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August 20, 2020

Susan Furbush, Clerk
Somerset County Superior Court
41 Court Street
Skowhegan, ME 04976

Michele Lumbert, Clerk
Capital Judicial Center
Kennebec County Superior Court
1 Court Street – Suite 101
Augusta, Maine 04330

Re: *West Forks Plantation, et al. v. Maine Department of Environmental Protection*,
Docket No. SOM-AP-20-04

*NextEra Energy Resources, LLC v. Maine Department of Environmental
Protection and Central Maine Power*, Docket No. KEN-AP-2020-27

Dear Ms. Furbush and Ms. Lumbert:

Enclosed please find for filing Respondent's Response to West Forks Petitioner's Motion for Reconsideration or Clarification in the above-captioned matter.

If there are any questions please do not hesitate to contact me at 626-8578.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Margaret A. Bensinger".

Margaret A. Bensinger
Assistant Attorney General

Enclosures

cc via email: Elizabeth Boepple, Esq.
Joanna Tourangeau, Esq.
Matthew Manahan, Esq.
Gerald Petruccelli, Esq.
Sigmund Schutz, Esq.

Benjamin Smith, Esq.
James Kilbreth, Esq.
Commissioner Gerald Reid, DEP

The Department agrees with the West Forks Petitioners, Motion at 3-4, that on remand to the Board, both NextEra Energy Resources, LLC (Petitioner in Docket No. KEN-AP-20-27) and the West Forks Petitioners should be given an opportunity to submit to the Board a more detailed written appeal statement that 1) articulates the arguments made in their respective Superior Court Rule 80C appeals, and 2) states whether they request a public hearing or the inclusion of supplemental evidence in the record, in accordance with the Board's procedural rules governing administrative appeals, 06-096 C.M.R. ch. 2 § 24(B). The Department requested this relief with respect to both NextEra and the West Forks Petitioners for the reasons outlined in its remand motions and briefs filed in these cases, which are incorporated herein. The Combined Order, at 5-6, provides for this relief only with respect to NextEra and not with respect to the West Forks Petitioners. The Department interprets the Combined Order as authorizing this relief on remand for both NextEra and the West Forks Petitioners and believes that this may have been an inadvertent oversight warranting clarification by the Court.

The West Forks Petitioners also assert that the Combined Order is silent with respect to their motion to stay their Rule 80C appeal (Docket No. SOM-AP-20-04) and should be further addressed. Motion at 3. The Department disagrees. As the Department reads the Combined Order, there is no need for the Court to further address the West Forks Petitioners' motion for a stay. The remand already ordered in consolidated Docket Nos. KEN-AP-20-27 and SOM-AP-20-04 will eventually produce a new Board decision that will supersede the Commissioner's decision at issue in Docket Nos. KEN-AP-20-27 and SOM-AP-20-04 and that will be the new operative Department final agency action subject to further appeal through new and different court action(s). This leaves nothing to be done in Docket Nos. KEN-AP-20-27 and SOM-AP-20-04, and there is no reason for them to remain pending in Superior Court.

As outlined in the Department’s remand briefs and as stated in the Combined Order (at 4), because of NRCM’s pending administrative appeal before the Board “it is now the Board that is the decision-making authority within the Department” and “the BEP’s new decision will be considered the “final agency action”” for further Rule 80C purposes. The Department’s position is that when the Board’s new and superseding decision is eventually issued, any appeals pending of the original decision, such as those in Docket Nos. KEN-AP-20-27 and SOM-AP-20-04, would be moot. The new decision will be subject to appeal and judicial review pursuant to the timelines and other requirements in the Maine Administrative Appeal Act, 5 M.R.S. §§ 11001-11008, and Rule 80C *only through new and different Superior Court action(s)*. This is the only procedural path that would make sense because any court appeal of a new Board final agency action issued on remand would be a new and different appeal and thus a different court matter altogether; the Board’s eventual new decision could not simply be swapped out for the prior superseded and mooted Department action that is the subject and focus of Docket Nos. KEN-AP-20-27 and SOM-AP-20-04. These existing appeals would not be tethered in any way to the new court action and thus should no longer remain pending.

Therefore, the Court should also clarify that this is the appropriate procedural path here: Because of the remand in the Combined Order, Docket Nos. KEN-AP-20-27 and SOM-AP-20-04 will no longer remain pending in Superior Court, and if, following remand, a timely appeal of the Board’s new and superseding decision on behalf of the Department is ultimately filed in Superior Court, any such appeal(s) would proceed in such new and separate court action(s), and motions for transfer to the Business and Consumer Docket could then be made in the new court action(s) at that time.

CONCLUSION

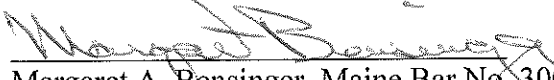
For the above reasons, the Department agrees with the West Forks Petitioners that clarification of the Combined Order is appropriate. The Court should clarify the Combined Order as follows:

1. Docket Nos. KEN-AP-20-27 and SOM-AP-20-04 are being remanded to the Board of Environmental Protection and will no longer remain pending in Superior Court;
2. On remand to the Board, Petitioners in both Docket Nos. KEN-AP-20-27 and SOM-AP-20-04 shall be given an opportunity to submit to the Board a written appeal statement that more fully articulates the arguments made in their respective Superior Court Rule 80C appeals, and that states whether they request a public hearing or the inclusion of supplemental evidence in the record, in accordance with the Board's procedural rules governing administrative appeals, 06-096 C.M.R. ch. 2 § 24(B); and
3. The Board's eventual decision issued on remand will supplant the Commissioner's decision as the operative decision on behalf of the Department and will be subject to further appeal and petition for judicial review pursuant to the Maine Administrative Appeal Act, 5 M.R.S. §§ 11001-11008, and Rule 80C through new and different court action(s). Motions regarding transfer to the Business and Consumer Docket may be made in any such timely filed action(s) at that time.

Dated: August 20, 2020

Respectfully submitted,

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Department of Environmental Protection