



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

Mark C. Draper, Chair

Cynthia S. Bertocci  
Executive Analyst

Ruth Ann Burke  
Board Clerk

JANET T. MILLS  
GOVERNOR

*Sent by electronic mail only*

August 4, 2020

James T. Kilbreth  
Drummond Woodsum  
84 Marginal Way, Suite 600  
Portland, ME 04101-2480  
[jkilbreth@dwmlaw.com](mailto:jkilbreth@dwmlaw.com)

Re: Request for Full Board to Consider Natural Resources Council of Maine's Request for a Stay of the Commissioner's NECEC Licensing Decision

Dear Mr. Kilbreth:

The Board of Environmental Protection (Board) received your July 22, 2020 letter requesting an appeal to the full Board of my decision to refer to the Commissioner the Natural Resources Council of Maine's (NRCM) application for a stay. NRCM's stay application was made to the Board on June 10, 2020, and asked the Board to stay the Commissioner's Order approving the Central Maine Power New England Clean Energy Connect (NECEC) project. No appeal of my referral of that stay application will be entertained by the full Board.

When NRCM's stay application was received, a request for a stay was already pending before the Commissioner. On June 5, 2020 West Forks Plantation and others (West Forks) requested that the Commissioner stay his NECEC Order pending the outcome of West Forks' judicial appeal in Somerset County Superior Court. As outlined in my letter of July 16, 2020, the referral of NRCM's stay application to the Commissioner will enable him to analyze both the NRCM and West Forks' requests on behalf of the Department in an efficient and cohesive manner.

Your appeal letter asserts that NRCM's stay application is not a typical stay motion because only the Board may make decisions on the NECEC permit applications here. Your letter bases these assertions on NRCM's underlying arguments regarding the Board's statutes and regulations that are at issue in NRCM's Board appeal and assumes those arguments are correct. The Board has not yet decided NRCM's appeal or the merits of these arguments and will not presume their validity for procedural purposes while NRCM's appeal is pending.

My decision to refer NRCM's stay request to the Commissioner is not a final licensing decision, is generally procedural in nature, and is not appealable to the full Board. Title 38 M.R.S. §341-D and Chapter 2, §24 of the Board's regulations provide, respectively, that the Board shall review "[F]inal license or permit decisions made by the Commissioner..." and

“[F]inal license decisions of the Commissioner may be appealed to the Board...” Chapter 2 does not provide for appeal of a procedural decision by the Board Chair to the full Board except in certain specified instances, such as a dismissal of an appeal for a lack of standing.

By analogy, Chapter 3 offers additional insight on the kinds of rulings by the Board Chair or a Presiding Officer that are generally appealable to the full Board. Chapter 3, §4(C) identifies rulings a Presiding Officer might make in an adjudicatory proceeding and section 4(D) indicates whether they are appealable to the full Board. A stay request does not fall under any of the kinds of rulings that would be appealable to the full Board in such a proceeding, as outlined in Chapter 3, §§ 4(C)(1)-(5) & 4(D). Rather, a stay request is akin to regulation of the course of the proceeding or a ruling upon an issue of procedure (Ch. 3, §4(C)(8)&(9)) – rulings that are not appealable under Chapter 3 in an adjudicatory proceeding. This lends further support to the conclusion that the referral to the Commissioner is not appealable to the full Board here.

For all of these reasons, your request to appeal to the full Board my referral of NRCM’s stay request to the Commissioner is denied and will not be heard by the full Board.

If you have any questions, please contact Cynthia Bertocci, the Board’s Executive Analyst, at (207) 287-2452 or [Cynthia.s.bertocci@maine.gov](mailto:Cynthia.s.bertocci@maine.gov) or Peggy Bensinger, Assistant Attorney General, at (207) 626-8578 or [Peggy.Bensinger@maine.gov](mailto:Peggy.Bensinger@maine.gov).

Sincerely,



Mark C. Draper, Chair  
Board of Environmental Protection

Cc: Gerald Reid, DEP Commissioner  
Service Lists in DEP and LUPC proceedings