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,

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

Pursuant to Maine Rules of Appellate Procedure 10 and Maine Rule of Civil Procedure 62(g), Plaintiffs-Appellees/Cross-Appellants Russell Black, et al. ("Plaintiffs") move this Court for an order lifting the automatic stay imposed under Maine Rule of Civil Procedure 62(e) of the Superior Court's decision and order dated August 10, 2021, which, among other things, reversed the decision of the Bureau of Parks and Lands ("Bureau" or "BPL") granting a lease to Central Maine Power Company ("CMP")[1] for a high-impact transmission line in violation of Maine Constitution Article IX, Section 23. As set forth in more detail below, in accordance with Rule 62(g), an order lifting the automatic stay is necessary to preserve the status

[1] CMP subsequently transferred its rights in the lease to NECEC Transmission LLC. All references to "CMP" in this motion refer collectively to CMP and NECEC Transmission LLC.

quo of the public lands and the effectiveness of any judgment subsequently to be entered.

PROCEDURAL BACKGROUND

On August 10, 2021, the Superior Court issued a decision and order declaring that, prior to entering into the 2014 and 2020 leases, BPL was constitutionally required to provide a public administrative process and to make a determination as to whether the proposed lease would reduce or substantially alter the public lots in question. Decision and Order (14 M.R.S.A. § 5953 & M.R. Civ. P. 80C), dated August 10, 2021 at 22-23 (hereinafter "Order"). The Superior Court also found no competent record evidence to support BPL's assertion that it made the constitutionally required reduction and substantial alteration determinations and, therefore, BPL's Director lacked authority to enter into the 2020 lease. Order at 27. The Superior Court thus reversed the 2020 lease. Order at 28.

Three days later, on August 13, 2021, BPL and CMP each filed a Notice of Appeal from the Superior Court's decision and order dated August 10, 2021, and all prior orders. On August 18, 2021, in a submission to the Maine Department of Environmental Protection, CMP took the position that because the Superior Court's decision and order is automatically stayed under Rule 62(e), it can construct its high-impact transmission line on the public lands during the pendency of the appeal. Opposition of Central Maine Power Company and NECEC Transmission LLC to

NRCM's Application for Stay at 3, August 18, 2021 (hereinafter, "Opposition of Central Maine Power") and attached hereto as Exhibit A. On August 20, 2021, Plaintiffs filed a cross-appeal.

ARGUMENT

This Court has held that Rule 62(e) imposes an automatic stay of a Superior Court's decision vacating an agency action. *Jones v. Sec'y of State*, 2020 ME 111, 238 A.3d 250. But the Court has inherent authority "to suspend, modify, restore, or grant an injunction or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered" during the pendency of an appeal. M.R. Civ. P. 62(g); *see also Hawkes Television, Inc. v. Me. Bureau of Consumer Credit Prot.*, 462 A.2d 1167, 1169 (Me. 1983) ("Rule 62(g) . . . merely declare[s] the inherent power of [the] court[] to make orders to preserve the status quo and to insure the effectiveness of any eventual judgment." (quoting 2 Field, McKusick & Wroth, *Maine Civil Practice* § 62.2 (2d ed. 1970)). It should exercise that authority to issue an order lifting the stay upon appeal in this matter in order to preserve the status quo of the public lands and ensure the effectiveness of any judgment subsequently to be entered.

I. Lifting the Automatic Stay is Necessary to Preserve Status Quo and Ensure the Effectiveness of a Subsequent Judgment

This Court has not addressed the standard for an order lifting an automatic stay pending appeal in order to preserve the status quo or effectiveness of a

judgment. Rather, it appears that any such order relating to the status quo or effectiveness of judgment is within the Court's discretion.

The status quo here is the constitutionally protected natural state of the public lands that are subject to the lease between BPL and CMP: "Courts routinely define the status quo as the 'last uncontested status which preceded the pending controversy.'" *Fire Tech v. Scott Technologies, Inc.*, No. CV-09-159, 2009 WL 8582937 (Me. Super. June 17, 2009) (citing *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987)). *Accord Tibbetts v. Tibbetts*, 406 A.2d 78, 80 (Me. 1979).

Here, the last uncontested status of the public lands was prior to BPL's *ultra vires* execution of the 2014 lease where the public lands at issue were subject to the constitutional provision that they "may not be reduced or [their] uses substantially altered except on the vote of 2/3 of all the members elected to each House." Me. Const. art IX, § 23. Given these constitutional protections, lifting the automatic stay pending appeal is the only way to ensure that the public lands are not unconstitutionally altered while this appeal is pending. Indeed, CMP has taken the position that it can construct its transmission line over the public lands during this appeal. *See* Opposition of Central Maine Power at 3 ("the August 10, 2021 Superior Court decision is stayed pending the appeal, which means **the BPL lease is still in**

effect. Accordingly . . . the Project can be built along the route approved by the DEP.") (emphasis in original).

Further, if the Court does not issue an order lifting the automatic stay, there is no way to ensure the effectiveness of any subsequent judgment in favor of Plaintiffs. In light of CMP's statements to the Department, it is a forgone conclusion that during this appeal it will construct its high-impact transmission line over the public lands, first clearcutting the corridor then erecting 100 foot tall towers. Where, as here, the Court is exercising its inherent equitable jurisdiction, it must presume "the uniqueness of each parcel of real property." *See Sullivan v. Porter*, 2004 ME 134, ¶ 25, 861 A.2d 625, 633 (discussing the equitable relief of specific enforcement of a contract). If this Court ultimately affirms the Superior Court's decision vacating the lease between BPL and CMP, absent lifting of the stay, any such judgment would be ineffective as the harm would have already been done to these unique public lands, as well as to Plaintiffs themselves—members of the public denied their right to notice and process and legislators denied both their right to notice and process and their constitutional right to vote. By contrast, if the automatic stay is lifted during the pendency of the appeal—preventing construction on the public lots during that time—and this Court ultimately reverses the Superior Court, CMP will be able to construct its high-impact transmission line over them then and the lifting of the automatic stay will have had no impact on the effectiveness of any such judgment.

II. Any Applicable Factors Weigh in Favor of Lifting the Automatic Stay

To the extent the Court considers lifting the automatic stay akin to issuing a stay or an injunction, Plaintiffs satisfy the factors that are applicable to such orders. "Requests for stays or injunctions before the Law Court are subject to the same standards for obtaining injunctive relief that are applied in the trial courts." *Nat'l Org. for Marriage* v. *Comm'n on Governmental Ethics & Elections Pracs.*, 2015 ME 103, ¶ 14, 121 A.3d 792, 797 (quoting *Maine Appellate Practice* § 10.1 at 107-08 (4th ed. 2013)). A party seeking to obtain a stay or injunction must demonstrate

> that (1) it will suffer irreparable injury if the [stay] is not granted; (2) such injury outweighs any harm which granting the [stay] would inflict on the other party; (3) it has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the [stay].

Id. ¶ 14 (quoting *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129, 132). Plaintiffs address each criterion in turn.

1. Plaintiffs Are Likely to Succeed on the Merits

Likelihood of success on the merits is "[t]he sine qua non of this four-part inquiry." *Nat'l Org. for Marriage*, 2015 ME 103, ¶ 28, 121 A.3d 792 (quoting *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 46 (1st Cir. 2005)). To demonstrate a likelihood of success on the merits, a party "must show that there is a substantial possibility of success on [their] claims." *Id.* ¶ 17 (quotation marks

omitted). Here, the Superior Court's well-reasoned decision in Plaintiffs favor demonstrates that there is a substantial possibility of success on their claims.

The principal argument that CMP and BPL relied on in this case, that leases under 12 M.R.S. § 1852(4) are categorically exempt from Article IX, Section 23 of the Maine Constitution, is manifestly incorrect. As the Superior Court explained,

> for this unique constitutional amendment to have any effect, the amendment itself, the Designated Lands Act, and statutes that remain on the books must be read harmoniously . . . This constitutional amendment limited the scope of BPL's authority over public reserved lands . . . Thus, BPL is obligated to determine whether a particular action (including a lease for electric power transmission pursuant to section 1852(4)) reduces or substantially alters the uses of public reserved lands before it takes that particular action.

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, March 17, 2021; Order at 27 (noting that court did not find any competent evidence in the record to support BPL's assertion that it made the requisite constitutional determination). These well-reasoned judicial opinions are the only judicial determination regarding Article IX, Section 23 of the Maine Constitution, and there is thus no controlling authority that could demonstrate the decision was evidently incorrect. Accordingly, Plaintiffs have plainly demonstrated that there is a substantial possibility of success on their claims.

2. Plaintiffs Will Suffer Irreparable Injury if the Stay is Not Lifted

Plaintiffs, as members of the public who use the public lands at issue and as legislators who were deprived of their constitutional right to vote on the leases, will suffer irreparable injury if the stay is not lifted. "'Irreparable injury' is defined as 'injury for which there is no adequate remedy at law.'" *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129. The Superior Court found that BPL failed to comply with Article IX, Section 23 of the Maine Constitution and, more specifically, deprived Plaintiffs (and the public) of their constitutional right to notice and a public process and deprived the legislator Plaintiffs of their constitutional right to vote on the leases. These constitutional violations are in and of themselves irreparable harm. As Justice Brennan observed in a concurring Supreme Court Opinion, "[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See, e.g., American Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1059 (9th Cir. 2009) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm.") (quoting *Nelson v. NASA,* 530 F.3d 865, 882 (9th Cir. 2008), *rev'd and remanded on other grounds by Nelson v. NASA*, 562 U.S. 134 (2011)).

In addition to the irreparable harm that the plaintiffs will suffer, the public lands themselves will be irreparably harmed if they are reduced or their uses

substantially altered during the pendency of this appeal in violation of the Constitution. The Maine Constitution expressly and absolutely prevents these lands from being reduced or their uses substantially altered without a 2/3rd vote of the Legislature, and in giving this Constitutional mandate its effect, this Court must presume "the uniqueness of each parcel of real property." Me. Const. art. IX, § 23; *Sullivan*, 2004 ME 134, ¶ 25, 861 A.2d 625. The unconstitutional reduction or substantial alteration of the uses of these public lots, even for minimal periods of time, unquestionably constitutes irreparable constitutional injury.[2]

If the stay is not lifted and the 2020 lease remains in effect, then CMP will begin construction on the public lands. As referenced above, it is CMP's position that now that they have filed an appeal, the 2020 lease is still in effect and they are free to engage in construction on these public lands while the appeal is pending. Opposition of Central Maine Power at 3.[3] As soon as CMP begins construction on the public lands, Plaintiffs' constitutional rights will be irrevocably lost. In a case

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[2] Furthermore, any clearing of the leased premises would take at least a generation to regrow—so the substantial alteration would be far from a minimal period of time. And BPL has never determined that clearing these leased premises are consistent with its management plan and in furtherance of its timber management goals—a prerequisite to conducting such clearing as part of BPL's timber management. Indeed, clearing for a transmission line is expressly considered a "change of use" to something other than timber harvesting—in order to avoid specific forest regeneration standards for this clear cut area within the corridor. *See* 01-669 C.M.R. ch. 20 (Maine Forest Service, Forest Regeneration and Clearcutting Standards).

[3] The Maine Department of Environmental Protection is currently determining what, if anything, the Superior Court's August 10, 2021 decision and order means for CMP's DEP permits. *See* Department of Environmental Protection Letter, *RE: New England Clean Energy Connect (NECEC) Transmission Line Project*, August 12, 2021, and attached hereto as Exhibit B. At the very least, this Court should lift the automatic stay until the DEP makes a determination as to whether CMP's DEP permits are still valid notwithstanding the pending appeal.

such as this, where the people of Maine passed the constitutional amendment establishing the constitutional rights at stake, it would be nothing short of a travesty for BPL and CMP to not only disregard the Maine Constitution, but to also disregard the only judicial decision on the topic.

3. Plaintiffs' Injury if the Stay is Not Lifted Outweighs Any Harm that Lifting the Stay Would Inflict on Appellants

While leaving the automatic stay in place and allowing these public lots to be reduced or substantially altered during the appeal would constitute irreparable harm, delaying the alteration of the use of these public lots would not cause CMP any similar harm. If the automatic stay is lifted during the appeal and the Law Court ultimately reverses the decision below, the harm suffered by CMP will have been a temporary delay in altering the uses of these public lots—something that is plainly not irreparable harm. Likewise, any financial harm caused by this delay is not irreparable, and could be mitigated by an expedited briefing schedule on appeal, something the Plaintiffs would happily agree to.[4] Finally, even if this Court lifts the automatic stay, until and unless the DEP suspends its permits, or a court issues a stay of those permits, CMP can continue to construct its high-impact transmission line anywhere along the permitted route other than the public lands.

[4] Plaintiffs' counsel has asked Appellants' respective counsel for their views regarding an expedited briefing schedule and expect to have substantive responses later this week or early next week.

4. The Public Interest Will Not be Adversely Affected by Lifting the Stay

The public interest will not be adversely affected by lifting the stay but rather would be furthered by preventing any reduction or substantial alteration to the use of these public lots during the pendency of this appeal. As referenced above, the unique constitutional provision at issue in this case was enacted by the people of Maine in 1993, and one of the fundamental concerns of Plaintiffs in this case has been whether the public was provided with proper notice and process prior to BPL leasing the public lands it holds in trust for the public's benefit. Now that the Superior Court has declared that the lease was *ultra vires*, it would be an affront to the public interest to permit BPL and CMP to continue on their unconstitutional path. Indeed "the West Forks and Johnson Mountain public reserved lands are not just public lands, they are *public trust* lands." Order at 19 (emphasis original). Surely protecting the *res* of that public trust during the pendency of an appeal is in the public interest.

5. Balancing the Four Criteria

The four criteria discussed above "are not to be applied woodenly or in isolation from each other; rather, the court of equity should weigh all of these factors together." *Nat'l Org. for Marriage*, 2015 ME 103, ¶ 28, 121 A.3d 792 (quoting *Dep't of Env't Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989)). Here, however, no balancing is required. For the reasons stated above, all four criteria weigh in favor

of lifting the stay. If the court does weigh these factors together, then surely preventing a constitutional harm that has been declared by the Superior Court from occurring during the period that CMP and BPL appeals that ruling is the only equitable outcome.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court issue an Order pursuant to Rule 62(g) to lift the automatic stay of the Superior Court's August 10, 2021 decision and order.

Dated at Portland, Maine this 24th day of August, 2021.

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CERTIFICATE OF SERVICE

I, Jeana M. McCormick, attorney for Appellees/Cross-Appellants certify that I have this day caused the foregoing Appellees/Cross-Appellants' Motion to Lift Automatic Stay Pending Appeal to be served on the below by via electronic mail and U.S. mail, first class postage prepaid, addressed as follows:

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Dated at Portland, Maine this 24th day of August, 2021.

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Exhibit A

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August 18, 2021

VIA ELECTRONIC MAIL

Mr. James R. Beyer
Maine Department of Environmental Protection
Bureau of Land Resources Regulation
106 Hogan Road
Bangor, ME 04401

RE: Central Maine Power Company, NECEC Transmission LLC, New England Clean Energy Connect, L-27625-26-A-N, L-27625-TG-B-N, L-27625-2C-C-N, L-27625-VP-D-N, L-27625-IW-E-N, L-27625-26-K-T, L-27625-26-V-M, L-27625-TB-W-M, L-27625-2C-X-M, L-27625-VP-Y-M, L-27625-IW-Z-M

Dear Mr. Beyer:

On behalf of Licensees Central Maine Power Company and NECEC Transmission LLC, please find enclosed an Opposition to NRCM's Application for Stay.

Please let me know if you have any questions.

Sincerely,

Matthew D. Manahan

Enclosure
cc (via email): BEP Service List (August 3, 3021)

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

NEW ENGLAND CLEAN ENERGY CONNECT	)
L-27625-26-A-N/L-27625-TG-B-N/	)
L-27625-2C-C-N/L-27625-VP-D-N/	)
L-27625-IW-E-N/ L-27625-26-K-T/	)
L-27625-26-V-M/L-27625-TB-W-M/	)
L-27625-2C-X-M/L-27625-VP-Y-M/	)
L-27625-IW-Z-M	)

OPPOSITION OF CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC TO NRCM'S APPLICATION FOR STAY

The Natural Resources Council of Maine (NRCM), yet again, contorts the Department's rules to serve its parochial purposes – to stop a vital clean energy transmission project, one which will utilize energy from existing dams that are currently spilling unused renewable energy due to a lack of transmission to carry that energy where it is needed, simply because NRCM has a distaste for hydropower. NRCM's strategy of obfuscation must end. As made frighteningly clear in the recent United Nations Intergovernmental Panel on Climate Change report,[1] the last decade was hotter than any period in 125,000 years. The New England Clean Energy Connect Project (NECEC or Project) is essential to reducing the greenhouse gas emissions driving this climate change. NRCM's August 11, 2021 Request for Stay of Department Order (Request), which requests that the DEP Commissioner or the Board of Environmental Protection[2] stay the Commissioner's May 11, 2020 Order (DEP Order) licensing the Project should be denied.

[1] Available at: https://www.ipcc.ch/report/ar6/wg1/.

[2] On August 12, 2021 the Board Chair declined to hear NRCM's Request, and NRCM's request therefore is no longer is before the Board. Licensees note, however, that the Board does not have authority to issue the stay NRCM seeks in any event for the reasons stated in Licensees' June 26, 2020, July 31, 2020, and October 16, 2020 responses to NRCM's prior requests for a stay of the DEP Order, incorporated herein by reference.

NRCM's continued distortion of the DEP's rules and procedures in an attempt to fatally delay the Project grows exhausting. As NRCM admits, its arguments for a stay of the DEP Order are largely unchanged in this, its *fifth* request for a stay of the DEP Order.[3] NRCM Request at 1-2. NRCM now vaunts a recent Superior Court decision[4] vacating the 2014 and 2020 Bureau of Parks and Lands (BPL) leases for Project,[5] arguing that this decision is game changing, and demonstrates its likelihood of success on the merits of its appeals to the Board. What remains firmly the same, however is the irrelevance of the leases to the Department now that the DEP Order has issued.

First and foremost, title, right, or interest (TRI) has not been pertinent to the Department since the date it concluded processing the permit applications and issued the DEP Order, on May 11, 2020. In fact, TRI is not needed at all for the DEP Order to remain valid. Instead, the DEP's rules require a showing of TRI during the application processing period only, a requirement intended to limit the use of DEP's resources for only those developments that have a cognizable property interest. NRCM cannot expand a prudential standard meant to conserve Department resources into a continuing obligation that would consume Department resources during ongoing litigation.

Second, and even if Licensees' TRI were relevant here, where the application processing period has concluded, Licensees have not lost TRI. On August 13, 2021 both the BPL and

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[3] On June 10, 2020 NRCM requested that the BEP stay the DEP Order. On June 19, 2020 NRCM filed its arguments for a stay in support of the Groups 2 and 10 request that the DEP stay the DEP Order. On July 16, 2020 the BEP Chair referred NRCM's June 10 stay request to the DEP. On July 22, 2020 NRCM appealed to the full Board referral of its stay request to the DEP, which the Chair ruled is not appealable to the full Board. The Commissioner denied NRCM's stay requests on August 26, 2020. On September 25, 2020 NRCM renewed its request for a stay of the DEP Order to the BEP, which the Chair denied on October 23, 2020. Finally, NRCM moved the Kennebec County Superior Court for a stay of the DEP Order on November 2, 2020, which Justice Murphy denied on January 8, 2021.

[4] Decision and Order, Docket No. BCDWB-CV-2020-29 (Murphy, J.) (Aug. 10, 2021).

[5] The 2020 BPL lease amends and restates the 2014 BPL lease, and thus is now the operative lease.

Licensees appealed the Superior Court's August 10, 2021 decision. Maine Rule 62(e) provides that the August 10, 2021 Superior Court decision is stayed pending the appeal, which means **the BPL lease is still in effect**. Accordingly, and contrary to NRCM's assertion, the Project can be built along the route approved by the DEP. NRCM Request at 1.

Third, NRCM's post-issuance stay request, after its prior requests already have been denied by the Commissioner and by the Maine Superior Court, is an end-run around the DEP's license suspension statute and rule, which sets forth the required procedure that includes a hearing and therefore provides the constitutionally-required due process NRCM seeks to sidestep here. In fact, on August 12, 2021 the Commissioner initiated just such a proceeding.

Accordingly, NRCM cannot meet the high bar for a stay, driven even higher by NRCM's demand that the Department act within five days (effectively transforming its request for a stay into a request for a temporary restraining order). NRCM Request at 1 ("respectfully" asking that the Department act on the Request by August 16, and threatening "judicial recourse" if it does not do so). The August 10, 2021 Superior Court decision has no impact whatsoever on the likelihood of NRCM's success on the merits of its appeal of the DEP Order, and any harm that could theoretically arise out of the loss of TRI in the BPL lands is mitigated by the license suspension proceeding that has been initiated by the Commissioner.

I. Any loss of TRI after the DEP has processed an application is irrelevant.

NRCM jury-rigs disparate provisions of the Department's Chapter 2 rules to create out of whole cloth its argument that Licensees must maintain TRI throughout the entire appeals period. This is patently false. The Chapter 2, Section 11(D) rule governing TRI nowhere states that TRI must be maintained past issuance of the license. In fact, the rule governing TRI – which falls within the Chapter 2 section governing "Application Requirements" – is expressly limited to the

"application processing period." DEP Regs. Ch. 2 § 11.D.

NRCM ignores these clear provisions, and instead foists the broad language on the scope and effectiveness of the entirety of Chapter 2 on the limited application requirement provisions of that chapter. Section 2 of Chapter 2, titled "Scope of Rule" describes, fittingly, the scope of the Chapter 2 rules:

> This rule applies to processing of license applications, appeals of Commissioner license decisions to the Board, petitions and motions to modify, revoke or suspend licenses, petitions for corrective action orders, and other determinations on specific matters as described in this rule, except as noted in section 2(B) or elsewhere in this rule. This rule applies in the absence of procedural requirements imposed by statute or rule. Where other specific procedural requirements apply, those requirements control.

DEP Regs. Ch. 2 § 2.A. Accordingly, Chapter 2 sets forth the individual rules such as "Application Requirements" (Section 11), "Decisions" (Section 19), "Appeal to the Board of Commissioner License Decisions" (Section 24), and "Revocation or Suspension of a License" (Section 25). Notably, license applications and appeals are separate "specific matters" governed by separate sections of Chapter 2. *Compare* DEP Regs. Ch. 2 § 11 *with* DEP Regs. Ch. 2 § 24.

The "Effect" provision of section 2 that forms the basis of NRCM's argument is merely a statement of the result that adoption of Chapter 2 will produce: where there exist "on or after the effective date of this rule" applications accepted as complete, appeals of license decisions, or petitions to modify, revoke, or suspend a license, the rule will govern those matters, as specified therein. DEP Regs. Ch. 2 § 2.C; *see also* Black's Law Dictionary 235 (3rd ed. 2006) (defining the noun "effect" as "[t]he result that an instrument between parties will produce on their relative rights, or that a statute will produce on existing law"). NRCM Request at 3-4. That does not mean that all of the rule applies to all those various proceedings, and certainly not where portions of the rule apply on their face only to one type of those proceedings. NRCM's claim that the "effect" of Chapter 2 imposes on the DEP the duty to monitor TRI until all appeals of license

decisions, and all litigation concerning the TRI itself, is exhausted is contrary to the specific language in the rule itself. NRCM Request at 4.

Imposing such an obligation also would make no sense, as the Law Court has affirmed that TRI is a prudential standard intended to protect state resources, not to subject the Department to *additional* proceedings after it has issued a license. *Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (TRI as a principle of administrative standing "is intended to prevent an applicant from wasting an administrative agency's time by applying for a permit that he would have no legally protected right to use."). NRCM's discussion of *Southridge* and *Tomasino* is beside the point because those cases concern whether an applicant has sufficient standing to seek a permit in the first instance. *Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345 (Me. 1995) (establishing that an applicant does not need to establish more than a *prima facie* claim of TRI); *Tomasino v. Town of Casco*, 237 A.3d 175 (Me. 2020) (determining that a developer may not rely on an easement that may not have been broad enough in scope to permit the activity and that was disputed by the owner of the land subject to the easement).

Here, Licensees made the requisite *prima facie* showing by providing the DEP with the 2014 BPL lease, and the DEP appropriately accepted that lease as establishing TRI. *See* Order at 8 (accepting "the decision of its sister agency to enter into the leases" and concluding that the leases established sufficient TRI). The 2014 Lease remained in effect throughout the entirety of the DEP application process. Developments after May 11, 2020 – the date of issuance of the permit – are quite simply irrelevant to the validity of the permit. Indeed, what happens after the DEP issues its decision is outside the record before DEP and therefore not relevant. Consequently, even if it turns out DEP was wrong about TRI, the Commissioner's decision to

issue the DEP Order was made based on the record at that time, and the fact that a judge later invalidated that TRI does not mean DEP should have ruled that way based on the evidence before it when it processed the applications. It further makes no sense for the Department to extend its review of TRI past the issuance of a permit, when any number of outcomes "might" occur – be it a decision not to exercise an option, amendment of a leasehold, or a final judicial adjudication of property rights. NRCM Request at 4. Those eventualities are beyond the DEP's purview, and are not part of the DEP's statutorily authorized review criteria for the applications DEP reviewed and approved.

Accordingly, whatever the outcome of the BPL lease litigation, which is ongoing, NRCM cannot make a showing that it has a strong likelihood of success on the merits of its TRI claim because, as the Superior Court has already found,

> The fact that an applicant's TRI is based on a possessory interest that might later be invalidated by a court does not mean the applicant lacked TRI to proceed before the DEP. Because of this, movants have not demonstrated they have a strong likelihood of success on the merits of this issue.

Order on NRCM's Motion to Stay DEP Commissioner's Order at 8, KEN-AP-20-27, SOM-AP-20-04 (Murphy, J.) (Me. Super. Jan. 11, 2021), citing *Southridge*, 655 A.2d at 348. NRCM's request for a stay must be denied.

II. The BPL lease is still in effect.

Even if Licensees' TRI after issuance of the DEP permit were relevant to the DEP's post-license rules and the pending appeals, which it is not, Licensees have not lost TRI. Pursuant to Maine Rule of Civil Procedure Rule 62(e), "the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal." On August 13, 2021 both the BPL and Licensees appealed the Superior Court's August 10, 2021 decision. That decision therefore is stayed pending a decision on that August 13, 2021 appeal, the BPL

lease is still in effect and, contrary to NRCM's assertion, the Project can be built along the entire route approved by the DEP. NRCM Request at 1, 3. NRCM's emphatic allegation that Licensees have "*no interest* in a critical portion of property at issue" is manifestly false, as is its conclusion that it "is likely to prevail in establishing that CMP does not have TRI." NRCM Request at 3.[6] Licensees do have TRI.

III. The Commissioner has ordered a license suspension proceeding.

Even if TRI were relevant to the DEP's post-license rules and procedures, which it is not, and even if Licensees had lost a portion of TRI in the Project, which they have not, NRCM's stay request is an end-run around the DEP's license suspension statute and rule, which provides a substantive process pursuant to the Maine Administrative Procedure Act intended to provide due process. 38 M.R.S. § 342(11-B); DEP Regs. Ch 2 §§ 25, 27. That process allows any person to petition the Commissioner to initiate proceedings to revoke or suspend a license, allows licensees to respond within 30 days (unless extended by the Commissioner), and requires that, within 21days of the licensee's response, the Commissioner must dismiss the petition or initiate a hearing proceeding.

Rather than initiate such a proceeding, however, NRCM makes its fifth request for a stay, significantly reducing Licensees' time within which to reply (due, as ordered by the Commissioner, within 7 days of NRCM's Stay Request) and seeking to deprive Licensees of the opportunity for a hearing required under the DEP's license suspension rules. While there has not been any change in circumstances that would require suspension of the DEP Order – again, TRI is a prudential standard relevant to an applicant's standing, not a licensee's standing, and

[6] Licensees note that even if the loss of TRI were grounds for staying a permit, the TRI at issue here is located in Project Segment 1, for which NECEC LLC holds the license. Accordingly, if a stay were appropriate here, a stay could only apply to the permit transferred to and held by NECEC LLC and not the portion of the DEP Order that concerns network upgrades held by CMP.

Licensees have not lost TRI in any event – the Commissioner on August 12, 2021 initiated proceedings to suspend the DEP Order, the suspension of which would be effective until: (a) the Superior Court's decision is reversed on appeal and the lease is reinstated; (b) a new lease is entered into for the portion of the corridor in Johnson Mountain Township and West Forks Plantation that is at issue; or (c) the licensees obtain Department approval of an amendment to the Order rerouting this portion of the transmission line. *See* Commissioner letter to Licensees (Aug. 12, 2021). No stay is necessary or appropriate.

IV. NRCM cannot meet the high burden for a stay.

Because TRI is not relevant to the DEP's post-issuance rules, and because Licensees made a *prima facie* showing of TRI during the relevant period – the processing of the license applications – the Superior Court's August 10, 2021 decision on the BPL leases has no bearing whatsoever on the merits of NRCM's appeals of the DEP Order and subsequent orders related to the Project. Even if it did, the operative BPL lease is still in effect, as the Licensees' and BPL's appeal of the Superior Court decision stays that court's vacatur. The DEP's analysis begins and ends there "because a stay cannot be obtained without a showing of a strong likelihood of success on the merits."[7]

As to the remaining elements of a stay, NRCM grounds each in its errant argument that Licensees' cannot complete the Project as permitted. NRCM Request at 4-7. Wedding its

[7] Order on NRCM's Motion to Stay DEP Commissioner's Order at 3, KEN-AP-20-27, SOM-AP-20-04 (Murphy, J.) (Me. Super. Jan. 11, 2021). Little time need be spent on the standard of review here, as the Department and Superior Court have already addressed and dismissed NRCM's prior stay requests. As the Department is aware, NRCM bears the burden of showing that a stay is appropriate – a burden that is quite heavy, because injunctive relief is "an extraordinary remedy only to be granted with utmost caution when justice urgently demands it" and no adequate remedy at law exists. *Bangor Historic Track, Inc. v. Dep't of Agriculture*, 2003 ME 140, ¶ 12, 837 A.2d 129; *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980); *Vafiades v. Me. State Harness Racing Comm'n*, 2016 WL 4151506, at * 2 (Me. Super. Ct. June 8, 2016). NRCM must affirmatively demonstrate: (1) a strong likelihood of success on the merits, (2) immediate and irreparable injury to the petitioner, and (3) no substantial harm to adverse parties or the general public. 5 M.R.S. § 11004; *Bangor Historic Track*, 2003 ME 140, ¶ 9, 837 A.2d 129 ("A temporary restraining order may be granted only if it clearly appears from specific facts shown

alleged injury to the benefits of the Project – benefits that NRCM has consistently and continuously debated – NRCM makes the bare argument that if the Project cannot actually connect power to the New England Control Area "the project purpose can no longer be met with the proposed route" and any Project impacts are no longer justified. NRCM Request at 4. But NRCM makes no showing as to how continued construction in commercial forestland in compliance with the conditions in the Order – designed to reduce or eliminate impacts to habitat and existing uses – would cause it or its members any concrete and specific injury. Just as with its prior stay requests, NRCM has "provided . . . no factual analysis of whether and how any such construction would actually cause them harm." Commissioner decision on stay at 4 (Aug. 26, 2020). As former Commissioner Reid noted, NRCM's "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." *Id.* at 5. NRCM's scant argument of harm here does not amount to a concrete showing of immediate and irreparable harm.[8]

Similarly, NRCM's ostensible showing of lack of harm to Licensees or the general public is grounded in the falsity that "CMP can no longer demonstrate that it has the rights to complete the project." Request at 6-7. That is not the showing required here. Rather than allege facts demonstrating "no substantial harm to adverse parties or the general public," 5 M.R.S. § 11004,

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by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant," quoting M.R. Civ. P. 65(a)). The first two criteria are the most critical, and require a showing of more than "mere possibility." *Respect Me. PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). **Failure to demonstrate any one of these criteria, however, requires that injunctive relief must be denied.** *See Bangor Historic Track*, 2003 ME 140, ¶ 10, 837 A.2d 129.

[8] Additionally, even if NRCM had pled any concrete and specific injury it would not be irreparable, given that any vegetation cut will regrow, and given the appeals process available to and utilized by NRCM and the Commissioner's ordered license suspension proceeding.

NRCM dismisses what it dubs "pocketbook harm to CMP"[9] and waxes generally on the policy behind the Natural Resources Protection Act and the Site Location of Development Act. *Id.* Notably, NRCM ignores entirely the harm to the general public that would result from delay or cancellation of the Project.

The loss of economic benefits of the Project alone are substantial.[10] Crucial, however, is the impact of the DEP Order in the fight against climate change. As the Commissioner explained in that Order, climate change "is the single greatest threat to Maine's natural environment":

> It is already negatively affecting brook trout habitat, and those impacts are projected to worsen. It also threatens forest habitat for iconic species such as moose, and for pine marten, an indicator species much discussed in the evidentiary hearing. Failure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts.[11]

Combating climate change is perhaps the greatest public benefit of the Project, and Mainers cannot afford to await the outcome of appeals, potentially several years down the road, for the Project to reduce "overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region."[12] As recent climate change reporting has made abundantly clear, this Project cannot wait.

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[9] The harm to Licensees that would result from a stay pending the outcome of the BPL litigation is clear and has been well-established in the numerous stay proceedings concerning the Project. Because Licensees need to continue construction well before this appeal is resolved in order to meet the required in-service date, Licensees would be harmed by a stay of the DEP Order to the extent that they would not be able to continue construction where otherwise fully authorized. More than mere "pocketbook harm," the attendant delay and possible cancellation (pursuant to contractual in-service obligations) of the Project would inflict incalculable injury on Licensees.

[10] The Project will create an average of more than 1,600 jobs per year in Maine; will increase tax revenues; will increase Maine's gross domestic product by an average of $94-98 million during construction; and will reduce wholesale electricity costs. *See NextEra*, 2020 ME 34, ¶ 30 & n.14, 227 A.3d 1117; Order Granting CPCN, Docket No. 2017-00232, 2019 WL 2071571, at *1 (Me. P.U.C. May 3, 2019).

[11] DEP Order at 105.

[12] *Id.; see NextEra*, 2020 ME 34, ¶ 30, 227 A.3d 1117.

For the foregoing reasons, Licensees request that the Commissioner deny NRCM's Request for Stay of Agency Decision.

Dated this 18th day of August, 2021.

Matthew D. Manahan
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Exhibit B

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JANET T. MILLS
GOVERNOR

MELANIE LOYZIM
COMMISSIONER

August 12, 2021

Via E-mail Only

Thorn Dickinson, President & CEO
NECEC Transmission LLC
83 Edison Drive
Augusta, ME 04336

Gerry J. Mirabile, NECEC – Manager Permitting & Compliance
Central Maine Power Company
83 Edison Drive
Augusta, ME 04336

RE: New England Clean Energy Connect (NECEC) Transmission Line Project

Dear Messrs. Dickenson and Mirabile:

In Department Order # 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, dated May 11, 2020 (the Order), the Department approved the New England Clean Energy Connect (NECEC) project. The project involves 145 miles of high voltage direct current transmission line from Beattie Township to Lewiston, a converter station in Lewiston, a new substation in Pownal, additions to several other substations, and upgrades to existing transmission lines. The stated purpose of the project is to provide renewable electricity from Quebec to the New England grid.

On August 10, 2021, in its decision in *Black v. Cutko*, No. BCD-CV-2020-29, the Superior Court reversed the Director of the Bureau of Parks and Lands' decision to enter into a lease in 2020 for a portion of the NECEC corridor located in Johnson Mountain Township and West Forks Plantation. Pursuant to the Court's judgment, NECEC Transmission LLC and Central Maine Power Company (CMP) will not have a lease to construct the approximately 0.9 mile portion of the transmission line approved in this location. While this portion of the transmission line is only a small part of the overall project, this portion is necessary to the overall project purpose of delivering electricity from Quebec to the New England grid.

Pursuant to 38 M.R. S. § 342(11-B) and Chapter 2, § 25(A) of the Department's rules, the Commissioner may revoke or suspend a license upon making certain findings, including a finding that: "There has been a change in condition or circumstance that requires revocation or suspension of a license." 38 M.R.S. § 342(11-B)(E); Ch. 2, § 27(E). I have determined that the Court's decision represents a change in circumstance that may warrant a suspension of the NECEC Order and I, therefore, am initiating this proceeding under the above-cited sections of

the law and rule. If a suspension is imposed, it would be in effect until: (a) the Superior Court's decision is reversed on appeal and the lease is reinstated; (b) a new lease is entered into for the portion of the corridor in Johnson Township and West Forks Plantation that is at issue; or (c) the licensees obtain Department approval of an amendment to the Order rerouting this portion of the transmission line.

Chapter 2, § 25(A) & (C) establish that the Commissioner may not revoke or suspend a license without providing the licensee written notice and opportunity for a hearing pursuant to Title 5, chapter 375, subchapter 4. This letter shall serve as the required notice that I have decided to exercise my discretionary authority to initiate proceedings to consider the suspension of the NECEC Order based on the criterion set forth in 38 M.R.S. § 342(11-B) and Chapter 2, § 27(E) in light of the Superior Court's decision regarding NECEC Transmission LLC and CMP's lease for a portion of the project approved in the Order and the licensees' present ability to fulfill the stated project purpose.

Pursuant to Ch. 2, § 25(D), NECEC Transmission LLC and Central Maine Power Company have 15 days from the date of this letter to request a hearing.

Melanie Loyzim, Commissioner