



STATE OF MAINE
DEPARTMENT OF CONSERVATION
MAINE LAND USE REGULATION COMMISSION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

PAUL RICHARD LEPAGE
GOVERNOR

WILLIAM H. BEARDSLEY
COMMISSIONER

COMMISSION DECISION
IN THE MATTER OF

Champlain Wind, LLC
Denial of Development Permit DP 4889
Bowers Wind Project

Findings of Fact and Decision

The Maine Land Use Regulation Commission, at a meeting of the Commission held on April 20, 2012, at Bangor, Maine, after reviewing the application and supporting documents submitted by Champlain Wind, LLC for Development Permit DP 4889, public and Intervenor comments and testimony, agency review comments, and other related materials on file, pursuant to Titles 12 and 35-A, the Commission's Standards and Rules, and the Commission's 2010 Comprehensive Land Use Plan finds the following facts:

SUMMARY OF PROPOSAL

1. *Applicant:* Champlain Wind, LLC
129 Middle Street, 3rd Floor
Portland, ME 04101
2. *Application Accepted as Complete for Processing:* March 14, 2011
(The Commission's statutory authority directs the Commission, with respect to wind energy development permit applications that are set for public hearing, to return a decision within 270 days from the date the application is accepted as complete for processing unless the Applicant requests an extension of time agreeable to the Commission and the Applicant as was the case with this application (see findings 14,O and 14, Q below.) See 12 M.R.S.A. § 685-B(2-C).
3. *Location of Proposal:* Carroll Plantation, Penobscot County
(Map 1, Lots #1, 3.1, 3.2)
(Map 5, Lots #17, 18.4)
(Map 8, Lots #2, 5, 13)
(Map 11, Lots #9, 9.1)

Kossuth Township, Washington County
(Map 1, Lots # 4, 7, 9.1, 9.2, 23)

4. *Current Zoning:* (M-GN) General Management Subdistrict
(P-WL) Wetland Protection Subdistrict
(P-SL2) Shoreland Protection Subdistrict

5. *Proposed Project.* The purpose of the proposed Bowers Wind Project (BWP) is to construct a 69.1 megawatt (MW) grid-scale wind energy development on Bowers Mountain, an unnamed ridge to the south referred to as “South Peak” in Carroll Plantation, Penobscot County, and on Dill Hill in Kossuth Township, Washington County. The proposed BWP would consist of up to 27 turbines with associated turbine pads – up to 10 of the turbines would be Siemens 3.0 MW turbines and up to 17 would be Siemens 2.3 MW turbines, with maximum height of 428 feet; existing and new access and crane path roads; 34.5 kV above-ground collector lines; permanent meteorological towers; an operation and maintenance (O&M) building; and a new substation to connect to an existing 115 kV transmission line.

The proposed BWP would be entirely located within the area designated for expedited permitting under the “Act To Implement Recommendations of the Governor’s Task Force on Wind Power Development” (the “Task Force Act”) (PL 2007, Ch. 661) and as amended through rulemaking by the Commission in accordance with 12 M.R.S.A. § 685-A(13) and 35-A M.R.S.A. § 3453 effective on December 16, 2010.

Following questions raised by the Commission regarding the visual impact on ground observers of required nighttime turbine lighting, the Applicant submitted information on nighttime lighting mitigation technology. The Applicant informed the Commission that it had commenced the process of determining the suitability of the BWP site for the use of a radar-assisted warning system, which would eliminate the current Federal Aviation Authority (FAA) requirement that the turbines be lit at night. In its filings with the Commission, the Applicant stated that if the radar-assisted warning system was approved by the FAA, it would evaluate the feasibility of retrofitting the BWP to incorporate such a system. The Applicant stated its evaluation of feasibility would take into account the following minimal considerations: a site suitability analysis indicating that the site is an appropriate candidate for use of such a technology; a determination by the FAA that the system is approved for use at this site; availability of reasonable and appropriate insurance coverage; a determination that the use of the system does not present an unreasonable risk to aircraft and that the vendor and technology are reliable; a determination that the system is compatible with the turbine manufacturer warranty; and, that the costs of implementing such a system are reasonable and the project is financeable with the use of the technology. The Applicant committed that it would evaluate and implement if feasible the use of this new radar-assisted technology if approved by the FAA.

SUMMARY OF REVIEW CRITERIA

6. *Review Criteria.* The Commission is the primary siting authority for a wind energy development entirely sited within the unorganized townships or plantations of Maine. As

discussed in more detail below, the proposed project is subject to the provisions of Title 12, §§ 685-B(2-B), (4) and (4-B); the applicable provisions within the Commission's standards and rules in Chapter 10; and the Commission's Comprehensive Land Use Plan (CLUP). The proposed project is also subject to the provisions of Title 35-A, Ch. 34-A, §§ 3451 *et seq.* The review of the project is also subject to the provisions of the Commission's rules in Chapter 4 and 5. Central to this decision are the review criteria for assessing scenic impact found in Title 12 § 685-B(4)C and Title 35-A, chapter 34-A, § 3452 – see finding 17 below.

Commission's Comprehensive Land Use Plan (CLUP). The legislative amendments made by the Task Force Act to the Commission's permitting authority with respect to expedited wind energy projects did not remove the Title 12 requirement that the Commission, in reviewing development permit applications, determine whether a proposal is in conformance with certain regulations, standards, and the CLUP. 12 M.R.S.A. § 685-B(4) & (4-B). The Commission's 2010 CLUP, while expressly recognizing the statutory changes made by the Task Force Act with respect to wind energy development in the expedited permitting area, continues to provide for the environmentally sound and socially beneficial utilization of indigenous energy resources where there are not overriding public values that require protection. (2010 CLUP at 13). The CLUP explains that it seeks to accommodate energy generation installations that are consistent with the State's energy policies, are suitable for the proposed locations, and designed to minimize intrusion on natural and cultural resources and values. (2010 CLUP at 13). The CLUP reflects the State's policy of identifying and protecting areas that possess scenic features and values of state or national significance, and it recognizes that sporting camps are recreational and cultural resources, worthy of protection from incompatible development and land uses. (2010 CLUP at 13, 18, 17, 265 – 267)

Each large-scale project proposed in the Commission's jurisdiction calls on the Commission to carefully consider on a case-by-case basis proposed impacts to the human and natural environment. Not all sites are appropriate for grid-scale wind energy development -- the Commission must find the appropriate balance between development and protection of natural resources and natural resource uses to achieve conformity with the goals and policies of the CLUP.

REVIEW OF EVIDENCE

7. *Review of Evidence.* The Commission has assembled a large administrative record regarding the BWP. The administrative record contains written and oral testimony and written comments from the Parties, government review agencies, and the public, all of which was gathered through a process conducted in accordance with the Commission's Chapters 4 and 5 Rules. In this matter, the process also included an evidentiary hearing, held at the discretion of the Commission. Thus, it is not possible to list or acknowledge all of the evidence that led the Commission to reach the factual findings and legal conclusions set forth below. Those findings and conclusions, however, are based on the application of the governing review criteria to all the evidence in the record and not only those examples of evidence recited herein.

SUMMARY OF REVIEW PROCESS

8. *Application Submittal.* Champlain Wind, LLC (Applicant) submitted its application for the proposed Bowers Wind Project (BWP), Development Permit DP 4889 on January 24, 2011. The Applicant is a wholly-owned subsidiary of First Wind.

The application was accepted by LURC staff as complete for processing on March 14, 2011. Public notices of “Intent to File” the application were published on January 24, 2011, and on January 27, 2011, respectively, in the Bangor Daily News and the Lincoln News. Public notices of the public evidentiary hearing were given in the Bangor Daily News on May 26, 2011, and June 17, 2011. Notices of the hearing were also given in the Lincoln News on May 26, 2011, and June 16, 2011.

9. *Intervenors and Interested Persons.* On April 6, 2011, within 45 days of accepting the application as complete, the Commission exercised its discretion and set this matter for a public evidentiary hearing, and granted Intervenor status to two Parties: the Conservation Law Foundation (CLF) and the Natural Resources Council of Maine (NRCM). The Partnership for the Preservation of the Downeast Lakes Watershed (PPDLW), David Corrigan and Gordon Mott were granted Intervenor status through the Sixth Procedural Order on June 2, 2011. NRCM withdrew as an Intervenor on June 9, 2011. CLF formally announced its support for the project on June 10, 2011. PPDLW and Corrigan intervened in opposition to the project. Mott intervened in support of the tangible benefits proposed by the Applicant. Fifteen (15) individuals requested status as, and the Commission recognized them as, Interested Persons in accordance with the Commission’s rules.
10. *Pre-filed Testimony.* The Applicant and Intervenors PPDLW, CLF, Corrigan, and Mott submitted pre-filed testimony on June 10, 2011. Issues addressed included, but were not limited to: scenic impact, wildlife impact, in particular lynx and birds and bats, and tangible benefits concerns. Written rebuttal testimony to pre-filed testimony was submitted on June 17, 2011.
11. *Public Hearing and Site Visit.* A public evidentiary hearing was held on June 27 and 28, 2011 in Lincoln, Maine and continued on July 6, 2011, in Bangor, Maine. Evening public hearing sessions were held on June 27 and 28, 2011 in Lincoln. A portion of the hearing, structured primarily to serve the purposes of hearing summaries of the pre-filed testimony from the Parties, hearing testimony from review agencies, and for conducting cross examinations, was held during the day on June 28th in Lincoln and continued on July 6th in Bangor, Maine. The Commission’s site visit was held on June 27th to observe the project site, road access, and views from several of the lakes which were identified as scenic lakes of state or national significance.
12. *Participating Review Agencies.* The Maine Department of Environmental Protection (MDEP), the State Soil Scientist, and the Maine Department of Inland Fisheries and Wildlife (MDIFW) attended the public hearing in order to answer questions as needed. In addition, the Commission retained additional staff with respect to processing this permit application, namely third party peer reviewers and experts, Dr. James Palmer (scenic) and Warren Brown

(sound). Dr. Palmer was present at the hearing to answer questions on matters of scenic impact as needed. The details of Dr. Palmer's comments and testimony on the proposed BWP can be found in the record and, by way of summary, below.

13. *Public Comments.* Members of the public and several of the Interested Persons submitted written comments and testified at the evening sessions of the public evidentiary hearing. The record closed for public comment on July 18, 2011.
14. *Post-Hearing Briefs.* The Applicant and Intervenor PPDW filed their final briefs on the deadline of August 22, 2011.
15. *Procedural Matters.* The Presiding Officer issued 16 Procedural Orders throughout the proceeding, addressing administrative and procedural matters.
 - A. *First Procedural Order.* On March 29, 2011, the First Procedural Order was issued, requesting legal argument from the Parties regarding whether, as set forth at 35-A M.R.S.A. § 3452(2), the scenic character impact review of the associated facilities should be conducted according to the provisions of 35-A M.R.S.A. § 3452, or according to the harmonious fit standard for non-expedited projects in 12 M.R.S.A. § 685-B(4) and LURC's Chapter 10 §10.25,E(1) scenic standards (*See Finding of Fact #18 for a discussion of the review criteria for the associated facilities*).
 - B. *Second Procedural Order.* On April 21, 2011, the Second Procedural Order was issued, stating that the scenic character standard to be applied during the review of the associated facilities of the proposed BWP would be 35-A M.R.S.A. § 3452, not 12 M.R.S.A., § 685-B(4) and LURC's Chapter 10 Rules, § 10.25,E(1) (see further discussion in Finding 18 below).
 - C. *Third Procedural Order.* On April 29, 2011, the Third Procedural Order was issued, containing the memorandum of the pre-hearing conference, and containing specifically the schedule for the public evidentiary hearing and procedures, the service list, filing requirements, pre- and post-hearing filings, and other administrative matters pertaining to the public hearing.
 - D. *Fourth Procedural Order.* On May 13, 2011, the Fourth Procedural Order was issued, regarding those individuals seeking status as Interested Persons, Intervenors, and preliminary consolidation of those seeking Intervenor status. Parties were provided an opportunity to comment on the preliminary consolidation of intervenors.
 - E. *Fifth Procedural Order.* On May 23, 2011 the Fifth Procedural Order was issued, clarifying that the standard set forth at 35-A M.R.S.A. § 3453 governs the Commission's finding on the impacts of turbine lighting on scenic character and existing uses related to scenic character.
 - F. *Sixth Procedural Order.* On June 2, 2011, the Sixth Procedural Order was issued regarding extending the deadline for response to scenic review of James Palmer,

amended and reaffirmed scheduling deadlines and final consolidation of Parties (see finding 9 above).

- G. *Seventh Procedural Order.* On June 23, 2011, the Seventh Procedural Order was issued regarding objections to certain pre-filed direct testimony, availability of witnesses at hearing, and objections to portions of the proposed site visit.
- H. *Eighth Procedural Order.* On June 23, 2011, the Eighth Procedural Order was issued with the public hearing schedule, noting continuation of evidentiary hearing to July 6, 2011, and consequent extension of close of record.
- I. *Ninth Procedural Order.* On July 14, 2011, the Ninth Procedural Order was issued regarding a request by the Commission for post-hearing submissions by the Applicant and the MDIFW, official notice of agency records consisting of a staff memo to the Commission regarding issues related to wind power development and a related report by the Appalachian Mountain Club, and an objection to public hearing testimony by an individual who pre-filed testimony as a witness for an Intervenor. The Parties were provided an opportunity to comment on the submittals by the Applicant and MDIFW. The Applicant was also provided an opportunity to provide rebuttal comments to those provided by MDIFW and Intervenors.
- J. *Tenth Procedural Order.* On August 3, 2011, the Tenth Procedural Order was issued regarding reopening the evidentiary record to allow for inclusion of material from the Applicant and staff regarding tangible benefits; staff response to issues raised by the native American tribes in the area; and Secretary of State records regarding the PPDW; and an order to disregard certain post-hearing rebuttal comment by a witness for the Applicant that was in the nature of legal argument.
- K. *Eleventh Procedural Order.* On August 11, 2011, the Eleventh Procedural Order was issued regarding official notice of agency records consisting of a public access easement for a portion of the project area and decommissioning references from other proceedings to provide context for the decommissioning portion of this proposal. The Parties were provided an opportunity to contest the substance or materiality of these records.
- L. *Twelfth Procedural Order.* On September 16, 2011, the Twelfth Procedural Order was issued regarding Commission staff's request to reopen the evidentiary record to allow for the submission of updated summary tables of the visual impact assessment (to include Pug Lake – a portion of West Grand Lake) by the Applicant's scenic consultant, LandWorks, and the scenic consultant for the Commission, Dr. Palmer. The Parties were provided an opportunity to comment on these updated summary tables to include Pug Lake.
- M. *Thirteenth Procedural Order.* On October 4, 2011, the Thirteenth Procedural Order was issued, indicating the Commission would disregard any comments made by the PPDW in response to the Twelfth Procedural Order which did not address the addition of Pug Lake to the visual assessment summary tables of LandWorks and Dr. Palmer and to

reopen the evidentiary record to allow submission of additional information by the Applicant regarding night lighting of the project facilities. [Note: while the order is dated October 4, 2011, due to technical difficulties, the order was not released until 5:30 a.m. on October 5, 2011.]

- N. *Commission Directive to Draft Denial.* On October 19, 2011, following a deliberative session on the visual impacts of this project, the Commission directed staff to draft a denial of the project and bring that draft denial to the December 7, 2011 Commission meeting for a vote by the Commission.
- O. *Request to Withdraw.* On November 8, 2011, the Applicant filed a request to withdraw its application, and agreed to an extension of the Commission's deadline for issuing a final decision through January 2012.
- P. *Fourteenth Procedural Order.* On November 15, 2011, the Fourteenth Procedural Order was issued in response to the Applicant's request to withdraw its application, and it indicated the Commission would act on the request to withdraw at its regularly scheduled meeting on December 7, 2011, with consideration of the denial of the permit application to occur at the Commission's January meeting, as necessary. The Parties were provided an opportunity to comment on the request to withdraw both in writing and orally at the December 7, 2011, Commission meeting.
- Q. *December 7, 2011, Commission action.* On December 7, 2011, the Commission tabled the Applicant's request to withdraw. The Commission further directed the Applicant to submit a written description of its plans for reconfiguring the BWP to address the concerns expressed by the Commission during this proceeding and the Commission's deliberations on the visual impacts of this Project in September and October of 2011. The Applicant agreed to an extension of the Commission's deadline for issuing a final decision through May 15, 2012. The Fifteenth Procedural Order (see below) further specified the process for further consideration of the request to withdraw.
- R. *Fifteenth Procedural Order.* On December 12, 2011, the Fifteenth Procedural Order was issued, directing the Applicant to submit, by Friday, March 9, 2012, a written description of its plans for reconfiguring the BWP as described in subsection Q above. In issuing the order, the Chair noted the purpose of the filing, together with any comments thereon received from the Intervenors and public, was to enable the Commission to decide whether, based upon its Title 12 authority enabling legislation and in keeping with considerations of administrative fair play, a withdrawal was appropriate under the facts and circumstances of this proceeding.
- S. *March 9th filing by Applicant.* On March 9, 2012, the Applicant responded to the Fifteenth Procedure Order by stating it was unable to provide a written description of its plans for moving forward with a reconfigured BWP because of uncertainties regarding the availability of capital due to a pending PUC decision, and also because the Applicant claimed there remained uncertainty regarding the statutory visual impact standard. The Applicant also renewed its request to withdraw its application.

- T. *Sixteenth Procedural Order.* On April 4, 2012, the Sixteenth Procedural Order was issued responding to certain objections by the Parties regarding the March 9th and subsequent filings. This Order also established an oral argument schedule for the Parties for the April 6, 2012, meeting at which time the Commission was to reconsider the Applicant's request to withdraw its application based on its March 9th filing.
- U. *April 6, 2012, Commission action.* On April 6, 2012, the Commission heard oral argument from the Applicant and Intervenors PPDLW, Corrigan, and Mott regarding the Applicant's March 9th filing and renewed request to withdraw. The Commission took the request to withdraw off the table (see section Q above), and discussed the merits of the request to withdraw. The Commission has the authority to manage and control its adjudicatory proceedings pursuant to its Title 12 enabling legislation and in keeping with considerations of administrative fair play. At the time of the Applicant's request to withdraw, this matter had already proceeded through a substantial administrative process, as summarized above. The Commission had convened more than one day of a public evidentiary hearing, the Commission had already articulated a basis for denial, and it had directed its staff to prepare a decision document denying the BWP. Under these circumstances, it would not be equitable to allow an applicant to withdraw, and therefore the Commission denied the request to withdraw. The Commission directed staff to bring a denial decision back to the Commission for decision no later than May 15, 2012, the agreed-upon deadline for issuing a decision in accordance with 12 M.R.S.A. § 685-B(2-C).

PROJECT SETTING

16. *Existing Conditions and Uses of the Site.* The proposed 69.1 MW BWP would be located on three ridges: Bowers Mountain and an unnamed ridge to the south (referred to as "South Peak" throughout the application) in Carroll Plantation, Penobscot County, and Dill Hill in Kossuth Township, Washington County. By way of placing the proposed project area in context, according to the application, the project is located in the Eastern Lowlands biophysical region of Maine, which is characterized by extensive lowlands with elevations generally below 600 feet, except for several hills within the Project area. The Bowers Mountain, South Peak and Dill Hill ridgelines have elevations between 750 to 1,120 feet above mean sea level. All of these rolling hills are located directly south of Route 6 and cross the town boundary from Carroll to Kossuth. Together they form a divide between stream drainages to Baskahegan Stream in the north, and to streams flowing to lakes and ponds in the south. The project area is primarily dominated by a regenerating Beech-Birch-Maple forest. The entire project area has been heavily logged in the past, with harvesting activities occurring largely between 10 and 20 years ago.
- A. While, as earlier noted, the project area is within the expedited wind development area, it also sits at the edge of a large "donut hole" excluded from the expedited area. This adjacent excluded area is part of the Downeast lakes region – an area known for its vast lake resources and the recreational opportunities they provide. This is an area recognized by the CLUP as a unique region within the Commission's jurisdiction (2010 CLUP at

54). Of this region, the CLUP notes: *“Today, the forest and fisheries continue to sustain the unique community in and around Grand Lake Stream Plantation. This community has more Registered Maine Guides than any place in Maine. These professionals provide a vital link between visitors and the complex ecosystem of lakes, marshes, woodlands, bogs and their wildlife in an area scientists recognize as one of unmatched biodiversity.”*

There is considerable testimony in the record from guides and sporting camp owners working in, and around the area of, Grand Lake Stream. While Grand Lake Stream is located approximately 18 miles from the BWP area, the testimony of the guides and camp owners, among other pieces of evidence in the record, addresses the anticipated adverse scenic impacts the BWP would have on their and their clients’ experiences in traveling through the lakes within 8 miles of the project area and the resultant adverse impact that the BWP would have to their livelihood.

- B. Like much of the Commission’s jurisdiction, the region is generally undeveloped, is currently forested, and the dominant land use is commercial forestry. An existing network of unimproved logging roads is present throughout the area and the effects of past and current timber harvesting are evident across the entire project area, from large clear-cuts to small selective harvesting areas. Aside from the roads and skidder trails, the area around the project area is mostly undeveloped with sparsely located year-round and seasonal properties. The majority of these properties nearest to the project are located to the south of the South peak turbines and the closest dwelling is a seasonal camp located approximately 2,500 feet to the south of the nearest proposed turbine. There are four year-round residences on Route 6 that are more than 0.5 miles from the nearest proposed turbine. The nearest sporting camp is Maine Wilderness Camps on Pleasant Lake approximately 2.8 miles of the closest proposed turbine. There are several other sporting camps that utilize the lakes within the 8-mile study area that are located as far as 18 miles away whose clients regularly utilize lakes within the 8-mile study area. The 8-mile study area is the area set by statute within which scenic impacts are assessed on certain identified resources of state or national significance (see finding 19 below).
- C. Much of the land in the area is privately owned. There are also a number of publicly and privately conserved lands in the 8-mile study area. Located in the southeastern part of the study area are portions of the Sunrise Conservation Easement held by the New England Forest Foundation, which maintains this undeveloped land forever in its present and historic, and primarily undeveloped condition, to allow its continued operation as a working forest. Under the terms of the Sunrise Conservation Easement, the land is managed to provide the perpetual ability to produce forest products, as well as to conserve and/or enhance forest and wildlife habitats, undeveloped shoreline, and historic public recreation opportunities for present and future generations. Overlaying the Sunrise Conservation Easement is a Public Access Easement acquired by the Bureau of Public Lands. The Public Access Easement grants public access to this area for the purposes of *“hunting, fishing, trapping, picnicking, swimming, cross-country skiing, snowshoeing, hiking, nature observation, and enjoyment of open space in accordance with applicable state rules and regulations.”*

- D. Typical recreational uses in the surrounding area include swimming, boating, fishing, hunting, and snowmobiling.

SCENIC IMPACT REVIEW CRITERIA AND ASSESSMENT

17. *Scenic Impact Review Criteria: Evaluation of effects on scenic character [Title 12, § 685-B(4)C and Title 35-A, chapter 34-A, § 3452].* The Commission’s criteria for approval for an expedited wind energy development in Title 12, § 685-B(4)(C), pursuant to the Task Force Act states: *“In making a determination under this paragraph regarding an expedited wind energy development, as defined in Title 35-A, § 3451, subsection 4, the Commission shall consider the development’s effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, § 3452.”*
- A. Title 35-A, chapter 34-A, §3452 states that when *“making findings on the effect of an expedited wind energy development on scenic character and existing uses related to scenic character, [the Commission] shall determine”*... *“whether the development significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character or existing uses related to the scenic character of the scenic resource of state or national significance.”* The determination by the Commission under this section also includes the associated facilities of the expedited wind energy development, unless otherwise determined by the Commission pursuant to 35 M.R.S.A. § 3452(2) (see Finding 18 below).
- B. Title 35-A, chapter 34-A, § 3452(3) further requires that when making a determination on impacts of an expedited wind energy development on scenic character, the Commission shall consider the following:
- (a) *“The significance of the potentially affected [scenic resource];*
 - (b) *The existing character of the surrounding area;*
 - (c) *The expectations of the typical viewer;*
 - (d) *The expedited wind energy development’s purpose and the context of the proposed activity;*
 - (e) *The extent, nature and duration of the potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities’ presence on the public’s continued use and enjoyment of the scenic resource of state or national significance; and*
 - (f) *The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of the turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.”*
- C. Title 35-A, § 3452(3) and (4) also state that *“a finding by [the Commission] that the generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy development has an unreasonable*

adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance.” The effects of portions of the developments facilities located more than 8 miles from a scenic resource of state or national significance shall be considered to be insignificant. (Title 35-A, § 3452(3)). A visual assessment is not generally required for the portions of the wind energy development located from 3 to 8 miles from scenic resources of state or national significance, but may be required if there is substantial evidence that such an assessment is needed. (Title 35-A, § 3452(4)). Based upon the applicant’s submissions, the Commission did not reach the issue of whether an 8-mile assessment was necessary (see Finding 19 below).

18. *Scenic Standard Applicable to Associated Facilities.* After accepting this application complete for processing, the issue of the scenic standard applicable to this project’s associated facilities was raised. The Chair provided the Parties an opportunity to submit argument prior to the resolution of this issue, all in advance of the Parties’ pre-filing of testimony. *See* First Procedural Order (March 29, 2011). At its April 6, 2011 regularly scheduled business meeting, the Commission formally delegated to the Chair the authority to determine whether the Title 35-A standard or the Title 12 standard would apply to the associated facilities. And, thereafter, the Second Procedural Order (April 21, 2011) set forth in detail the findings and conclusions regarding the scenic standard applicable to the associated facilities.

A. *Title 35-A analytical framework.* Pursuant to 35-A M.R.S.A. § 3452(2): “*The [Commission] shall evaluate the effect of associated facilities of a wind energy development in terms of potential effects on scenic character and existing uses related to scenic character in accordance with Title 12, section 685-B, subsection 4, paragraph C . . . in the manner provided for development other than wind energy development, if the [Commission] determines that application of [Title 35-A, subsection 3452, paragraph 1]. . . to the development may result in unreasonable adverse effects due to the scope, scale, location or other characteristics of the associated facilities. An interested party may submit information regarding this determination to the primary siting authority for its consideration. The primary siting authority shall make a determination pursuant to this subsection within 30 days of its acceptance of the application as complete for processing.*” 35-A M.R.S.A. § 3452(2) (emphasis added). Thus, to determine whether to apply Title 35-A or Title 12, this section directs the Commission to first apply the scenic standard provided Title 35-A to the associated facilities, and then compare that to the application of the scenic standard provided by Title 12.

(a) *Title 35-A standard.* The Title 35-A scenic standard and its associated criteria are found at 35-A M.R.S.A. §§ 3452(1) & (3). In applying that standard, the Commission considers views of the associated facilities only from statutorily designated scenic resources of state or national significance, and based upon the criteria set forth in Title 35-A, it would consider whether the associated facilities significantly compromised those views such that there was an unreasonable adverse effect on scenic character or existing uses related to scenic character. 35-A M.R.S.A. §§ 3451(9), 3452(1) & (3). Upon this review, that is—the scenic impacts of the

associated facilities under the Title 35-A standard—section 3452(2) then directs the Commission to consider whether the application of that standard, as opposed to application of the scenic standard set forth in Title 12, “may result in unreasonable adverse effects due to scope, scale, location or other characteristics of the associated facilities.” 35-A M.R.S.A. § 3452(2). Thus, the Commission must next consider what it would consider with regard to the scenic impacts of associated facilities under the Title 12 standard that it would not consider under the Title 35-A standard.

- (b) *Title 12 scenic standard.* Under the Commission’s traditional scenic standard, 12 M.R.S.A. § 685-B(4)(C) and Commission Standards § 10.25(E)(1), the Commission would consider whether “*adequate provision has been made for fitting the [project] harmoniously into the existing natural environment in order to ensure there will be no undue adverse effect on [among other things] existing uses [and] scenic character . . . in the area likely to be affected by the project.*” Thus, under Title 12, the standard is the so-called harmonious fit/no undue adverse effect standard, and the Commission’s review of the scenic impacts of associated facilities would not be limited to those views that have been identified by the Legislature as significant under Title 35-A. *See* 35-A M.R.S.A. § 3451(9) & § 3452(1). Under Title 12 the Commission would consider the impacts the associated facilities would have on views from scenic resources of state or national significance as well as locally significant scenic resources in the area likely to be affected by the project.
- (c) *Contrasting Titles 35-A and 12.* If the Commission were to apply the Title 35-A standard to associated facilities, two factors are relevant for the Commission’s consideration. First, the Commission would not consider the scenic impacts of the associated facilities on locally significant scenic resources. Second, with respect to views of the associated facilities from scenic resources of state or national significance, the Commission would not consider whether the associated facilities fit harmoniously into the natural environment. Thus under the analytical framework provided by 35-A M.R.S.A. § 3452(2), the Commission must ultimately consider: whether (because of their scope, scale, location or other characteristics) the associated facilities may (because the first and second factors stated above would not be taken into consideration) result in unreasonable adverse effects.

B. *Application of Title 35-A to Bowers Wind Project.* As a preliminary matter, to determine which scenic standard applies to the associated facilities in this project, the definition of associated facilities, as compared to generating facilities, must be clear.

- (a) *Definition of associated facilities.* Title 35-A defines associated facilities and generating facilities. In accordance with 35-A M.R.S. §§ 3451(1) & (5):
 - (i) *Generating facilities* means wind turbines, including their blades, towers, and concrete foundations, and transmission lines (except generator lead lines).
 - (ii) *Associated facilities* means all other facilities that are not generating facilities, and that includes the turbine pads, which are the cleared, leveled areas of gravel around each turbine, all roads used to access the turbines, the generator lead lines, and the meteorological towers, as well as the operations and maintenance building and the substation.

- (b) *Bowers Wind Project's associated facilities.* The record indicates the following with respect to the scope, scale, location and other characteristics of this project's associated facilities:
- (i) Lakes located to the south of the project area in the Downeast lakes region (other than the lakes in this region that have been designated scenic resources of state or national significance under the Task Force Act) have been identified as locally significant scenic resources, but the views of associated facilities from these resources will be limited for the reasons stated below;
 - (ii) This project does not propose a new generator lead line;
 - (iii) The operations and maintenance building, substation, and express collector line will be located on the north side of the project area, and while the access road to the operations and maintenance building will be visible from an existing road, and the express collector line will be visible where it crosses an existing road, none of those associated facilities will be visible from any identified scenic resources;
 - (iv) This project proposes 9.8 miles of new access roads in a project area that contains existing logging roads, the roads will be located at relatively low elevations, the topography will not require extensive cut and fill, and therefore the visual impact from the roads will primarily be limited to notches in the vegetation canopy;
 - (v) Elevations proximate to the project area are relatively low-lying and elevations that will provide views of the associated facilities will be at a distance that reduces the scenic impact; and
 - (vi) This project's associated facilities may be visible to varying degrees from statutorily designated scenic resources of state or national significance, but they will not be visible from any national natural landmark, federally designated wilderness area, nationally-listed historic property, or national park.

C. *Scenic standard applicable to associated facilities.* As set forth in the Second Procedural Order, the Commission does not conclude that the application of the Title 35-A scenic standard to this project's associated facilities may result in an unreasonable adverse effect. While such application will eliminate consideration of the associated facilities' scenic impact on any locally significant scenic resources, nothing in the record indicates any concern in that regard. Further, in view of the scope, scale, location and other characteristics of the associated facilities, as identified above, the Commission concludes that not requiring them to fit harmoniously into the natural environment with respect to how they will be viewed from scenic resources of state or national significance will not result in an unreasonable adverse effect. For all of these reasons, the Title 35-A scenic standard, not the Title 12 standard, is applicable to the associated facilities of the BWP.¹

¹ Following the issuance of the Second Procedural Order, PPDLW asserted that the Chair had failed to properly consider the scenic impacts of the meteorological (MET) towers, and thus argued that the Title 12 scenic standard ought to have been applied to the associated facilities. The record shows, however, that the MET towers of the BWP would only have been visible in a limited way from limited locations, and thus the MET towers do not provide a basis to conclude that the Title 12 standard ought to have been applied to the BWP associated facilities.

19. *Applicant's VIA.* The Applicant submitted a Visual Impact Assessment (VIA) dated January 19, 2011 that was conducted by LandWorks of Middlebury, Vermont. Scenic Resources of State or National Significance (SRSNS) were identified according to the definition in 35-A M.R.S.A. § 3451(9). The VIA analyzed scenic impacts to 8 miles, so the Commission did not reach the visual impact assessment issues described in Title 35-A §3452 (4), namely whether a VIA was necessary and whether the VIA must address impacts located more than 3 miles and up to 8 miles away.

The record shows that the following 9 lakes are SRSNS within 8 miles that have views of the project: Pleasant Lake, Shaw Lake, Duck Lake, and Junior Lake—all of which are within 3 miles of the Project; and Scraggly Lake, Keg Lake, Bottle Lake, Sysladobsis Lake and Pug Lake, which is a subset portion of West Grand Lake—all of which are within 3-8 miles of the Project. (*See Applicant's VIA and July 5, 2011, memo from LandWorks to the Applicant*) The record also shows that these lakes are connected by water or portages that facilitate recreational use of these lakes as canoe routes by guides and the general public. (See, for example, testimony of NRCM). See Table 1 below for a summary of the findings regarding the 9 lakes by both LandWorks and Dr. Palmer, the Commission's scenic review expert.

Six other SRSNS were identified as having no views of the project within 8 miles: Horseshoe Lake, Lombard Lake, West Musquash Lake, Norway Lake, Upper Sysladobsis Lake, and the Springfield Congregational Church. (*See Application Exhibit #17, VIA p. 20*)

Applicant's overall scenic impact assessment: *"This region of Maine has very low population, vast woodlands, and plentiful lakes. It is not recognized as a tourism center and there are primitive recreational opportunities. It is a working landscape on which the region's residents have depended for centuries, including the harvesting and processing of forest products, evidence of which can be seen in the hillsides and the network of logging roads throughout the area. Throughout most of the study area, topography, forest cover, and roadside vegetation constrain or block views of the Project, limiting the overall visual impact. There are scenic resources of state or national significance within the viewshed, which include thirteen great ponds and one national historic site. For each of these resources, the assessment examined its significance, character, use, and visibility, as defined by 35-A MRSA §3452.3. This information was used to make a determination of whether the Project "has an unreasonable adverse effect on the scenic values and existing uses related to scenic character of a scenic resource of state or national significance." This Visual Impact Assessment demonstrates that the Project, as proposed, **will not result in an unreasonable adverse effect on the scenic values and existing uses related to scenic character of a scenic resource of state or national significance.**" (Exhibit 17 of application, page 2) In the Applicant's pre-filed testimony it is stated that "this is not a pristine landscape, and has long been a working landscape that has been used and developed for its recreational, timber and water resources." (LandWorks pre-filed testimony, p. 17)*

A. *Intervenor Comments:* The PPDW employed Michael Lawrence & Associates (MLA) to prepare their own VIA of the project area (see pre-filed testimony of MLA). MLA rebutted two of the overall conclusions of the Applicant's VIA: (1) that this "region of

Maine ... is not recognized as a tourism center”, and (2) that the overall visual impact is limited by topography, forest cover, and roadside vegetation.

As for the region not being recognized as a tourism center, MLA asserted that the project area is part of the Downeast lakes watershed which has served as a recreation area for “travelers ...as early as 1830” when Passamaquoddy guides brought clients into this area. Gary Campbell, a small business owner with an MBA from Harvard Business School, also testified on behalf of PPDW. Campbell has had a summer residence in Lakeville for the past 28 years, and he explained in his testimony that “*in the Downeast Lakes regions [of which the project area is a part], tourism employs hundreds of people directly and many more indirectly. ...Small businesses include sporting camps, lodges and housekeeping cabins, hunting fishing guides, as well as retail and service businesses.*” Campbell also cited the 2005 Strategic Plan for Implementing the Maine Nature Tourism Initiative, which was prepared for the Maine Department of Economic and Community Development. This Plan describes the Grand Lake Stream and BWP area as “*situated within nearly 2 million unbroken acres of northern woodlands*” where “*Maine Guides can lead their visitors on a number of adventures depending on the season.*” (see pre-filed testimony of Gary Campbell). Registered Maine Guides, testifying on behalf of Intervenor Corrigan, also testified to the importance of lakes in the project area to their guiding business. (see pre-filed testimony of David Tobey and Dale Tobey).

As for the Applicant’s claim regarding limited visual impact, MLA asserted that it is irrelevant that topography or vegetation limits views of the project from viewpoints other than lakes. MLA argues that what must be considered is the chain of lakes within the project area that are the scenic resources of state or national significance, and specifically the 9 of which that would have views of the BWP.

- B. *Public Testimony from the Natural Resources Council of Maine (NRCM):* NRCM, a Maine nonprofit organized for the purpose of conserving Maine’s environment, testified at the public session of the evidentiary hearing. NRCM testified that “*most of the North Woods is a working landscape, not pristine wilderness. Limiting a finding of unreasonable adverse impacts to pristine landscapes or unique vistas like Katahdin (as [the Applicant’s scenic expert] LandWorks did in its testimony) would be inconsistent with the law and insufficiently protective of the other places in Maine with high scenic and recreational importance.*”
- C. *Third Party Review.* The Commission’s retained scenic expert, Dr. James Palmer of Scenic Quality Consultants, conducted a third party peer review, dated June 3, 2011, of the Applicant’s Visual Impact Assessment (VIA). Dr. Palmer has an MLS in landscape architecture and a PhD in forestry/natural resource planning from the University of Massachusetts, Amherst, with over 30 years of experience in consulting and research on environmental perceptions and behavior. He has provided scenic assessment consulting services to the Commission and the Maine Department of Environmental Protection on several other projects, including six wind power project proposals.

As noted in Finding 19 above, the Applicant prepared a VIA with the following results. Nine lakes were identified as SRSNS within 8 miles that have views of the project: Pleasant Lake, Shaw Lake, Duck Lake, and Junior Lake -- which are within 3 miles of the Project-- and Scraggly Lake, Keg Lake, Bottle Lake, Sysladobsis Lake and Pug Lake (portion of West Grand Lake) -- which are within 3-8 miles of the Project. (See Applicant's VIA, Exhibit 17 of application, and July 5, 2011, memo from LandWorks to the Applicant). The Commission's scenic consultant, Dr. Palmer, generally agreed with the results of the Applicant's VIA by LandWorks but found that the potential adverse scenic impact was greater on the SRSNS than that estimated in the Applicant's VIA (see Table 1 below).

Dr. Palmer's overall scenic impact assessment: In his peer review, Dr. Palmer stated "*overall this VIA is accurate and clearly presented.*" Dr. Palmer's review, however, concluded that the scenic impacts of the project would be more severe than indicated by the Applicant's VIA. Dr. Palmer's overall conclusion includes the following statement: "*The apparent scenic impact to the state and nationally significant scenic resources is Adverse at some locations and Very Adverse others. It is my judgment that it will be very difficult to decide whether the scenic impact to some of the state or nationally significant scenic resources is Unreasonably Adverse without better information about the "extent, nature and duration" of their use, the "expectations of the typical viewer" and "potential effect...on the public's continued use and enjoyment" of these resources.*" (See Palmer review, p.63)

Palmer stated, as to applying the statutory "typical user" criterion above to, for example, Junior Lake, "*there are no existing data to directly address this criterion. An alternative approach is to apply deductive reasoning to respond to this criterion using common knowledge and assumptions. Because it is not empirically grounded, it may not be valid or reliable.*" (See Palmer review, p. 45) He commented similarly for each lake having views of the project.

- D. *Summary of impacts; Lake Management Program.* Table 1 summarizes the scenic status of each of the lakes with views of the turbines, distance to the nearest turbine, number of turbines visible within 8 miles, and overall scenic impact as judged by LandWorks (the Applicant's scenic expert) and Dr. Palmer (Commission's scenic expert). The overall scenic impact assessment for each lake takes into account the extent to which turbines would be visible at the hub. As highlighted in Table 1 below, there is agreement as to which 4 lakes have the greatest potential for adverse scenic impact: Pleasant, Shaw, Scraggly, and Junior Lakes.

Table 1. Summary of Resources of State or National Significance Within 8 Miles of Any Visible Project Element -- LandWorks and Dr. Palmer (listed in descending order by distance to nearest turbine)

	Scenic Status [Significant (S), Outstanding (O)]	Distance to Nearest Visible Turbine	# of Turbines Visible within 8 Miles (27 total)	Overall Scenic Impact (LandWorks)	Overall Scenic Impact (Palmer)
GREAT PONDS					
Within 3 miles of the Project					
<i>Pleasant Lake</i>	(O)	2.16 mi.	0-27	<i>Medium</i>	<i>Med-High</i>
<i>Shaw Lake</i>	(S)	2.6 mi.	0-25	<i>Medium</i>	<i>Med-High</i>
Duck Lake	(S)	2.7 mi.	0-18	Low	Low-Med
<i>Junior Lake</i>	(S)	2.99 mi.	0-23	<i>Medium</i>	<i>Medium</i>
Within 3-8 miles of the Project					
<i>Scraggly Lake</i>	(S)	3.3 mi.	0-26	<i>Medium</i>	<i>Med-High</i>
Keg Lake	(S)	3.78 mi.	0-18	Low	Medium
Bottle Lake	(S)	5.1 mi.	0-13	Low	Low
Sysladobsis Lake	(S)	6.34 mi.	0-22	Low	Low-Med
Pug Lake ² (West Grand Lake)	(O)	7.2 mi.	0-6	Low	Low-Med

Column 1 above sets forth the lakes' scenic status, as established by the Commission's *Lake Management Program* of June 1990 (see Appendix C of the CLUP). As shown above, all of the 9 lakes that would be impacted by the BWP received either an outstanding or significant scenic rating based upon the *Program*, which as explained below was an exhaustive process.

The Lake Management Program was the culmination of a 5-year undertaking by the Commission in consultation with the Maine Department of Inland Fisheries and Wildlife, State Planning Office, Natural Areas Program and other agencies. The Program first assessed the land use and natural resource characteristics associated with the approximately 1500 lakes in the Commission's jurisdiction that are over 10 acres in size (representing 98% of the lake surface area located in the Commission's jurisdiction). This preliminary assessment culminated in the *Wildlands Lake Assessment* in 1987.

Then, with the guidance of a Lakes Policy Committee—which included representatives of major landowners, statewide environmental and sportsmen's organizations, the

² While the Applicant's post-hearing brief states there should be no visibility of turbines from Pug Lake (portion of West Grand Lake), LandWorks notes in its July 5, 2011, memo to the Applicant that assuming a tree height of 45 feet, portions of up to 6 turbines could be visible within 8 miles of Pug Lake. The Applicant's VIA assumes a tree height of 45 feet in its visibility analysis of all other lakes (see Exhibit 17 of Application, p. 6).

University of Maine and the Commission—an *Action Program for Management of Lakes in Maine Unorganized Areas* was prepared and accepted by the Commission in January of 1989. The *Action Program* recommended a variety of innovative regulatory and non-regulatory lake management techniques, including policy guidance, special review criteria for lake development, lake concept plans, lake management classifications and other public and private efforts.

Following numerous public meetings and hearings around the state, the recommendations of the *Action Program* culminated in the 1990 adoption of the *Lakes Management Program*, which included an amendment to the Commission's CLUP and regulations governing land use around lakes.

In enacting the Task Force Act, the Legislature adopted the scenic assessment of lakes established in the Commission's *Lake Management Program*. 35-A M.R.S.A. § 3451(9)(D)(2). Of the 1500 lakes only 280 lakes were considered as having either significant or outstanding scenic values. Fourteen of those 280 lakes are within 8 miles of the BWP, and, as shown in Table 1, 9 of those 14 would have views of the BWP turbines.

20. *User data*. The Legislature has directed the Commission, in determining whether a wind energy development Applicant has satisfied the applicable scenic standard, to consider, among other things, the expectations of the typical viewer and the extent, nature, and duration of the potentially affected public uses of the relevant scenic resources. 35-A M.R.S.A. § 3452(3). As explained in paragraph 19 above, in view of the degree of the adverse scenic impact of the BWP, a careful consideration of this criterion is warranted.

On behalf of the Applicant, the Portland Research Group conducted two studies. The first was a January 2011 telephone survey of users of outdoor resources in Maine during the past three years, focusing on those who used the lakes within 8 miles of the BWP. The second study was a February 2011 intercept survey of snowmobilers who attended a ride-in to the Stetson Mountain Wind Project. Although the Applicant's pre-filed testimony asserts that the findings of these studies show the BWP would not have an unreasonable impact on uses related to scenic resources, the Commission's expert questioned the methodology and reliability of the studies in his peer review.

The Applicant also surveyed activity on Pleasant, Scraggly, and Bottle Lakes over Memorial Day weekend (2011) and boat traffic through a stream that provides the only water access point to Junior Lake, during 11 days in July 2011. Both surveys documented low overall use, and the July survey documented little, if any, guiding activity. The Memorial Day weekend survey was conducted by two individuals over a total of approximately 10 hours observing use on these lakes and around their shore areas (See May 31 letter to the Applicant from Randy Seaver). The stream/waterway survey was conducted on 11 days from July 4 through July 15 by an observer who camped on the site. All boats travelling through the stream/waterway to Junior Lake were documented as well as all boats observed travelling in Junior Bay (a portion of West Grand Lake before entering the waterway). (See July 19 letter to the Applicant from Stantec reporting the results of the survey).

Additionally, the Applicant asserts there are a number of existing significant studies and surveys that demonstrate that public use and recreational activity does not decline following the construction of wind turbines. The Applicant submitted to the Commission studies that have been conducted in Prince Edward Island, Scotland, the Czech Republic, Searsburg, VT, and Quebec. The Applicant states that all of these studies indicate that public acceptance of wind turbines is high, and that the existence of wind energy projects in an area has little negative effect on tourism or recreational use.

Furthermore, the Applicant maintains that the results of the Baskahegan Stream Watershed Recreational Use & Resource Analysis (“Baskahegan Study”) are compelling evidence that the visibility of turbines, on a lake that receives relatively high recreational use (including by guides), has not had any adverse impact on the public’s continued use and enjoyment of that resource following turbine construction. The Baskahegan Study was conducted in the summer of 2010 by faculty and students of the University of Maine on Baskahegan Lake in Brookton Township, Washington County, following the construction of the Stetson Mountain Wind Project in T8 R3 NBPP, Washington County. The purpose of the Study was “to illuminate the characteristics of recreation use patterns and site condition around the Baskahegan watershed area.” (see Exhibit D of LandWorks pre-filed testimony). The Stetson Mountain Wind Project had become operational the previous year, but no one interviewed for the study indicated any detrimental impact from the turbines visible from that lake. The interviewees, however, were not asked specifically about the turbines, which are approximately 8.9 miles from the boat launch where most of the interviews were conducted. The Stetson Mountain Wind Project turbines are approximately 5.1 miles from the closest part of Baskahegan Lake, which is not recognized under state law as a SRSNS.

A. *Intervenor PPDLW*: Witnesses for the PPDLW included several Registered Maine Guides and sporting camp owners from the Grand Lake Stream area, which is about 18 miles from the BWP area, who utilize the lakes within 8 miles of the BWP to guide their clients, primarily for the purpose of recreational fishing. They all expressed the concern that the visual impact of the BWP turbines would reduce the likelihood their clients would want to return to the area and thus adversely impact their businesses.

In its rebuttal comments of July 28, 2011, Intervenor witnesses guides Dave Tobey and Andy Buckman, and sporting camp owner Charles Driza all question the reliability of the Applicant’s July 2011 survey of boat traffic through the waterway to Junior Lake. Tobey states “*guiding on these waters are the busiest during May and June... [Grand Lake Stream] is always slow during July. Around the first of August the guiding picks up again with the fall season becoming a popular time.*” Similarly, Buckman states “most of our canoe groups are off on trips in other areas of Maine and Canada during July.” And Driza states “*Junior Lake and Junior Stream [which is the waterway stream leading to Junior Lake] are two of our most used destinations in May and June when our fishing season is at its peak.*”

B. *Public comment*: During the two public sessions of the evidentiary hearing on June 27 and June 28, 2011 several other Registered Maine Guides and sporting camp owners

from the Grand Lake Stream area testified as to the importance of the lakes in the project area to their businesses. They stated concerns similar to those of the PPDLW witnesses about the adverse impact the BWP would have on the segment of their business that relies on guests utilizing the lakes within 8 miles of the project. They explained that their livelihood depends on the natural beauty of this area, and stated that some of their clients had expressed negative reactions to the views of the Stetson Mountain Wind Project turbines from Baskahegan Lake.

C. *Third party review:* Regarding the Applicant's snowmobile survey, Dr. Palmer explains that it was not an unbiased probability sample³ because the respondents had already declared, by agreeing to attend the ride-in to the Stetson Mountain Wind Project, that they thought they would enjoy recreating in and around a wind power project. Palmer stated that “[b]ecause of this self-selection bias, I do not see what role this survey can play as a responsible decision making tool.”

Regarding the telephone survey, Dr. Palmer explains that it used “a nonprobability sampling procedure where the data cannot be generalized beyond the specific 191 respondents in the survey. It begins with a list of self-declared outdoor activity participants. In addition, some people were excluded from the survey, which had a quota to balance gender and limit the number of respondents who rarely or never used the scenic lakes in the study area. A probability sample would be needed to estimate the extent, nature and duration of recreation use. A second problem is that respondents did not see simulations of what the Bowers Wind Project turbines would look like from the study area. It is therefore highly unlikely that they could have an accurate mental image of the ‘scope and scale’ of the turbines from any particular viewpoint.” (Palmer comments on VIA, page 36)

Regarding the Baskahegan Study, Dr. Palmer stated that, like the snowmobile survey, it was affected by a self-selection bias because persons who chose not to visit Baskahegan Lake because the Stetson Mountain Wind Project turbines were visible from the lake were not included in the survey. While Palmer agreed it was significant that no one who did continue to visit the Lake post-construction mentioned the visibility of the turbines, no one in the study was actually asked about the effect of seeing turbines, and thus he did not find the results persuasive in evaluating the potential impacts of the BWP. See paragraphs 19(C) & (D) above regarding BWP's degree of adverse scenic impact. Dr. Palmer also noted that Baskahegan Lake is not a SRSNS, and the boat launch from which most of the survey was completed was over 8 miles from the Stetson Mountain Wind Project, and thus beyond the 8-mile limit for assessing scenic impacts set by the Legislature under the Task Force Act. (Palmer cross-examination, July 6, 2011, page 59 of transcript). See 35-A M.R.S.A. § 3452(3) (providing that the Commission, in

³ The record includes Dr. Palmer's explanation of his use of the term “probability sample:” A probability sampling scheme is one in which every unit in the population has a chance (greater than zero) of being selected in the sample, and this probability can be accurately determined. The combination of these traits makes it possible to produce unbiased estimates of population totals, by weighting sampled units according to their probability of selection. Examples of probability sampling include simple random samples, systematic samples, stratified samples and cluster samples. Examples of nonprobability sampling include accidental samples, quota samples, and purposive sampling.

determining a wind energy development's effect on scenic character, "shall consider insignificant the effects" of turbines that are located more than 8 miles away).

As to the existing studies cited by the Applicant regarding how people perceive wind projects, Palmer noted that those studies were not conducted in the context of the specific statutory criteria applicable in Maine pursuant to the Task Force Act. Title 35-A has specific criteria about how to evaluate the scenic impact of a wind power project, including, for example, considering turbines only within 8 miles of specific, identified, significant resources, and considering the impacts only on those who actually use the resources. Dr. Palmer also opined that, in order to be reliable, respondents in a study need to be presented with an accurate visual simulation from real viewpoints toward a proposed project to understand the potential scenic impact. These conditions have rarely been met by previous studies, which are typically about wind energy in general, without reference to particular viewpoints, user activities, or specific projects.

Dr. Palmer explained that the Searsburg, VT study, which he conducted, had many strengths, but the respondents were not engaged in recreational activities and the viewpoints had not been designated by law as significant.

21. Remote recreational values and evaluating scenic impact under customary VIA's

The Task Force Act's scenic impact evaluation criterion, directing the Commission to consider the extent, nature, and duration of a project's impact on public uses, *see* 35-A M.R.S.A. § 3452(3)(E), may appear to contradict (under customary visual impact assessment methodologies) the Commission's long-standing policy, embodied in its CLUP and regulatory standards, to value remote recreation and related low levels of public use. This is most evident with regard to certain lakes in the Commission's jurisdiction that, because of long-standing Commission policy, are valued because of their remote characteristic and thus potentially low level of use. The Commission concludes, however, that there is no conflict; rather, this is an issue that requires the Commission to harmoniously apply Titles 35-A and 12, as well as the Commission's regulations and its CLUP.

A. *Value of remoteness.* The Commission has a long-standing policy on valuing remote recreation, embodied in its districts, standards, and CLUP (2010 CLUP at 5, 17, 258, and 259). Thus, as stated above, while the Commission is directed to consider the extent, nature and duration of a project's impact, the Commission does not interpret that criterion to require it to discount certain resources that receive limited use. For example, some SSRNS are located in areas zoned as P-RR, the Recreation Protection Subdistrict, which is the subdistrict characterized by areas that currently support, or have opportunities for, unusually significant primitive recreation activities (Section 10.23, I of Commission's rules). Additionally, there are areas within the Commission's jurisdiction that, while not zoned as P-RR, share the same characteristics of remoteness and associated low levels of use that are integral to the experience of the typical user. Therefore it would not be consistent with the CLUP for the Commission to discount the significance of such a scenic resource due to its low level of use. *See* 35-A M.R.S.A. § 3452(3)(A). Thus, with respect to SRSNS in the P-RR, or in instances where substantial evidence shows that a SRSNS's low use contributes to the value of the resource, the Commission will consider

a low level of use on equal footing as a high level of use in determining whether an applicant has satisfied the applicable scenic standard. (See staff discussion paper titled “Evaluating Scenic Impacts Under the Wind Energy Act” for September 7, 2011, Commission meeting).

- B. *Shaw Lake*. This record shows that this lake is inaccessible and undeveloped and, in addition to having a significant scenic value, it also has significant fishery value according to the Commission’s Wildlands Lake Assessment. As demonstrated by materials submitted by the Applicant, use of the lake is most likely limited to adventurous, inveterate paddles and anglers. It is a favorite of a number of smallmouth anglers.

22. Connectivity of regulated resources

The record for the BWP shows that several of the SRSNS that would be affected by this project form a waterway through the landscape within 8 miles of the proposed project. Staff prepared a discussion paper for the September 7, 2011, Commission meeting titled “Evaluating Scenic Impacts Under Wind Energy Act” which contained a section on evaluating “traveling through the landscape” visual impact where there are multiple SRSNS views from a water or land trail within 8 miles of a proposed wind project. There is testimony in the record about the value of these SRSNS lakes in terms of their connectivity as water trails.

Public testimony and comments on connectivity: NRCM noted two such trails in the AMC Quiet Waters Canoe Guide through the project area lakes -- see the testimony of NRCM including a map showing water trails through the project area. In its July 28, 2011, comments, the PPDLW noted several such water trails through the project lakes: 4 trails advertised by Maine Wilderness Camps all of which include use of Pleasant Lake, the REI website which advertises two water trails which include use of Pleasant, Scraggly and Junior Lakes, and the wilderness travel firm “Wilderness Inquiry” which leads canoe trips through Junior Lake.

There is also extensive testimony from guides and sporting camp owners who utilize the lakes within the project area with their clients. For example, guides explained that they often lead trips through the waterway, taking their clients up and back through several lakes in a day or over several days. See the testimony of witnesses for intervenors Partnership for the Preservation of the Downeast Lakes Watershed (PPDLW) and David Corrigan. There were also several guides and sporting camp owners who testified during the evening public sessions on 6/27 and 6/28 regarding the importance of these lakes to their guiding services.

Applicant’s comments on connectivity: In its rebuttal comments of July 25, 2011, the Applicant states “that the potential impacts due to the connectivity of these lakes is overstated. Not all of these lakes are connected, including Sysladobsis Lake, Pleasant Lake and Shaw Lake. For most of the other lakes, the connections are often shallow and rocky, limiting or preventing access to motorboats wishing to travel between lakes due to low water levels, particularly later in the season.”

Third-party comments on connectivity: Palmer stated in his July 26, 2011, correspondence that “it appears to me that the affected scenic lakes are part of a connected network.”

SCENIC CHARACTER IMPACT CONCLUSIONS

Based on the above, with respect to the Bowers Wind Project proposal, the Commission finds and concludes that:

23. Wind power projects must be evaluated on the basis of the provisions of the Commission’s statute, as revised in accordance with provisions of PL 2007, Ch. 661 (the Task Force Act). The Applicant has not carried its legal burden of proof in showing that the criteria of the Commission’s statute, 12 M.R.S., § 685-A(4), or the criteria of 35-A M.R.S., Ch. 34-A, § 3452 have been met. The Commission recognizes the BWP’s high visibility in the landscape is not a solely sufficient basis for determining that this project would have an unreasonable adverse scenic impact. 35-A M.R.S. § 3452(3). For all of the reasons discussed below, however, the Applicant has failed to demonstrate that the scope and scale of the BWP will *not* significantly compromise views from the SRSNS such that the BWP would have an unreasonable adverse effect on the scenic character or existing uses related to scenic character of the SRSNS.

The Commission notes that the more than 10 million acres under its jurisdiction are characterized not only by natural character and recreational opportunities, but also by maintained forests and farmlands. (2010 CLUP at 2). Thus, much of the jurisdiction is a working landscape, and limiting a finding of unreasonable adverse impacts to only pristine landscapes or unique vistas would be inconsistent with Title 12, the Task Force Act, and the CLUP as it would be insufficiently protective of resources with high scenic value. On this record, the scenic impacts to this Downeast lakes region do not satisfy the applicable criteria.

- A. *Project assessment.* The Applicant conducted a scenic assessment in accordance with Title 35-A, chapter 34-A, § 3452 of scenic resources of state or national significance (Title 35-A, § 3451(9)) within 8 miles of the proposed BWP. Within 8 miles of the proposed turbine locations, the area in which the Applicant must prepare a visual impact assessment, there are 9 scenic resources of state or national significance that will have views of the project. Based upon the Applicant’s commitment to retrofit the BWP with nighttime lighting mitigation technology, if feasible and approved by the FAA, the Commission has limited concern about the potential of the BWP to have an unreasonable adverse scenic impact on night skies. Within the Commission’s approximately 10.5 million-acre jurisdiction, however, these 9 lakes are among only 280 lakes that have either significant or outstanding scenic ratings, thus resulting in the BWP having a significant impact on the scenic lakes in the Commission’s jurisdiction. Importantly, 4 of these lakes are within notable proximity to turbines, that is, within 3 miles of the project.

The BWP significantly compromises views such that it has an unreasonable adverse effect on Pleasant, Shaw, Junior, and Scraggly Lakes due to the number of turbines visible from these lakes and their proximity to the turbines: Pleasant Lake (all 27 turbines visible with the closest being within 2.16 miles), Shaw Lake (up to 25 turbines visible with the closest being within 2.6 miles), Junior Lake (up to 23 turbines visible with the closest being within 2.9 miles), and Scraggly Lake (up to 26 turbines with the closest being within 3.3 miles). Of these 4 lakes the effects to Pleasant Lake are particularly notable as this is a lake that, pursuant to the Commission's comprehensive Lake Management Program assessment, received the highest scenic rating of "outstanding." All 27 turbines of the BWP would be visible from Pleasant Lake.

The effect of the BWP is also particularly adverse as the record shows that the 9 lakes collectively represent water trails that receive significant use as recreational resources by the public, including the clients of guides and sporting camp owners from the Grand Lake Stream area. As users travel through the 9-lake waterway, there would be repeated views of the BWP turbines. The fact that some of the 9 lakes are connected only by a shallow stream or a portage trail (e.g. Scraggly to Shaw Lake), is not compelling since the Commission considers portaging a common practice in following canoe trails. Such evidence includes the testimony of guides and sporting camp owners, the AMC canoe guide, and the testimony of NRCM.

- B. *Evidence regarding impact on uses related to scenic character:* Title 35-A directs the Commission to consider specific criteria in evaluating effects on scenic character and related existing uses, and user survey data may be helpful with regard to some, but not all, of the criteria. User data, which is not limited to user survey data, can assist in the Commission's consideration of the expectations of the typical viewer, the effect on the public's continued use and enjoyment, and the duration of the impact. 35-A M.R.S.A. §§ 3452(3)(C) & (E). The record for the BWP indicates that the scope and scale of the impacts of this project on the typical viewer and on the public's continued use and enjoyment of the SRSNS would be significant.

On this record as a whole, the Commission was not persuaded by the Applicant's submissions for the reasons explained by Dr. Palmer. See Finding 20(C). Given the significant scenic impacts of the BWP, the Commission finds the more credible evidence in the record to be that provided by testimony and comment from the public and by the Grand Lake Stream area guides and sporting camp owners. This evidence shows the likely impact on the recreational uses of these SRSNS, including the impact on the client base of the guides and camp owners, from the extensive scenic impact of the project. Notably, the community in and around the Grand Lake Stream area has more Registered Maine Guides than any place in Maine. Accordingly, the Commission was not convinced by the evidence presented by the Applicant that the expectations of, and the continued use by, those that recreate in this area would not be unreasonably adversely effected by the BWP.

- C. *Remote recreational experiences and low levels of use.* As discussed above, under certain circumstances the Commission has determined that resources which provide remote

recreational opportunities and resultant low levels of use are valuable, and thus in those situations it will consider low levels of public use as contributing to the value of the resource. Without this adjustment to customary VIA's, such VIA's are best suited to more urban areas than to areas such as the Commission's jurisdiction.

As noted in finding 21 above, the Commission concludes that there is substantial evidence in the record that remote recreational values and associated low levels of use are integral to the experience of the typical user of Shaw Lake. Thus the primitive recreational values of Shaw Lake and its resultant low use are judged to contribute to the value of that Lake. Thus the impact to Shaw Lake was greater than that estimated by both the Applicant and the Commission's scenic consultant because both discounted the impact due to low use, contrary to the Commission's long standing policy on remoteness. While on this record, in view of the other significant impacts on the other 8 SSRNS, this conclusion is not essential to a finding of an unreasonable adverse impact, the discussion, findings, and conclusions regarding Shaw Lake reflect a harmonization of the traditional VIA approach and the Task Force Act with the Commission's long-held policy on valuing remote recreational experiences and consequential low levels of public use.

D. *Summary.* Views from all 9 of the SRSNS will be significantly compromised by the BWP such that the development would have an unreasonable adverse effect on the scenic character and existing uses related to scenic character. The adverse effect is unreasonable due to turbine number, extent of turbine visibility, turbine proximity to the resources, the nature of the views as users travel through the SSRNS, the scenic significance of the SRSNS, and the evidence showing the scenic impacts will have an adverse impact on uses related to the SSRNS. While the scope and scale of the BWP is less visible from Duck, Keg, Bottle, Sysladobsis, and Pug Lakes, see Table 1 above, the adverse effect on the views from the SRSNS is unreasonable due to the nature of the views as users travel through the SSRNS water trail. The Commission therefore concludes the BWP would have an unreasonable adverse effect on the scenic character and existing uses related to scenic character of the SSRNS located within 8 miles of the project.

24. For all the reasons discussed herein, the Commission concludes that at this development location there are overriding scenic and public values, that the BWP has not minimized its intrusion on these existing scenic and public values, and that therefore the BWP is not in conformance with the policies and goals of the Commission's CLUP.

While the 2010 CLUP expressly recognizes the statutory changes made by the Task Force Act with respect to wind energy development in the expedited permitting area, the CLUP provides for the environmentally sound and socially beneficial utilization of indigenous energy resources where there are not overriding public values that require protection, and it clarifies that it seeks to accommodate energy generation installations that are consistent with the State's energy policies, are suitable for the proposed location(s), and minimize intrusion on natural and cultural resources and values. The CLUP specifically recognizes that sporting camps are recreational and cultural resources, worthy of protection from incompatible development and land uses. The CLUP identifies the need to protect the values of the jurisdiction that provide residents and visitors with a unique array of recreational

experiences, especially high-value natural resources and remoteness where they exist. (2010 CLUP at pages 17, 265 – 267). Finally, the CLUP is consistent with the Task Force Act in that, while it recognizes the Act’s goal of facilitating the siting of wind power, the CLUP continues to protect the state’s quality of place and natural resources (p. 188) and pursues a policy of identifying and protecting areas that possess scenic features and values of state or national significance (p. 18).

For all the reasons stated in these Conclusions and based upon the record before it, the Commission finds the BWP, with respect to scenic and recreational resource impacts would not be in conformance with the above-identified goals and policies of the 2010 CLUP.

FINAL CONCLUSIONS

A number of other issues were raised concerning conformity of the proposed BWP with applicable provisions of Titles 12 and 35-A, the Commission’s Standards, and its CLUP. The above conclusions require the Commission to deny the application, and thus the Commission does not make findings and conclusions on those other issues. The Commission noted during its deliberations, however, that this proceeding primarily turned on whether the BWP application met the scenic impact review criteria, and therefore it did not see a need to engage in an extended deliberation on the other applicable criteria.

The Commission appreciates the professional manner in which the Applicant prepared and presented its application for the BWP, as well as the thorough participation by the Intervenor and members of the public. While the proceedings to process expedited wind energy development proposals in the Commission’s jurisdiction have proven to be necessarily complex, the Commission’s evaluation of such proposals are clearly guided by its statutory permitting authority, as modified by PL 2007, Ch. 661 (codified in part in Title 12 and in part in Title 35-A), the Commission’s Chapter 10 standards & rules, and its Comprehensive Land Use Plan (CLUP). Based on the findings set forth above, and in addition to the conclusions set forth above, the Commission concludes that, with respect to the 27-turbine Bowers Wind Project (BWP) proposal, the Applicant has not met its burden of demonstrating that the BWP is in conformance with the applicable statutory and regulatory requirements, and that it is not consistent with the goals and policies of the CLUP. (12 M.R.S. §§ 685-B(2-B), (4) and (4-B); 35-A M.R.S. §§ 3401-3404, 3451-3458; applicable provisions of the Commission’s Chapter 10 standards and rules; Comprehensive Land Use Plan (2010 CLUP)).

Therefore, the Commission DENIES Development Permit DP 4889, submitted by Champlain Wind, LLC for the 27-turbine Bowers Wind Project, as proposed.

In accordance with 12 M.R.S.A. section 689, 5 M.R.S.A. section 11002, and Maine Rules of Civil Procedure 80C, this decision by the Commission may be appealed to the Law Court within 30 days after receipt of notice of the decision by a party to this proceeding, or within 40 days from the date of the decision by any other aggrieved person.

DONE AND DATED AT BANGOR, MAINE THIS 20TH DAY OF APRIL, 2012.



By: _____

Samantha Horn Olsen, Acting Director
Maine Land Use Regulation Commission