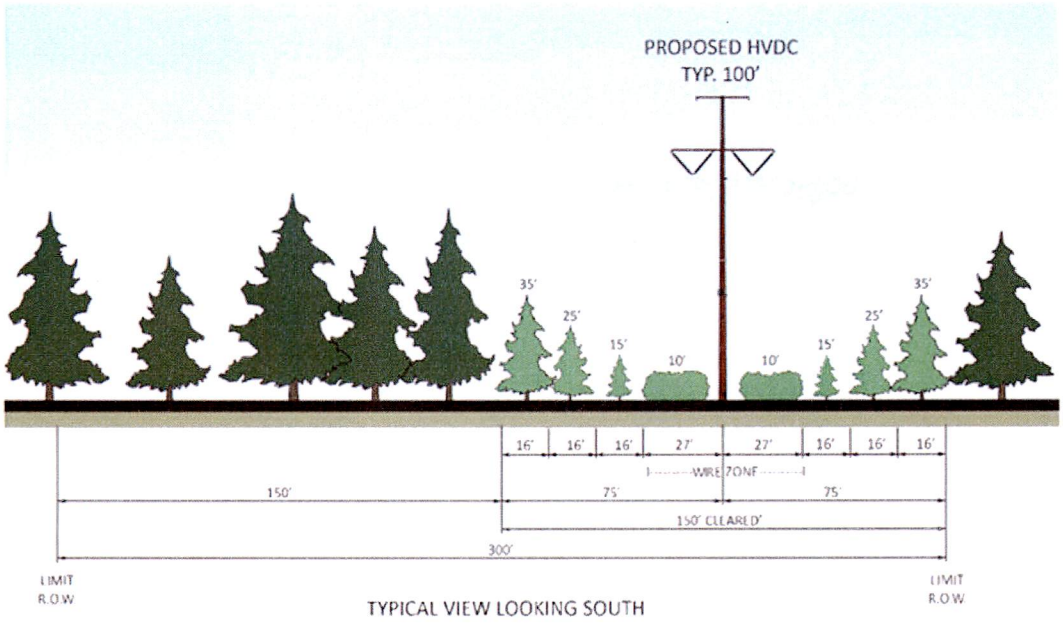
Plaintiffs have not carried their burden to show that maintaining the automatic stay will cause them irreparable harm, in part by failing to support their showing with any affidavit testimony. *See* M.R. Civ. P. 65(a) (defining standards for preliminary injunctive relief also applicable here, explaining relief is proper only if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result"); *see also Town of Charleston v. Sch. Admin. Dist. No. 68*, 2002 ME 95, ¶ 6, 798 A.2d 1102 ("Proof of irreparable injury is a prerequisite to the granting of injunctive relief.").

In considering the element of irreparable harm, the Court should identify the status quo of the leased land. The land at issue is not part of a state park or nature preserve and does not receive protection due to any "unique" status. Motion at 5. Rather, the Legislature has authorized the Bureau to lease all public reserved land,

including the leased land, for a wide variety of intensive development, including among other uses, for public roads, landing strips, pipelines, railroad tracks, garages, warehouses, or transmission and telecommunications facilities. *See* 12 M.R.S. § 1852 (identifying uses authorized under leases). Indeed, the Bureau historically has authorized timber harvesting on the very parcels at issue every 20 years, with the next 20-year cycle only five years away. *See* ARII0093-95. Accordingly, where Plaintiffs premise their irreparable harm argument on the claim that lifting the automatic stay will prevent "harm … to these unique public lands," Motion at 5, they fail to acknowledge that lifting the stay will not impose any legal restraint on the Bureau leasing the very same land to a third party for some other statutorily permitted use, such as a landing strip or pipeline, during the pendency of this appeal. Lifting the automatic stay thus does no more to prevent development of the leased land than does leaving the stay in place.

The factual premise of Plaintiffs' motion—that NECEC LLC will engage in "clearcutting" of the leased land during the pendency of the appeal, *see* Motion at 5—also is erroneous for the following reasons:

*First*, NECEC LLC has no right to "clearcut" the land at all, as its DEP permit allows only limited removal of vegetation consistent with the following depiction:




*See* Dickinson Aff. at ¶ 7, Exs. B and C (with Exhibit C containing both NECEC LLC's Vegetation Clearing Plan and Vegetation Maintenance Plan); ARI0006 (limiting use of leased premises to permitted uses). As the foregoing shows, NECEC LLC cannot remove any vegetation from half of the 300 foot-wide leased parcel. With respect to the remaining half, NECEC LLC can remove vegetation only in a fashion that will achieve the tapered vegetation removal depicted above. *See id.* While NECEC LLC will remove woody vegetation within the 54-foot wide wire zone during construction, as required under its vegetation clearing and management plans approved by the DEP, vegetation that is approximately 10 feet tall will regenerate so that the wire zone primarily consists of native, scrub-shrub habitat. *See* Dickinson Aff., Ex. C at 12-14 of Vegetation Clearing Plan. Trees within each 16-foot wide taper tier will be selectively cut during construction and vegetation maintenance cycles in a manner that retains those trees that do not exceed their respective tier's

designated height. *See id.* at 9-10 of Vegetation Maintenance Plan. When calculated as a percentage of the full acreage of the Johnson Mountain Township and West Forks Plantation public reserved lots, only 1.3% of those lots will be subject to any vegetation removal. Plaintiffs, who, again, enjoy no personal or private property interests in the land, who do not abut the land, and who do not even live in the municipalities where the land lies, cannot claim to be irreparably harmed by such limited removal of vegetation, particularly where the leased land historically has been used for timber harvesting.[6]

*Second*, contrary to Plaintiffs' claim that "it is a foregone conclusion" NECEC LLC will begin clearing operations on the leased land, Motion at 5, it in fact has no immediate intention of engaging in such operations and has committed to the Bureau, and can commit to the Court, it will not engage in such activities during the pendency of this appeal. *See* Dickinson Aff. at ¶ 17. In stating otherwise, Plaintiffs misconstrue NECEC LLC's statements to DEP. As explained above, Plaintiffs have used the Judgment as a premise to request DEP halt the construction of the entire NECEC Project, arguing the Judgment strips NECEC LLC of TRI for the length of the

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[6] In approving the DEP Permits, DEP found that, even with the required vegetation removal, the NECEC Project makes sufficient "provision for the protection of wildlife," avoids "Significant Wildlife Habitat impacts to the greatest extent practicable," "will not unreasonably harm or disturb any significant vernal pool habitat or other Significant Wildlife Habitat," "will not unreasonably harm any aquatic habitat or fisheries," "will not unreasonably impact significant wildlife habitat," avoids and minimizes "freshwater wetland and waterbody impacts to the greatest extent practicable," "will not have an adverse effect on unusual natural areas on or near the development site," and avoids and minimizes "natural resource impacts to the greatest extent practicable." DEP Order at 76, 83-84, 89.

corridor. In arguing against Plaintiffs' request for an immediate stay, NECEC LLC argued correctly that the automatic stay of the Superior Court's judgment leaves NECEC's TRI in the corridor intact, and nowhere proclaimed its immediate intention to clear the leased land. *See generally* Ex. A to Motion to Lift Stay. Nevertheless, if the Court concludes Plaintiffs may suffer harm from NECEC LLC engaging in vegetation removal on the leased premises during the appeal, the Court need only order NECEC LLC to refrain from all construction activities on the leased premises during the pendency of the appeal, rather than lift the automatic stay, which in turn would enjoin the effectiveness of the entirety of the lease and open the door for Plaintiffs to block the entire NECEC Project through a permit suspension by DEP. An order precluding construction on just the leased premises would eliminate any tangible harm Plaintiffs have claimed. *See Tamko Roofing Prod., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 40 (1st Cir. 2002) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)) ("Injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs."); *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 14 (1st Cir. 2000) ("Injunctions must be tailored to the specific harm to be prevented.").

*Finally*, Plaintiffs' claim of irreparable harm cannot be squared with their approach to the leasehold interest to date. Plaintiffs began learning of the lease beginning in 2016, but waited until June 23, 2020, to challenge it. Then, while NECEC LLC was free to construct on the leased land after the First Circuit lifted a

temporary injunction on construction of the project on May 14, 2021, but before a required cessation of clearing activities during June and July under the USACE permit, Plaintiffs never sought any preliminary relief to enjoin NECEC LLC from so constructing. Plaintiffs similarly cannot claim to be irreparably harmed by a stay of the Judgment where they have filed a cross-appeal of that ruling and thus, at a minimum, have reserved their right to alter or amend its terms. *See* M.R. App. Proc. 2C(a)(1) ("If the appellee seeks any change in the judgment that is on appeal, the appellee must file a cross-appeal to preserve the issue."). Plaintiffs cannot have it both ways by seeking relief from a judgment via their own appeal *and* by asking the Court to give that judgment immediate effect before the Court has an opportunity to review it. Allowing Plaintiffs' request to give an erroneous Superior Court ruling immediate effect, before the Law Court can review it, would be foundationally unfair to NECEC LLC and the Bureau.

### C. The balance of harms and the public interest cut in favor of maintaining the automatic stay.

As discussed above, the harm Plaintiffs may suffer from the automatic stay is minimal to non-existent given the limited vegetation removal authorized by the DEP permit and Plaintiffs' lack of interest in the leased land. On the other hand, lifting the automatic stay may trigger significant disruption to the NECEC Project by fueling Plaintiffs' efforts to halt its construction throughout Maine and give rise to a wave of litigation involving third parties, all to the public's detriment.

*First*, during the proceedings before the Superior Court, no indication surfaced suggesting the Bureau administered the lease at issue any differently than it has administered any of the dozens of leases the Bureau has granted since its inception in 1997. Accordingly, if the Bureau erred in its issuance of the 2014 Lease and 2020 Lease, then it erred in its issuance of each and every lease it previously issued. As of last count provided to the Legislature, the Bureau was a party to 288 residential camp lot leases plus 57 additional leases for a variety of purposes, including the lease at issue here. *See* Me. Dept. of Agric., Conservation & Forestry, Bur. of Parks & Lands, Fiscal Year 2020 Annual Report to the Joint Standing Committee on Agric., Conservation & Forestry, at 30-31 (Mar. 1, 2021).[7] In the event the Court lifts the automatic stay, each of the remaining active leases will be subject to immediate attack by a range of third parties—particularly under the expansive theory of standing the Superior Court adopted—before the Court has the opportunity to weigh the merits of the Superior Court's decision. The public interest is not served by triggering such a wave of litigation before the Court can speak with finality as to the merits of the significant and novel legal issues involved in this litigation.

*Second*, Plaintiffs have made clear their intention to block the entirety of the NECEC Project throughout Maine, not just on the leased land, and seek the immediate effectiveness of the Judgment to support their request that DEP suspend

[7] The annual report is available at https://www.maine.gov/dacf/parks/publications_maps/docs/2020LandsAnnualReport.pdf . (last visited September 3, 2021).

its permit for the NECEC Project during the pendency of this appeal. Halting construction of the entire project during the pendency of this appeal, assuming the usual 9 to 12 months for such proceedings to conclude, will cause NECEC LLC significant financial harm and threatens the long-term viability of the NECEC Project. *See* Dickinson Aff. at ¶¶ 11-16. Transmission projects like the NECEC Project require careful, sequential planning and the synchronization of work from a variety of contractors. *Id.* at ¶ 12. For instance, NECEC LLC must coordinate the work of contractors providing services related to the deployment of erosion and sedimentation controls, vegetation removal, the fabrication, transport, and erection of poles, the stringing of the electrical conductor, and the construction of electrical substations. *Id.* That work can proceed only within various legal, regulatory and practical factors, ranging from permitting requirements to weather conditions. *Id.*

As construction of the NECEC Project has begun, NECEC LLC is in the midst of executing a carefully-timed construction schedule that balances all of the foregoing factors to achieve commercial operation by mid-December 2023, in advance of NECEC LLC's August 23, 2024, contractual deadline to put the project in service. *Id.* at ¶¶ 11-13. While execution of the current construction schedule will allow NECEC LLC to complete the project by the currently expected commercial operation date of mid-December 2023, a delay in all project construction of 9 to 12 months, in addition to causing layoffs of hundreds of workers currently constructing the project, will make it impossible to complete the NECEC Project by that date and

may, in fact, make it impossible to put the project into service by the contractual deadline of August 23, 2024. *Id.* at ¶ 13. Indeed, even if the appeal takes 9 to 12 months, the construction delay will be significantly longer, given that the appeal will not conclude pursuant to a fixed schedule around which NECEC LLC can plan. *Id.* at ¶ 13-14. After the Court rules, NECEC LLC will require several weeks, if not months, to remobilize its contractors in order to resume construction activities. *Id.* at ¶ 14. This remobilization entails, among other activities, reobtaining any expired municipal permits and approvals, re-engaging the applicable contractors, and having the contractors re-hire the construction crews and other necessary employees, and contract for and mobilize necessary equipment and materials, to resume construction activities as soon as possible. *Id.* For example, due to permitting requirements, the principal contractor responsible for tree clearing, access roads and environmental controls would need to remove all currently installed construction mats, triggering an additional period of restoration on the same land. *Id.* at ¶ 15. Overall, this demobilization and remobilization would result, in many cases, in a complete re-work of construction activities already completed to date.

These remobilization activities, together with additional project management activities and other additional fixed costs, would impose significant additional expenses on the NECEC Project, ranging from $73 to $83 million. *Id.* at ¶ 16. The foregoing figures concern only the impact on the NECEC Project's costs, and do not

include the lost revenue associated with a delay in putting the project into service by mid-December 2023. *Id.*

Notwithstanding all of the foregoing, the current construction schedule for the NECEC Project does not contemplate any construction activities on the leased land until late fall of this year. *Id.* at ¶ 17. With some modifications and because the leased land consists of less than one mile of the 145-mile project, the existing construction schedule would permit NECEC LLC to delay construction activities, including the vegetation clearing authorized by the DEP Permit, on the leased land pending the current appeal without materially impacting the expected commercial operation date for the project. *Id.* NECEC LLC has informed the Bureau it does not intend to construct on the leased land during the appeal, and can so commit to the Court as well. *Id.*

*Third*, as the Court is aware, after an extensive review process, in which 31 parties participated, including Plaintiffs NRCM, Buzzell and Haynes, the PUC granted a CPCN for the NECEC Project, finding the project to be in the "public interest" and to meet a "public need." Add. 23, 115. The PUC found that the NECEC Project will provide Maine and its residents significant benefits including, among others, millions of dollars in reduced electricity costs, enhanced transmission system reliability, enhanced electricity supply reliability and diversity, macroeconomic benefits including over 1,600 jobs and increases in State Gross Domestic Product of over $90 million annually during construction and the reduction of regional greenhouse gas emissions

of between 3.0 and 3.6 million metric tons per year. Add. 23-24, 89. The Court affirmed these findings and the granting of the CPCN. *See NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 30, 277 A.3d 1117. Disruption in the construction of the NECEC Project threatens to deprive the State and its residents of these significant benefits.

**D. Plaintiffs' proposal concerning expedited treatment.**

Plaintiffs suggest the Court adopt an expedited briefing schedule in the event the Court grants the instant motion, so as to mitigate the harm NECEC LLC will suffer as a result of such a ruling. *See* Motion at 10. NECEC LLC agrees that expediting the case would be appropriate under those circumstances.[8] However, since Plaintiffs will not suffer any harm as a result of maintaining the automatic stay as discussed above, NECEC LLC does not believe expediting the case would be necessary or appropriate in the event the Court denies the motion. Indeed, Plaintiffs' proposed briefing schedule situates this case for decision by the Court just as the people of Maine will be voting on a citizens' initiative containing provisions directly and materially relevant to the issues to be decided on this appeal. *See Caiazzo v. Sec'y of State*, 2021 ME 42, ¶¶ 6, 27, ---A.3d---.

[8] Through email, Plaintiffs have suggested a schedule whereby the record is filed on September 10; Appellants' brief is due on or by September 24; Appellees' brief is due on or by October 8; Appellants' reply brief is due on or by October 15; and argument takes place as soon as possible thereafter. NECEC LLC agrees such a schedule would be appropriate in the event the Court grants the instant motion.

## CONCLUSION

The Court should deny Plaintiffs' motion.

DATED: September 7, 2021

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## CERTIFICATE OF SERVICE

I, Nolan L. Reichl, Esq., hereby certify that a copy of this Opposition to Appellees/Cross-Appellants' Motion to Lift Automatic Stay Pending Appeal was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on September 7, 2021:

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