

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. _____

WEST FORKS PLANTATION, TOWN)
OF CARATUNK, KENNEBEC RIVER)
ANGLERS, MAINE GUIDE SERVICE,)
LLC, HAWKS NEST LODGE, ED)
BUZZELL, KATHY BARKLEY, KIM)
LYMAN, NOAH HALE, ERIC)
SHERMAN, MIKE PILSBURY, MATT)
WAGNER, MANDY FARRAR AND)
CARRIE CARPENTER,)

**PETITION FOR JUDICIAL REVIEW OF
FINAL AGENCY UNDER M.R.CIV.P. 80C**

Petitioners,

v.

STATE OF MAINE, BOARD OF)
ENVIRONMENTAL PROTECTION)

Respondent

And

CENTRAL MAINE POWER,)
NECEC TRANSMISSION LLC,)

Party-In-)
Interest)

INTRODUCTION

1. Pursuant to 5 M.R.S. § 11001 *et seq.* and Maine Rule of Civil Procedure 80C, Petitioners West Forks Plantation, Town of Caratunk, Kennebec River Anglers, Maine Guide Service, LLC, Hawks Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman, Noah Hale, Eric Sherman, Matt Wagner, Mike Pilsbury, Mandy Farrar and Carrie Carpenter, consisting of individuals, businesses and towns (“Petitioners” or “West Forks”), by and through their undersigned counsel, respectfully petition for review of the Board of Environmental Protection’s July 21, 2022 Order (“BEP Order”) denying West Forks’ appeal of the Maine Department of Environmental

Protection's ("DEP" or the "Department") May 11, 2020 Finding of Facts conditionally approving Central Maine Power's ("CMP/NECEC") applications for State land use permits (the "License") for the New England Clean Energy Connect project ("NECEC").

2. During the pendency of the appeal to the BEP¹, the citizens of Maine exercised their constitutional right to legislate by overwhelmingly voting to approve a citizen initiative (the "New Law" or the "Initiative") that:

- Prohibits the construction of high impact transmission lines in the Upper Kennebec Region (amending 35-A M.R.S. § 3132, sub-§6-D).
- Requires approval of the Legislature for construction of a high-impact electric transmission line anywhere in the state, "except that any high-impact electric transmission line crossing or utilizing public lands designated by the Legislature pursuant to Title 12, section 598-A is deemed to substantially alter the land and must be approved by the vote of 2/3 of all the members elected to each House of the Legislature." (amending 35-A M.R.S. § 3132, sub §6-C).

3. The New Law as approved by the voters of Maine, applied retroactively to any high impact transmission line not under construction on or after September 16, 2020, but with respect to the public lands lease section, applied retroactively to leases executed on or after September 16, 2014.

4. The vote on the Initiative was "certified by the Maine Secretary of State and the Governor proclaimed the result of the vote on November 19, 2021. Accordingly, pursuant to

¹ On June 8, 2020 Petitioners timely filed their appeal of the DEP Order to this Court pursuant to Rule 80C. Docket #SOM-AP-20-04. Contemporaneously, NextEra timely filed their appeal of the same Order to the Kennebec Superior Court, Docket #KEN-AP-20-27 and on the same date, Natural Resources Council of Maine timely filed their appeal to the Board of Environmental Protection ("BEP"). On July 2, 2020, the DEP filed with Somerset and Kennebec Superior Courts for a "remand" of both 80C appeals to the BEP to be heard together with NRCM's appeal, and a Motion to Stay the 80C appeals. On July 2, 2020 CMP and interested parties in support of the NECEC, filed a joint request to consolidate and transfer the two 80C appeals to the Business and Consumer Docket ("BCD"). By Order dated August 11, 2020, the Court granted DEP's Motion to Stay the two 80C appeals and DEP's request to remand to the BEP. The Court also granted CMP's motion to consolidate the two 80C appeals. The Court, however, deferred decision on the request to transfer to the BCD stating: "the Court will await the results of the administrative appeal prior to deciding on whether to transfer the case to the BCD." Order, August 11, 2020 at p. 6. Accordingly, Docket #SOM-AP-20-04 and KEN-AP-20-27 remain open and pending.

Article IV, Part Third, Section 19 of Maine’s Constitution,”² the New Law took effect 30 days following the Governor’s proclamation on December 19, 2021.

5. The New Law is now and was at the time of the BEP meeting on July 20 and July 21, 2022, the applicable law prohibiting construction of the NECEC.

6. The BEP through its Hearing Officer³, refused to apply the new law in the appeal and in considering the request for a hearing.

7. The day after the vote, in an attempt to halt the application of the New Law, NECEC and Avangrid Networks, Inc. (the parent company of CMP) filed a Verified Complaint for Declaratory Judgment and a Motion for a Preliminary Injunction, *NECEC Transmission LLC et al. v. Bureau of Parks and Lands, et al.* No. BCD-CIV-2021-00058⁴.

8. The Court found that:

- a) “allowing the Initiative to become law will not violate Plaintiff’s constitutional rights or constitutional principles. The vested rights doctrine does not apply, and to the extent that it does, Plaintiffs’ rights to continue building the corridor did not vest. The Court also concludes the Initiative does not violate Separation of Powers principles or the Contracts Clause,”⁵; and
- b) the Plaintiffs’ Motion for Preliminary Injunction failed to meet every one of the four criteria required for a Court to grant injunctive relief.⁶

9. Following the result of the election, and the Superior Court decision in *Black v. Cutko*, BCD-CV-2020-29 reversing the decision of the Director of Public Parks and Lands to enter

² DEP Suspension Order, November 23, 2022, at p.9.

³ Board of Environmental Protection, Consolidated Appeals of the New England Clean Energy Connect Order and Transfer Order, May 2, 2022, at p. 2.

⁴ *NECEC Transmission LLC et al. v. Bureau of Parks and Lands, et al.* No. BCD-CIV-2021-00058 is on appeal to the Law Court Docket No. BCD-21-416.

⁵ *NECEC Transmission LLC et al. v. Bureau of Parks and Lands, et al.* No. BCD-CIV-2021-00058, at 2.

⁶ *NECEC Transmission LLC et al. v. Bureau of Parks and Lands, et al.* No. BCD-CIV-2021-00058, at 52.

into a lease with CMP for a portion of the NECEC route, the DEP Commissioner ultimately suspended the License citing the New Law and the *Black v. Cutko* decision as a change of circumstances that, after hearing, warranted suspension of the License.⁷ The License Suspension was not appealed and remains in effect pending final disposition of *NECEC Transmission LLC et al. v. Bureau of Parks and Lands, et al.* No. BCD-21-416⁸.

PARTIES

10. The following Petitioners were grouped together as one party at the BEP Appeal, and are, or will be, particularly impacted by the BEP Order.:

- West Forks Plantation: A town of 56 residents in Somerset County which voted 45 - 7 in September, 2018, not to support the Project and continues to oppose the project through this appeal.
- Town of Caratunk: A town of 68 residents in Somerset County originally supported the Project early on but then retracted its support and actively engaged in opposition to the Project through the PUC proceedings as well as in the DEP and LUPC proceedings.
- Kennebec River Anglers: An outfitting business in Caratunk, Maine, offering guided fishing trips on the Kennebec River including the section crossed by the proposed Project line which, despite the undergrounding in this short section, will be directly and negatively impacted by the proposed Project.
- Maine Guide Service, LLC: An outdoor guiding business based in Caratunk, Maine that guides clients on the Kennebec River and in the Forks, West Forks, and Caratunk area.

⁷ DEP Suspension Order, November 23, 2021

⁸ *Id.*

- Hawks Nest Lodge: A lodge located on National Scenic Byway Route 201 in West Forks, Maine that caters to outdoor recreationalists and employs up to 18 local residents.
- Mike Pilsbury, a resident and business owner in Caratunk, Maine and licensed Maine Guide.
- Ed Buzzell: A resident, Registered Maine Whitewater Guide and former Registered Maine Recreational, Hunting, and Fishing Guide and owner of Kennebec Kayak, Inc., a business in Moxie Gore, an area within Segment 1 of the Project whose hospitality and recreational business and livelihood will be directly and negatively impacted by the Project.
- Kathy Barkley: A resident of Caratunk, recreational user, and worker in the local hiking and whitewater rafting tourism industry in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Kim Lyman: A resident, recreational user, Registered Maine Whitewater Guide, owner of guest rental cabins, and long-time worker in the local tourism industry in Caratunk in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Noah Hale: A resident of West Forks, recreational user, Registered Maine Whitewater Guide, and worker in the hospitality and tourism industry in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Eric Sherman: A life-long resident, recreational user, classroom teacher in Greenville, Registered Maine Whitewater and Maine Recreational Guide in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.

- Matt Wagner: A seasonal resident, long-time recreational user in the Forks area, a Registered Maine Whitewater Guide, landowner in the Forks, co-owner and Operations Manager of InSource Renewables and previous commercial guide and trip leader in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Taylor Walker: A resident, recreational user, Registered Maine Whitewater Guide, and an outdoor filmmaker in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Mandy Farrar: A resident, recreational user, landowner in Solon, whitewater guide, and forester in the Segment 1 area of the Project who will be directly and negatively impacted by the Project.
- Carrie Carpenter: A resident, recreational user, landowner in East Moxie Township, whitewater guide, and worker in the tourism industry in the Segment 1 area of the Project who will be directly and negatively impacted by the project.

11. Petitioners include individual residents and property owners, local businesses, and a local township and town in Segment 1 and the northern end of Segment 2 of the proposed NECEC.

12. All Petitioners will be specifically negatively impacted by the NECEC cutting through the local landscape because of impact to tourism, local businesses, ecosystem services, and property values.

13. Respondent BEP is a state agency with its primary office in Augusta, County of Kennebec, State of Maine.

14. Upon information and belief, Party-in-Interest, NECEC is a Maine entity to which CMP transferred the License.

15. Upon information and belief, Party-in-Interest, CMP is a Maine business and the original applicant for the NECEC license.

JURISDICTION AND VENUE

16. Pursuant to 5 M.R.S. § 11001 *et seq.* and Maine Rule of Civil Procedure 80C, this Court has jurisdiction over Petitioners' claims.

17. Venue is proper under 5 M.R.S. § 11002(1)(B) because the Board has its principal office in Kennebec County, and under 5 M.R.S. § 11002(1)(C) because the activity authorized by the BEP Order is located in part in Kennebec County.⁹

STANDARD OF REVIEW

18. Judicial review of a final agency action under M.R. Civ. P. 80C involves review of the agency decision for abuse of discretion, errors of law, or findings not supported by the evidence. *Centamore v. Dep't of Human Servs.*, 664 A.2d 369, 370 (Me. 1995).

19. Review is limited to "determining whether the agency's conclusions are unreasonable, unjust, or unlawful in light of the record." *Imagineering v. Sup't of Ins.*, 593 A.2d 1050, 1053 (Me. 1991).

20. The Court does not decide if it would have reached the same conclusion as the agency did; instead, the Court decides whether the record contains competent and *substantial evidence* that supports the agency's decision. *See id (emphasis added)*.

21. On appeal, the burden of proof "rests with the party seeking to overturn the decision of an administrative agency." *Seven Islands Land Co. v. Me. Land Use Regul'n Comm'n*, 450 A.2d 475, 479 (Me. 1982).

⁹ Somerset County Superior Court, is also the proper venue for this group of Petitioners under 5 M.R.S. § 11002(1)(A) because all of the petitioners reside or have their place of business in Somerset County. However, since there are two pending dockets that were previously consolidated (Docket #SOM-AP-20-04 and KEN-AP-20-27) and two appeals of the BEP Order have now been filed in Kennebec County Superior Court, Petitioners are bringing their appeal in Kennebec to assist the Court in reviewing all appeals more efficiently.

FACTUAL BACKGROUND AND ISSUES ON APPEAL

22. On September 27, 2017, CMP submitted its application to the Department for a Natural Resources Protection Act (NRPA) permit pursuant to 38 M.R.S. §§ 480-A – 480-JJ and a Site Location of Development Law (Site Law) permit pursuant to 38 M.R.S. §§ 481-490 for its proposed NECEC project. CMP's proposal includes new construction and/or expansion of a 145.4 miles-long, 320 kilovolt (kV) High Voltage Direct Current transmission line in a corridor running from the Canadian border in Beattie Township to a new substation in the Town of Lewiston, with associated substations, poles and other structures.

23. The first portion of the proposed line, Segment 1, cuts a new swath within a 54-foot wide by 53.1 mile corridor through the unfragmented forest region of north western Maine extending from the Quebec, Canada border in Beattie Township to Moxie Gore. Segment 1 is entirely within townships and plantations served by the LUPC.

24. After more than two years of delay to take up the consolidated appeals of West Forks, NextEra and NRCM, the BEP convened a meeting on July 21 and July 22, 2022.

25. The BEP refused to allow any of the Appellants to present argument on: 1) the New Law, 2) the Superior Court's decision in *Black v. Cutko* and 3) the Commissioner's Suspension Order.

26. In taking up the appeals, the BEP refused to: apply the New Law, recognize the Commissioner's Suspension Order, and recognize and apply the Superior Court's decision in *Black v. Cutko*.

27. The BEP also refused to allow for a hearing while acknowledging concerns over the sufficiency of certain conditions in the License, including: 1) the adequacy of Special Condition 39 requiring permanent conservation of 40,000 acres in the vicinity of Segment 1; 2) requirement that

a decommission plan be submitted for Department review after construction and operations were complete; 3) adequacy of the vegetation management plan.

28. Despite the BEP's concerns, it seemed more concerned that holding additional hearing time would be an inconvenience by taking up more BEP time and/or possible delay of a decision.

29. The BEP's refusal to allow for a hearing and then altering certain conditions was unlawful and unreasonable.

30. The mitigation conditionally approved, including conservation of 50,000 acres of land elsewhere but not in an identified location, the altered reporting requirements for a vegetation management plan and certain "fixes" the BEP attempted to impose related to the decommissioning requirement does not resolve the fatal flaws in the License and does not repair the damage to Maine's northwest woods.

31. As stated in Petitioners' original appeal, while modified and conditioned the Project may be better than that which was originally proposed, but that is not the standard. It is unreasonable, unjust, and unlawful for the BEP to determine the NECEC project is now reasonable due to improvements from the poorly designed and planned original permitted proposal. A bad Project made less bad is not the legal standard.

32. The Legislature's mandate in creating the Department review process was not to empower this or any agency to redesign a bad and flawed Project to make it better, but still end up with a Project that is harmful and damaging to the environment and people of Maine.

33. To the extent that Petitioner NextEra raised additional grounds and issues on appeal not raised herein, Petitioners join in Petitioner NextEra's Rule 80C appeal dated August 16, 2022 and filed in this Court.

34. To the extent that Petitioner Natural Resources Council of Maine (“NRCM”) raised additional grounds and issues on appeal not raised herein, Petitioners join in NRCM’s Rule 80C appeal dated August 19, 2022 and filed in this Court.

CONCLUSION

For all of the above reasons, the BEP’s Order was unreasonable, unjust, and unlawful and should therefore be vacated, or in the alternative, this Court should remand to the Board with the directive to apply the New Law.

RELIEF REQUESTED

WHEREFORE, Petitioners respectfully request that the Court grant the following relief:

- A. Order that the Board of Environmental Protection’s refusal to apply the law was unlawful and an error as a matter of law; and
- B. Issue an order vacating and reversing the BEP Appeal Order authorizing Central Maine Power Company to proceed with constructing the New England Clean Energy Connect project; or alternatively
- C. Remand to the BEP to hold a hearing for further proceedings, findings of fact or conclusions of law, including applying the law correctly, or directing the agency to hold such proceedings or take such action as the Court deems necessary; and
- D. Grant such other relief as the Court deems to be just and proper.

Respectfully Submitted,
West Forks Plantation, Town of Caratunk, Kennebec
River Anglers, Maine Guide Service, LLC, Hawks
Nest Lodge, Ed Buzzell, Kathy Barkley, Kim Lyman,
Noah Hale, Eric Sherman, Matt Wagner, Mike
Pilsbury, Mandy Farrar and Carrie Carpenter

By their attorneys,



Dated: August 22, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I served a copy of this Petition for Review under M.R. Civ. P. 80C, upon all attorneys, spokespersons and representatives of record via electronic mail with a request for waiver of service as listed below. If waiver of required service pursuant to 5 M.R.S.A. § 11003 is not waived by any of the parties, the foregoing Petition shall be sent via certified mail, return receipt on the following business day.

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