DrummondWoodsum
ATTORNEYS AT LAW

David M. Kallin
Admitted in ME

207.253.0572
dkallin@dwmlaw.com

84 Marginal Way, Suite 600
Portland, Maine 04101-2480
207.772.1941 Main
207.772.3627 Fax

June 7, 2021

By Email to Service List

Mark Draper, Chair
Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

RE: *Appeal pursuant to DEP Rule Ch.2 § 24 of the Department's Order Approving NECEC Minor Revision: Order # L 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*

Chair Draper and Board Members:

I write on behalf of the Natural Resources Council of Maine ("NRCM") to appeal the May 7, 2021 Order ("Minor Revision Order") approving Central Maine Power Company's and NECEC Transmission, LLC's (together, the "Applicants") application for minor revisions ("Minor Revision Application") to the conditionally approved New England Clean Energy Connect ("NECEC" or "Corridor") pursuant to DEP Rule Ch.2 § 24. As detailed below, the Commissioner's approval of the Minor Revision Application does not comply with the Site Location of Development Act, 38 M.R.S. § 482 *et seq.* ("Site Law"), or Chapter 2 of the Department's Rules.[1] The scope and scale of the changes approved in the Minor Revision Order should have been treated as amendments, not minor revisions, to the Permit Orders. The Board should consolidate its review of all of the various changes that have occurred to the NECEC permits that are currently on appeal before it, and as part of the hearing procedures previously requested by NRCM, should take up its review of the project as now proposed in its entirety, in a single proceeding.[2]

Background

On May 11, 2020, the Department conditionally approved construction and operation of NECEC, which involves a 145-mile, high-voltage, direct current (HVDC) transmission line from Québec

[1] Additionally, as NRCM has explained previously, CMP and NECEC LLC do not have sufficient right, title, or interest in the public reserved lands underlying portions of the transmission line so the Department could not properly act on this amendment. NRCM incorporates by reference its full arguments set forth in its submissions in this Minor Amendment proceeding as well as in in its Transfer Appeal and Permit Appeal.

[2] The procedure the Board should follow is to assume original jurisdiction over the entirety of the project permits before it. This is a project of statewide significance, and the Permit Order and Minor Revision Order should each be vacated so that the Board can consider the entirety of the project in that capacity. 38 M.R.S. §§ 341-D(2), 344(2-A) and 06-096 CMR. Ch. 2 § 17(C).

to an interconnection with the New England energy grid in Lewiston, a converter station in Lewiston, a new substation in Pownal, additions to several other substations, and upgrades to existing transmission lines. On December 4, 2020, the Department transferred a portion of the permit for NECEC from CMP to NECEC LLC.

The Applicants submitted a Minor Permit Application on December 30, 2020 proposing a series of changes to NECEC. On January 15 and February 1, 2021, NRCM submitted a request for the Board to assume jurisdiction over the Application, submitted comments on the Application, and argued that the underlying changes do not qualify as minor revisions. On February 10, 2021, the Commissioner sent a letter to NRCM and Sierra Club with her determination that the Minor Revision Application does not represent a project of statewide significance and recommending that the Board not assume jurisdiction. The Board voted on March 18, 2021 not to consider assuming original jurisdiction over this Application. The Department approved the Minor Revision Application on May 7, 2021, finding that the modifications sought pursuant to the Application, as amended,[3] qualify as minor revisions.

Standing to Appeal

NRCM, as an appellant to the original Permit Order on appeal before the Board, is particularly harmed by the Department's decision to modify that Permit Order through the Minor Revision Order without Board oversight or provision of the required public notice and engagement procedures, and is thus an aggrieved party with standing to pursue this appeal. 06-096 CMR Ch. 2 § 24(B)(1). Furthermore, NRCM is Maine's largest environmental advocacy group with over 25,000 members and supporters, has a mission to protect, restore, and conserve Maine's environment, now and for future generations, and the permitting of the NECEC in this area harms that mission. Many of NRCM's members use the area proposed for the NECEC for their outdoor recreation, such as fishing, hunting, and hiking. NRCM also has members and supporters who are guides in this area, and NECEC would harm their businesses. Accordingly, the Department held in the original proceeding that NRCM established particularized injury. NRCM's submissions and the Department's findings in the First Procedural Order are incorporated by reference in support of this appeal.[4] NRCM is thus an aggrieved party with standing to pursue this appeal.

The Project Modification is a Hazardous Activity.

The Minor Revision Order is silent with regard to compliance with the requirements of 38 M.R.S. § 487-A(4) which apply to all transmission lines. Specifically, the Site Law specifies that "permanently installed transmission line[s] carrying 100 kilovolts, or more," are a hazardous activity that, regardless of size, are subject to all Site Law notice and public engagement

[3] By letter dated March 11, 2021, the Commissioner determined that two parts of the application would not qualify as minor revisions. The Applicants withdrew these modifications by letter dated March 16, 2021. The Department erred by treating these parts as separable and by not evaluating whether their withdrawal by the applicant was permissible pursuant to 38 M.R.S. § 487-A(4).

[4] Because NRCM requests consolidation of the appeal of the Minor Revision Order with review of the Permit Order, NRCM is not separately including material already in the Permit Order record. If the Board would prefer NRCM include this material as exhibits to this appeal, NRCM will amend this appeal.

requirements and further, that special additional notice requirements (set forth in 38 M.R.S. § 487-A(4)) apply to such activities because of their hazardous nature.

This portion of the Site Law mandates notice requirements that were not followed here and further provides that:

> In addition to finding that the requirements of section 484 have been met, the department, in the case of the transmission line or pipeline, shall consider whether any proposed alternatives to the proposed location and character of the transmission line or pipeline may lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost.

38 M.R.S. § 487-A(4). The Minor Revision Order entirely ignores these Site Law requirements. Instead, by letter dated March 11, 2021, the Commissioner found that two of CMP's proposed alternatives would not qualify as minor revisions—but they were "proposed alternatives" to the location and character of the transmission line that could have lessened its impact on the environment. Accordingly, by statute, the Department was required to consider these alternatives and should have treated the entire Minor Revision Applications as an amendment. Of course, the Department is not authorized to ignore Section 487-A. The Board must overturn the Minor Revision Order.

The Site Law does not Allow Approval of a Development of State or Regional Significance as a Minor Revision.

The Legislature, in its wisdom, found that the potential for developments of a certain size or nature to cause "irreparable damage to the people and the environment" required the State to "regulate the location of developments which may substantially affect the environment and quality of life in Maine. 38 M.R.S. § 481. "[T]he location of such developments is too important to be left only to the determination of the owners of such developments." *Id.* The State achieves the Legislature's objectives through its implementation of the Site Law, which applies to any "[d]evelopment of state or regional significance that may substantially affect the environment." 38 M.R.S. § 482. Plainly, if the proposed changes would—on their own—meet the Site Law's jurisdictional requirements to be considered a development of "state or regional significance," those proposed changes cannot be "minor."

The Minor Revision Order simultaneously posits that the modifications in the Minor Revision Applications are "minor revisions" even while conceding that these revisions, standing alone, are within the definition of "development of state or regional significance." The Department freely admits that modifications it approved pursuant to the Minor Revision Order involve more than 20 acres in land area—thereby constituting a development of state or regional significance such that the Department cannot void the notice and public process requirements set forth under the Site Law by treating that project as a minor revision.[5] Minor Revision Order at 4.

[5] These modifications are also trigger Site Law notice and public engagement requirements if they "cause a total project to occupy a ground area in excess of 3 acres. Stripped or graded areas that are not revegetated within a calendar year are included in calculating the 3-acre threshold." 38 M.R.S. 482(2),(6). The proposed reroute around Bowman

The Department's basic premise is wrong. A project that meets the Site Law definition of a development of state or regional significance cannot be treated as a minor revision. Even were that not the case, the proposed modifications do not meet the definition of a minor revision. A 'Minor Revision' is defined as an "application to modify a license previously granted by the Department, [1] where the modification significantly decreases or eliminates an environmental impact, [2] does not significantly expand the project, [3] does not change the nature of the project, or [4] does not modify any Department findings with respect to any licensing criteria." 06-96 CMR Ch. 2 § 1(N). The modifications at issue meet none of these criteria. Here, the Department concedes that the first criterion is not met, but argues that all three of the others are. Minor Revision Order at 9. But the reroute around Bowman airfield illustrates the error in the Department's analysis. That reroute, which involves three acres of land that were not previously analyzed by the Department, would—by necessity—require modifications to findings of fact. It is different land, with different resources impacted, and the findings of fact as to one parcel of land cannot simply be ported to another parcel. The Department concedes, as it must, that these new project impacts to new lands must be reviewed pursuant to the Site Law. Minor Revision Order at 4-5. Consequently, the Department must make *new findings* about the environmental impacts to new parcels from the proposed project modifications. 38 M.R.S. § 484. New findings, by definition, entail changes to the existing findings with respect to licensing criteria as they apply to the project. Indeed, the Department's argument that it is not making new findings would mean that it is not adhering to its obligation to apply the law to the Minor Revision Applications, which would be an independent basis to reverse its decision. Furthermore this multi-acre expansion to new land is "significant" in its own right, even if it is not large when compared to the size of the project as a whole.

Project modifications that would, independent of the underlying project, require review pursuant to the Site Law cannot be properly approved as a minor revision. Instead, the Department must comply with all applicable procedural requirements of Chapters 2 and 3 of the Department's Rules. 06-96 CMR Ch. 2-3. More fundamentally, it is the Board that should be considering the project as a whole, and the Department should not be revising the project in separate proceedings while the underlying permits are before the Board

Conclusion

The Minor Revision Order errs as a matter of law because it: (1) ignores the Site Law provisions applicable to hazardous activities like transmission lines, (2) improperly processes a development of state or regional significance as defined by the Site Law as a minor revision, and (3) wrongly approves the proposed modifications to the underlying permits at a time when the underlying project is currently before the Board. NRCM respectfully requests that the Board consolidate these revisions with the currently pending permits and exercise its jurisdiction to provide the required public process and review as part of the pending appeals of the Department's May 2020 Permit Order and Transfer Order. While NRCM does not request a separate hearing specific to these minor amendments, the Board should hold a public hearing as requested in those other appeals in

---

airfield is more than 3 acres and there is no revegetation deadline. It is thus unclear how the Department concluded that this threshold will not be met. *See* Minor Revision Order at 5.

a manner that addresses the project as it currently stands, not as it stood over a year ago before the Department authorized numerous significant changes to the project.

Sincerely,

David M. Kallin

Cc: Service List (by email only)