

By Email and Overnight Mail

October 7, 2020

Mark C. Draper, Chair
c/o Executive Analysts Hinkel and Bertocci
Board of Environmental Protection

Jim Beyer, NECEC Project Manager
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333

RE: Request for Board Jurisdiction Over CMP's Application
for Partial Transfer of MDEP Site Law and NRPA Permits
and Water Quality Certification DEP APPLICATION #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

Dear Chair Draper and Board Members, Executive Analysts, and NECEC Project Manager
Beyer:

Pursuant to 06-96 CMR, Ch. 2 § 17(A), the Natural Resources Council of Maine ("NRCM") hereby requests that the Board of Environmental Protection ("Board") consolidate jurisdiction over Central Maine Power Co.'s ("CMP") September 25, 2020 Application for Partial Transfer of MDEP Site Law and NRPA Permits and Water Quality Certification in connection with the New England Clean Energy Connect ("NECEC") transmission line ("Partial Transfer Application") with its pending review of the Department's May 11, 2020 Order conditionally authorizing the NECEC ("Permit Order"). NRCM also requests a public hearing in connection with this application as consolidated into any hearing held by the Board in connection with its review of the Permit Order. Consolidation of this application to amend the Permit Order with Board review of the Permit Order is required as a matter of law and is in the interests of efficiency and administrative economy.

First, under the Department's rules, a transfer application is a permit amendment and, when filed during the pendency of a Board review, must be considered by the Board.¹ Pursuant to 06-96

¹ NRCM notes that on October 6, 2020, the Department accepted the Partial Transfer Application as complete for processing by the Commissioner. This decision is in error because of the foregoing and because it purports to effectuate transfer of the NRPA portion of the Permit Order via a permit by rule process which is not properly applicable to a NRPA permit like the Permit Order. For the reasons stated herein, the Board alone has jurisdiction

CMR. Ch. 2 § 1(L), the terms “permit” and “license” are “used interchangeably” in the Department’s rules, and mean “the whole or any part of a new license, amended license, renewal license, transfer ... approval, or similar form of permission issued by the Department that is required by law.” The Department also broadly defines “Amendment Application” to include any “application to modify a license previously granted by the Department, except for minor revisions.” *Id.* § 1(C). Thus, by definition the Permit Order currently on appeal to the Board *includes* the Partial Transfer Application.² CMP’s attempt to submit the Partial Transfer Application for Department review as a separate, new Commissioner decision is improper.³ The Partial Transfer Application is directly relevant to issues on appeal, and provides certain of the supplemental evidence specifically requested by parties seeking Board review of the Permit Order. The Board must conduct the Department review of the Partial Transfer Application because, by definition, it is part of the Permit Order and any decision thereon will substantively alter the terms of the Permit Order.

CMP now concedes in its cover letter for its Partial Transfer Application that “[i]n May 2019 the Maine Public Utilities Commission approved a Stipulation requiring that ownership of the NECEC be transferred from CMP to NECEC Transmission LLC (NECEC LLC), including ‘[A]ll land use permits, any outstanding land use permit applications, and other regulatory permits (the “Permits”) related to the NECEC’” (“PUC Stipulation”). CMP thus acknowledges that, as of May of 2019, it was required to transfer any outstanding permit applications before the Department, but did not do so in the year that passed while the Commissioner considered the Permit Order. NRCM raised this exact issue in its appeal to the Board of the Permit Order with regard to right title and interest, as well as findings regarding financial capacity and technical ability. *See* NRCM Request for Board Review, 8-9. The Board cannot properly review CMP’s submissions regarding financial capacity and technical ability in the context of the Permit Order while the Commissioner is simultaneously considering changes to those exact findings in the Permit Order through the Partial Transfer Application.

Finally, consolidation of the Partial Transfer Application with the currently pending Board review is in the interest of administrative economy and complies with the rationale under which

over this application, if the Commissioner nonetheless proceeds to process the transfer application, NRCM requests that a hearing be held and that NRCM be allowed to intervene.

² NRCM previously established that the NECEC is a project of statewide significance. *See* NRCM Request for Board Review (June 10, 2020) at 4-7. This is an independent reason that the Board must take original jurisdiction over the Partial Transfer Application. 38 M.R.S. § 341-D; 06-96 CMR. Ch. 2 § 17. Now that CMP has filed this Application, it makes little sense to take appellate jurisdiction over the Permit Orders while the Board takes original jurisdiction, as it must, over the Partial Transfer Application that amends the Permit Order. If the Board does take this bifurcated approach, it should nonetheless consolidate the matters and conduct *de novo* evidentiary hearings on the issues raised by all appellants.

³ CMP’s notice of the Partial Transfer Application was defective. Pursuant to 06-96 CMR. Ch. 2 § 21(B), “If a licensee seeks to amend a license regarding an issue that was the subject of an appeal to the Board, notice of the amendment application must be provided to the prior appellant(s) as if they were abutters, in accordance with section 14(A) of this rule.” Here, CMP seeks to amend the technical and financial capability portions of the Permit Order while those same criteria are on appeal before the Board. Accordingly, CMP was required to (but did not) give prior notice of its “Intent to File” the Partial Transfer Application “mailed by certified mail or Certificate of Mailing to all appellants before the Board.” Instead, CMP merely filed the Application and distributed it to the service list without prior notice.

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the Department asked the Superior Court to remand the two judicial appeals of the Permit Order, Docket Nos. KEN-AP-20-27 and SOM-AP-20-04. As the Department there argued, consolidation of all matters before the Board is “the only way to ensure fairness to all parties in this high-profile matter of Statewide interest.” *See* Department Remand Motion in KEN-AP-20-27 at 8. The Court agreed with the Department, reasoning that any Board decision in this matter will supersede the Permit Order and become the Department’s final decision on the NECEC application and that the Board may amend or reverse the Permit Order, changing the final agency action in the matter. Combined Order on Motions (August 11, 2020). The same rationale applies here and requires consolidated Board review of the Permit Order and Partial Transfer Application.

It is inconsistent with Department rules and impractical, inefficient, and wasteful of Department resources for the Board to review the Permit Order while the Commissioner is simultaneously reviewing and potentially changing the Permit Order findings on the financial and technical capability of the NECEC applicant. The Board must therefore consolidate these matters, take original jurisdiction over this project of statewide significance, and hold a hearing on the various issues raised by all appellants with regard to the Permit Orders including the amendments requested in the Partial Transfer Application.

Sincerely,

A handwritten signature in cursive script that reads "James T. Kilbreth (J.T.)". The signature is written in black ink and is positioned above the printed name.

James T. Kilbreth

cc: Service List (by email only)