



STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
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COMMISSIONER

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Memorandum

To: Commissioners
From: Samantha Horn Olsen, Planning Manager
Nicholas Livesay, Executive Director
Date: December 2, 2015
Re: Wind Power: Removal by Petition of Specified Places From the Expedited Area

At the November 4, 2015 Commission meeting, staff presented a draft overview document that describes procedural information about filing a petition to remove a specified place from the expedited area and filing a request for substantive review. The overview document also provides some insight into how the Commission may apply the statutory criteria for removing a specified place from the expedited area.

Commissioners asked questions and made suggestions about topics that the document should address. Since the meeting, Staff have also heard from a few people who wished to discuss or make comments on the document. Attached is a revised version, incorporating the suggested changes where possible. At the December 9 Commission meeting, staff will summarize the changes, respond to questions the Commissioners raised during the November 4 meeting, and briefly review some of the points that were made by commenters that did not result in changes to the document, so that the Commissioners are aware of the varying opinions on these matters. Commissioners may direct further changes or may accept the staff's work on the document to date as sufficient based on what we know at this time. If complete, the document would be posted to the Commission's website to assist and inform the public. As the Commission begins to process petitions and substantive reviews and gains experience in applying the criteria, as well as at any other time, the Commission may revisit the contents of the document. It can be reviewed and updated as needed.

Staff sent a copy of the draft document to the PUC, and received a reply which indicates that the PUC "will be happy to provide the Commission with information within its expertise to assist in the review process." This hopefully helps address the Commission question about how Commissioners might know about energy potential. The PUC information would be combined

18 ELKINS LANE, HARLOW BUILDING

with any other available information to assist the Commission in making a decision in any particular petition proceeding.

Attachment: December 2 DRAFT- “Overview of the Process for the Maine Land Use Planning Commission’s Review of Petitions for the Removal of Places from the Expedited Area for Wind Energy Development”

DRAFT
Overview of the Process for the
Maine Land Use Planning Commission's
Review of Petitions for the Removal of Places
from the Expedited Permitting Area for Wind Energy Development
December 2015

Background

The 123rd legislature enacted, "An Act to Implement Recommendations of the Governor's Task Force on Wind Power Development," Public Law 2007, Ch. 661 that became effective April 18, 2008. The Act established the expedited permitting area for wind energy development, encompassing all of the organized area of the State and a portion of the unorganized and deorganized areas now served by the Land Use Planning Commission. As directed by that legislation, the Commission adopted through rule-making the description and map of the expedited permitting area located in the Commission's rules as Appendix F to Ch. 10, Land Use Districts and Standards.

Statutory Directive – Removal by Petition

In 2015, the legislature enacted "An Act To Improve Regulatory Consistency within the Jurisdiction of the Maine Land Use Planning Commission," Public Law 2015, Ch. 265 that becomes effective January 1, 2016. The statutory change creates a six month time window within which registered voters in a given town, township, or plantation within the Commission's jurisdiction may petition to have a place removed from the expedited area. Title 35-A, section 3453-A describes the mechanism by which the petition process is to take place, and provides the opportunity for any person to object to the removal of the specified place by requesting "substantive review" of the petition. Pursuant to the provisions of this section, when a valid petition is filed, the specified place automatically will be removed unless a person requests substantive review. When a substantive review is requested, certain criteria apply:

3. Removal by petition with review. A person may, in writing, request substantive review of a petition for removal under subsection 1 by the Maine Land Use Planning Commission. Upon receipt of a timely filed request for substantive review, if the commission finds the requirements of subsection 1, paragraphs A and B are satisfied, the commission shall, by rule, remove a specified place in the unorganized and deorganized areas from the expedited permitting area if it finds the proposed removal:

- A. Will not have an unreasonable adverse effect on the State's ability to meet the state goals for wind energy development in section 3404, subsection 2, paragraph C; and
- B. Is consistent with the principal values and the goals in the comprehensive land use plan adopted by the Maine Land Use Planning Commission pursuant to Title 12, section 685-C.

In general, the effect of removing a place from the expedited area is to require, before a wind energy development may be permitted, one of two things to occur. The place must be added back into the expedited area pursuant to 35-A M.R.S. § 3453, or rezoned to a Commission zoning subdistrict that allows wind power development pursuant to 12 M.R.S. § 685-A(8-A). These processes are different and if, successful, affect subsequent permitting differently. Notably, the criteria the Department of Environmental Protection must apply when evaluating visual impacts of a project differ depending on

whether a project is proposed to be located in the expedited area or a Planned Development (D-PD) subdistrict as a result of Commission rezoning.

Because of the significance removing a place from the expedited permitting area may have on future wind power development proposals and the interest of residents, land owners, developers, and many other members of the public in the location of wind power development, the Commission has developed this overview document. The document, however, may not be relied upon to create rights, substantive or procedural, and nothing in this document should be construed to supersede or replace the controlling statute that will govern the Commission's receipt and review of petitions to remove a specified place from the expedited permitting area.

Process for Filing a Removal Petition

Who may circulate a petition: Any person may be a petition circulator. Petition circulators must collect signatures from voters who are registered to vote in that town, plantation, or township. Signatures may be collected at any time prior to June 30, 2016.

Obtaining a petition: Anyone interested in circulating a petition to remove a specified place from the windpower expedited permitting area should contact Tim Beaucage by email at Timothy.Beaucage@maine.gov; by phone (207) 287-4894; or in person at 18 Elkins Lane, Harlow Building 4th floor, Augusta, ME 04333. Please be prepared with your mailing address, email address or phone number, and the specific location intended for removal.

Specified place: A petition may seek removal of a "specified place" from the expedited permitting area. A specified place is ~~defined as~~ the entirety or a portion of a township, plantation, or municipality (each is also referred to as a minor civil division or MCD) in the unorganized and deorganized areas, that has been identified in Appendix F of Chapter 10 of the Commission's rules. The statutory language "or portion thereof" appears to apply broadly. -As a result, a petition may be circulated to remove an entire MCD that is within the unorganized or deorganized areas of the State from the expedited area, or to remove only a portion of a MCD. Thus, in some instances, residents could petition to remove part of their MCD from the expedited area, while leaving another part in this area. In other instances only a portion of a MCD presently is included in the expedited area. In these instances, a petition may be circulated to remove the entirety of this portion or some subset of this portion. When less than the whole of a township, plantation, or municipality is proposed for removal from the expedited area, signatures from registered voters in the entire MCD may be collected on the petition. If the specified place contains an area that may not be removed because of one of the exemptions listed in 12 M.R.S. § 3453-A(5), the remainder of the place may still be removed by petition. For example, if a township contained a permitted wind project, a petition could seek removal of all of the township except for the area within the permitted wind project boundary.

Filing window: Once the necessary signatures have been collected, the circulator must take an oath (specified on the petition) before a notary public and file the petition with the LUPC. Petitions must be filed between January 1, 2016 and June 30, 2016.

Signature requirement: Registered voters residing in a MCD may sign a petition to remove all or a portion of that MCD from the expedited permitting area. To be valid, a petition must be signed by at least 10 percent of the number of registered voters residing in the MCD that voted in the most recent gubernatorial election.

Signature verification: Upon receipt of a completed petition, the LUPC: i) will post notice of receipt of the petition on its website and through its related email and postal mail notification system; and ii)

will submit the petition to the Secretary of State, Division of Elections, for certification that those signatures gathered on the petition are those of qualified registered voters.

Decision: If no person requests substantive review of a valid petition, the specified place will be automatically removed from the expedited area. The Commission will formalize this rule change by preparing a basis statement and filing it with the Secretary of State's office.

Procedure for Requesting Substantive Review

Requesting substantive review: Following the receipt of a petition for removal, the Commission will post notice on its website and will send an email with information about the posting to persons who have subscribed to the email notice list for this topic. Paper notice also will be mailed to anyone who has requested that form of notice. Persons who wish to request substantive review of the petition must submit their request no later than midnight of the 45th calendar day following the website posting, except if the 45th day falls on a weekend or holiday, then the request must be submitted by midnight on the next business day. If no one requests substantive review within the 45-day period, the specified place identified in a valid petition is automatically removed from the expedited area.

Form and Contents of Submission: A request for substantive review must be submitted in the form of a letter to the Commission containing the name, signature, and contact information of the person requesting review and a description of the specified place for which review is requested. The letter may be mailed to: SHS 22, Augusta, ME 04333-0022; delivered in person to 18 Elkins Lane, Harlow Building 4th floor, Augusta, ME 04333; emailed to: Samantha.horn-olsen@maine.gov or faxed to: 207-287-7439. Upon receipt of a request for substantive review, the Commission will establish a schedule for the commission's review, including submission deadlines. The Commission encourages persons submitting such a request to use a method that will provide a dated receipt of delivery, such as hand-delivery during business hours, certified mail, or electronic delivery.

Processing Fees: The Commission may assess a fee to cover the Commission's actual costs of processing a request for substantive review. Costs may include notice, travel and public hearing costs, as well as the cost of staff time in some instances. The fee is assessed to the person requesting substantive review and in the manner provided in 12 M.R.S. § 685-F(2). Please contact the Commission staff for more details.

Notice of the Proceeding and Public Involvement: Upon receipt of a request for substantive review, the Commission will obtain the tax records for the specified place and notify property owners by mail. Property owners and the public will have an opportunity to comment on the proposal, and to request a public hearing. If 5 or more persons request a public hearing, one must be held. If there are not 5 requests, the Commission may choose to hold a public hearing at its discretion. Whether or not a public hearing is held, public comment will be accepted by the Commission.

Commission's Intent in Scheduling: The Commission intends to handle requests for substantive review in a timely manner. The Commission will look for opportunities to combine public hearings when there is more than one request for substantive review in a geographic area, so as to make efficient use of travel and meeting time for the public and for the Commission. When considering scheduling more than one hearing together, the Commission will also consider whether it would create confusion or unfair comparisons between petitions. Therefore, the Commission intends to process requests for substantive review in an order that makes efficient use of resources, and is fair to the participants, ~~but~~ not always in the exact order in which requests are received.

Form of Decision: The Commission will review all of the evidence and make a decision about whether the statutory review criteria are satisfied. As this is a rulemaking proceeding, if the review criteria are satisfied, the Commission will move forward to a formal rulemaking basis statement that will contain the rationale for their decision and will remove the specified place from the expedited area. If the Commission finds that the review criteria are not satisfied, they will cease rulemaking and will indicate their reasons in the form of a written document or a motion at a public meeting. If the rulemaking ceases, then the specified place will remain in the expedited area.

Appeal of Decision: As provided in 12 M.R.S. § 689 and in accordance with 5 M.R.S. § 11002 and Maine Rule of Civil Procedure 80C, the Commission’s decision following substantive review may be appealed to Superior Court within 30 days after receipt of the notice of decision by a party to the review, or within 40 days from the date of the decision by any other aggrieved person.

Substantive Review of a Petition

The area within the project boundary of an existing wind power project and the area within the project boundary of a proposed project where a complete application has been submitted to the Department of Environmental Protection may not be removed from the expedited permitting area through the petition process. As a result, any wind power development plans for a specified place subject to a petition for removal will be preliminary, if they exist at all. Therefore, the Commission must review the place petitioned for removal based on its general characteristics and with an understanding of the general nature of wind power development and its effects. The Commission’s substantive review of a petition cannot be based on particular turbine or infrastructure locations or layouts. Likewise, the Commission will not take into account areas that have already been removed by petition in evaluating the criteria – that type of “first-come, first-served” evaluation is not possible due to the general nature of the information available about progress toward the state’s goals and potential for new capacity.

Also important to note is that if the Commission does remove a place from the expedited area following substantive review, a person may, in the future, petition to put that place back into the expedited area. Alternatively, a person could petition the Commission to rezone an area removed from the expedited permitting area to allow wind power development. Therefore, removal of a specified place from the expedited area does not mean that wind energy development will never be sited there, but rather that based on the best information available at the time of removal, the statutory criteria for removal were satisfied. As both additions and removals are rulemaking proceedings, no one participant has a “burden of proof,” but rather the Commission must review the record and make a decision based on the available information.

Title 35-A, section 3453-A(3) contains two statutory criteria; both must be met during the substantive review process to remove a place from the expedited area.

Criterion A. The proposed removal will not have an unreasonable adverse effect on the State’s ability to meet the state goals for wind energy development in section 3404, subsection 2, paragraph C.

Application of this criterion involves developing an understanding of where the State stands with regard to achieving its goals for wind energy development installed capacity for the year 2030 and what is needed for the State to make up the gap between where we stand now and the statutory goal. The

Commission recognizes that all areas within the expedited permitting area are not the same. For example, the wind resources, public resources, transmission infrastructure, and existing land uses all differ from place to place. As a result, a place that has limited potential for energy generation and that would be subject to disproportionate impacts on public resources from wind power development is the type of place the Commission likely would find provides little value toward achieving the State's goal. This type of place likely could be removed from the expedited permitting area without having an unreasonable adverse effect on the State's ability to meet the goals for wind energy development. In contrast, a place that has the potential for exceptional power generation, even though wind power development might have some impacts on public resources or existing uses, could be the type of place the Commission would find provides significant value towards achieving the State's goals. Removal of this type of place from the expedited area might have an unreasonable adverse effect on the State's ability to meet its goals.

These basic hypotheticals are intended solely to illustrate that the Commission's application of this criterion involves a balancing. In evaluating whether removing a specified place from the expedited area would have an unreasonable adverse effect on the State's ability to meet its goals for wind energy development, the Commission begins by assessing the progress the State has made in achieving the goals set out in 35-A M.R.S. § 3404. From there, the types of factors the Commission may consider as part of the balancing it must undertake include, but are not limited to, the following:

- The suitability of the area for wind projects as far as it is known today, including ~~the availability of transmission lines to transfer the generated electricity~~, the quality of the wind resource; the availability of transmission lines to transfer the generated electricity, or suitability for new transmission infrastructure; and other relevant information;
- The impact to local communities, particularly the public values associated with infrastructure, economic development, and community character; and
- The impact to public resources and, if applicable, public infrastructure. Evaluation of the potential impact to public resources could include, in part, identification, at a landscape level, of important natural, recreational, scenic, archaeological and historic resources in the area. Detailed assessments of specific resources would be appropriate during DEP permit review.

The Commission anticipates incorporating information provided by the Public Utilities Commission in evaluating this criterion. In addition, information about future projects and transmission feasibility from ISO New England and other sources may be solicited and/or considered by the Commission.

Persons requesting substantive review should submit information about the suitability of the area for wind projects, the need for new transmission infrastructure, and the public resource, infrastructure, and local community impacts, as described above, along with any other information they believe would be relevant to the Commission in its substantive review of a petition.

Criterion B. The proposed removal is consistent with the principal values and the goals in the comprehensive land use plan adopted by the Maine Land Use Planning Commission pursuant to Title 12, section 685-C.

The principal values and the goals contained within the Comprehensive Land Use Plan (CLUP), taken together and in balance with one another, provide guidance to the Commission. It is one of the Commission's primary roles to interpret the CLUP and apply it in a manner consistent with State

statute. To ensure that full information is available, the Commission anticipates requesting comments from other government agencies with expertise in subject areas referenced in the goals. Interested members of the public also will have an opportunity to provide comments as part of the substantive review process.

A person requesting substantive review should include a description of how the proposed removal would or would not be consistent with the principal values and goals contained in the CLUP. An overview of the character, resources, and uses of the area should be part of this description. Additionally, information and analysis sufficient to allow the Commission to evaluate how the proposed removal would generally affect existing uses and resources in the specified place should be part of this discussion. Existing uses and resources identified in the principal values and goals of the CLUP include, among others, residential uses, forest resources, energy resources, scenic resources, recreational uses and resources, plant and animal resources, and other natural resources.

All of the principal values and some of the goals contained in the CLUP are relevant to the expedited area removal process. A subset of the CLUP goals that are of particular note is listed below to assist in the preparation of materials for submission to the Commission as part of its substantive review. A person participating in substantive review, however, should review all of the principal values and all of the goals to ensure all desired relevant information is provided to the Commission. Additional portions of the CLUP may provide helpful context when trying to understand what is intended by the principal values and the goal, however, the Commission's review will only focus on consistency of the proposed removal with the principal values and the goals, and not with the entire CLUP.

Goals of particular note:

I.A. LOCATION OF DEVELOPMENT

Goal: Guide the location of new development in order to protect and conserve forest, recreational, plant or animal habitat and other natural resources, to ensure the compatibility of land uses with one another and to allow for a reasonable range of development opportunities important to the people of Maine, including property owners and residents of the unorganized and deorganized townships.

I.B. ECONOMIC DEVELOPMENT

Goal: Encourage economic development that is connected to local economies, utilizes services and infrastructure efficiently, is compatible with natural resources and surrounding uses, particularly natural resource-based uses, and does not diminish the jurisdiction's principal values.

I.D. INFRASTRUCTURE

Goal: Ensure that infrastructure improvements are well planned and do not have an adverse impact on the jurisdiction's principal values.

II.A. AGRICULTURAL RESOURCES

Goal: Conserve and protect working farms, encourage the development of new farming enterprises, and conserve agricultural soil resources.

II.B. AIR AND CLIMATE RESOURCES

Goal: Protect and enhance the quality of air and climate resources throughout the jurisdiction.

II.D. CULTURAL, ARCHAEOLOGICAL AND HISTORICAL RESOURCES

Goal: Protect and enhance archaeological and historical resources of cultural significance.

II.E. ENERGY RESOURCES

Goal: Provide for the environmentally sound and socially beneficial utilization of indigenous energy resources where there are not overriding public values that require protection.

II,F. FOREST RESOURCES

Goal: Conserve, protect and enhance the forest resource in a way that preserves its important values, including timber and fiber production, ecological diversity, recreational opportunities, as well as the relatively undeveloped remote landscape that it creates.

II,G. GEOLOGIC RESOURCES

Goal (pertaining to mountain resources): Conserve and protect the values of high-mountain areas from undue adverse impacts.

II,H. PLANT AND ANIMAL HABITAT RESOURCES

Goal: Conserve and protect the aesthetic, ecological, recreational, scientific, cultural and economic values of wildlife, plant and fisheries resources.

II,I. RECREATIONAL RESOURCES

Goal: Conserve the natural resources that are fundamental to maintaining the recreational environment that enhances diverse, abundant recreational opportunities.

II,J. SCENIC RESOURCES

Goal: Protect the high-value scenic resources of the jurisdiction by fitting proposed land uses harmoniously into the natural environment.

The Commission also notes the following:

- Submission materials regarding location of development and economic development factors should look at the economic and development context of the specified place and the surrounding region. What are the economic drivers of the area? How would these be affected by wind energy development? What are the other major uses in the area and how would they be affected?
- When a wind energy development permit application is evaluated by DEP, a detailed evaluation of natural resource impacts is conducted. The Commission's review of potential impacts on natural resources when considering a change to the expedited area boundary is different and is conducted at the landscape level for the purpose of determining whether there is an overriding issue that bears on whether the removal is consistent with the principal values or goals of the CLUP. To aid such a landscape evaluation, a person should consider providing the Commission a general description of the natural resources in the area; responses from natural resource agencies regarding the presence, potential presence, or absence of natural resources of concern; and the results of any field surveys to which the person may already have access. The person should consider providing any mapping data received from natural resource agencies regarding the presence or absence of natural resources in the area, but need not undertake time-consuming or costly resource surveys or mapping projects unless desired by that person.
- Particular consideration of areas above 2700 feet in elevation may be appropriate and are emphasized in the CLUP.
- The Commission recognizes that some persons who wish to comment on substantive review proceedings may not have access to technical information, and may wish to speak about how the petition would affect them personally. The Commission encourages individuals who comment to

consider the CLUP principal values and the goals in developing their comments so that they may speak from their experience, but still provide information directly relevant to the review criteria that the Commission may consider in its review.