



PAUL R. LEFAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection

FROM: Mark Margerum, Project Manager and Mark Bergeron, Division Director, Division of Land Resource Regulation, Bureau of Land & Water Quality

RE: Appeal filed by Friends of Maine’s Mountains, Friends of Saddleback Mountain, Rand Stowell, and other Aggrieved parties, of Site Location of Development Act and Natural Resources Protection Act Approval #L-25137-24-A-N/L-25137-TG-B-N for Saddleback Ridge Wind Project, Carthage, Canton and Dixfield

DATE: February 16, 2012

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Statutory and Regulatory References: The applicable statutory and regulatory framework for the issues raised in this appeal are the Site Location of Development Law (Site Law), 38 M.R.S.A. § 484; Site Location of Development Rules, Chapter 375 § (10); and the Maine Wind Energy Act, 35-A M.R.S. A. §§ 3451-3455. The Site Law Rules interpret and elaborate on the Site Law criteria. In the section pertinent to this appeal, the Site Law Rules provide guidance for the determination of whether a project will be in compliance with the noise standard of the law. The Wind Energy Act sets forth additional licensing criteria specific to the public benefits and scenic character issues raised in this appeal. Procedures for appeals before the Board are outlined in the Department’s Rules Concerning the Processing of Applications, Chapter 2 § 24 (B).

Location: The project site is located north of Route 2/17 in the Town of Carthage. The project transmission line extends south from the project into Dixfield and Canton.

Procedural History and Project Description: On October 26, 2010, the licensee submitted a Site Law application and an NRPA application for the construction of a 32-megawatt (MW) wind energy generation facility known as the “Saddleback Ridge Wind Project”, which is an expedited wind energy development as defined by the Wind Energy Act. The proposed project consists of 12 GE 2.75-103 wind turbines (2.75 MW each) with associated turbine pads. The turbines will be constructed on Saddleback Ridge in Carthage. The proposed project also includes an approximately 9,090-linear foot access road leading from Winter Hill Road in Carthage to the ridgeline; an approximately 9,635-linear foot access road connecting the turbines; a 1,750-square foot operations and maintenance building and associated transmission lines and electrical substations.

On December 10, 2010 the Department received a request for a public hearing filed by attorney Rufus Brown on behalf of Friends of Maine's Mountains (FOMM) and other interested persons listed in the filing. The Department denied this request in a letter from James Brooks, Acting Commissioner, dated January 21, 2011.

In response to the amount of public interest in the proposed project, the Department held a public meeting on March 10, 2011 in the Town of Dixfield to provide interested persons with an opportunity to present their concerns to the Department and submit information into the record.

The Department approved the permit applications on October 6, 2011. A timely appeal to the Board was filed on November 7, 2011 by the appellants listed above. On January 11, 2012 the licensee filed its response to the appeal.

Environmental Issues and Discussion:

1. NOISE ISSUES RAISED IN APPEAL:

The appellants contend that the Department erred in its findings that the noise generated from the proposed project will have not an unreasonable effect on the surrounding environment, based on the following contentions:

- (A) The Department failed to provide due process and protect the liberty interests under the Maine and U.S. constitutions to several of the appellants because the project has the capacity to impact their health and diminish the value of their property to the extent that it generates excessive noise;
- (B) The Department failed to require the licensee to model nighttime stable atmospheric conditions with high wind shear above the boundary layer and other conditions that may affect in-flow airstream turbulence and the Department allowed the applicant to use Noise Reduction Operation (NRO) to achieve compliance with the nighttime noise standard; and
- (C) The Department should have applied the 42 dBA nighttime standard contained in the provisionally adopted Chapter 375(10)(I) Sound Level Standards for Wind Energy Developments to this project to prevent potential adverse health effects of nighttime noise.

A. The appellants' argument that their constitutional rights were violated in that that they were denied due process by the Department's failure to conduct an evidentiary hearing is without merit because the record reveals that the appellants had a fair opportunity to participate in the licensing process and submit evidence for consideration. The licensing process followed here provided ample opportunity to all members of the public for the submission of evidence, the examination of the evidence submitted by the licensee and the analysis by the consultants hired by the Department, and the submission of responses to that evidence and analysis.

Appellants' argument that the Department's decision is unconstitutional under the Due Process clause because of a potential diminishment in the value of their property due to a project constructed on nearby property is outside of the types of interests addressed by that clause of the Constitution and in any case, the record here does not support the appellants' claim.

B. the issue of the adequacy of the licensee's modeling of predicted sound levels, the Department retained the services of a third party noise expert, EnRad Consulting (EnRad), to review the sound level study that was submitted by the licensee. In its review of the licensee's March 17, 2011, revised noise assessment, which incorporated a new quieter turbine blade, EnRad commented that the proposed use of NRO for turbines 8 and 9, which the assessment predicts will achieve compliance with the Department rules, is confirmed by RSG by two common methods to account for ground attenuation and modeling uncertainties as employed in Department wind turbine project applications. EnRad further commented that, in its opinion, the revised noise assessment is reasonable and technically correct according to standard engineering practices and the Department Regulations on Control of Noise.

C. The appellants' argument that the Department should have used certain aspects of the provisionally adopted rule, Chapter 375(10)(I) Sound Level Standards for Wind Energy Developments acknowledges that the rule is not yet in effect and the relevant criteria for this project are the existing Chapter 375(10) noise rules. The results of the licensee's revised sound level study indicate that, with two turbines operating in the proposed noise reduction operation mode, sound levels from the Saddleback Ridge Wind Project will meet the Department's nighttime 45 dBA hourly equivalent limit at the closest protected location. Results also indicate that sound levels during the daytime while operating at full sound power will be at least 9 dBA below the 55 dBA hourly equivalent limit. The use of a ground absorption factor of $G=0$ with no sound absorption from foliage or vegetation overestimates sound propagation and is an alternative to applying an additional 3 dBA uncertainty factor.

Because EnRad is no longer available to advise the Board on this matter, the Department retained the services of another third party noise expert, Tech Environmental, Inc., to review the issues raised by the appellants. Tech Environmental reviewed the arguments submitted by the appellants and the responses submitted by the licensee and found no unresolved noise issues.

2. SCENIC CHARACTER ISSUES RAISED IN APPEAL:

The appellants assert that the Department erred in its finding that the project would not have an unreasonable adverse effect on the scenic character, existing uses related to scenic character, or other existing uses in the area based on the following contentions:

- (A) The evaluation criteria for assessing visual impact under the Wind Energy Act requires rulemaking to avoid an unconstitutional delegation of legislative discretion;
- (B) The Wind Energy Act creates an unconstitutional, irrebuttable presumption that only great ponds listed in the "Maine's Finest Lakes" Study qualify as Scenic Resources of State Significance;
- (C) The visual impact assessment is deficient because it does not consider the visual impact of the project by those using the Mount Blue State Park to access Webb Lake;
- (D) The visual impact assessment is deficient with regard to the scenic impact of the roads, turbine pads, and other associated facilities; and,

(E) The visual impact assessment is deficient because it does not adequately address cumulative effects.

A. Appellants' claim that the Wind Energy Act is unconstitutionally vague and an unconstitutional delegation of authority, however an examination of the Wind Energy Act confirms that the Legislature provided the Department and the Board a great deal of guidance on the assessment of visual impacts from wind energy projects. The Act defines the scenic resources which are entitled to protection by creating categories of scenic resources of state or national significance, some of which are further refined according to geographic location, and designates some specific lists within those categories. It sets levels of review based on distance from the scenic resource, with a Visual Impact Assessment required within three miles, optional from three to eight miles, and not required beyond eight miles. It gives guidance on how to consider impacts to these resources, and it creates a presumption that the mere fact that the development's generating facilities are a highly visible feature in the landscape is not a sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect. The Act also designates the factors to be considered, such as the significance of the potentially affected resource and the scope and scale of the potential effect of views of the project on a scenic resource.

B. The appellants' arguments with regard to the Maine's Finest Lakes study do not take into account the amount of evidence gathered in the composition of that study. The study was published by the Critical Areas Program of the Maine State Planning Office in October, 1989, adapted the inventory process established by the prior Wildlands Lake Assessment. The Finest Lakes study brought together a team of resource experts from across state government with private resource consultants to work through an eight step process to assess lake resource values under seven resource categories. The Department believes that it was reasonable for the Legislature to rely on this landmark report.

C. The appellants' argue that the licensee should have been required to assess potential impacts on those viewers accessing Webb Lake through Mt. Blue State Park because state parks qualify under the Wind Energy Act as however Webb Lake does not qualify as a "scenic resource of state or national significance" under the Act. The Wind Energy Act provides that in the organized territory of the State, a great pond is a "scenic resources of state or national significance" if it is one of the 66 great ponds identified as having outstanding or significant scenic quality in the "Maine's Finest Lakes" study, published by the Maine State Planning Office. Webb Lake is not listed in the study of Maine's Finest Lakes; therefore it is not defined as a scenic resource of state or national significance and the applicant is not required to demonstrate that the development would not have an unreasonable effect on its scenic character or existing uses.

D. The licensee's Visual Impact Assessment (VIA) concluded that the associated facilities for the project (roads, pads, transmission lines, O&M building, and related improvements) will have minimal impact on views from scenic resources of state or national significance and that they will not be of a location, character, or size to cause an unreasonable adverse visual affect on the scenic character of the study area. In December, 2010, the appellant FOMM submitted a

review of the licensee's VIA which raised no issues regarding visual impacts of the associated facilities. The Department finds no evidence to support appellant's argument that the VIA is deficient with respect to the associated facilities.

Because of the number of scenic resources of state or national significance within eight miles of the project site with potential views of the project (Mount Blue State Park, Halfmoon Pond, Perkins Lot-Bald Mountain, and seven historic resources), the Department hired an independent expert, James F. Palmer of Scenic Quality Consultants (SQC), to review the evidence pertaining to scenic impacts and provide the Department with comments.

In the January, 2011 report SQC concludes: "Overall (the applicant's) VIA is accurate and clearly presented. Additional fieldwork and analysis completed for this review generally supports this conclusion. A framework based on the Wind Energy Act's evaluation criteria is systematically applied to all of the state and nationally significant scenic resources."

E. Interested persons raised concerns about the scenic impact of multiple wind energy projects being proposed in the region around the Saddleback Ridge project. The Department does not have any regional planning authority and must consider scenic impacts within the limitations of the Wind Energy Act. Accordingly the Department requested the applicant to assess the potential for other wind projects to impact protected scenic resources of state or national significance which are also impacted by the Saddleback Ridge project. The applicant's assessment of the project area found that there were no such impacts from projects existing, approved or with applications pending. The Board and the Department have been clearly instructed by the Maine Law Court that it is inappropriate speculation to consider in an analysis of cumulative impacts, potential future projects for which there is no evidence that they will be constructed or of what the impacts would be if they were constructed.

3. TANGIBLE BENEFITS ISSUES RAISED IN APPEAL:

The appellants object to the licensee's proposal to make a \$60,000 payment to the Bureau of Parks and Lands in the Maine Department of Conservation for land acquisition in the area of Mount Blue State Park. The appellants argue that the Bureau of Public Lands has in the past said it would not accept such a public benefit payment, citing a procedural order from the Bowers Wind Project proceeding in front of the Land Use Regulation Commission (LURC).

In light of the Commissioner of Conservation's position in the LURC proceeding, the Department asked the Bureau of Public Lands to review the draft order as it relates to tangible benefits, and in an email dated October 3, 2011 the Acting Deputy Director of the Bureau of Parks and Lands reaffirmed the agency's intention to accept the proposed donation by the licensee in this case.

The licensee also proposes to contribute at least \$4,000 per turbine per year for the life of the project to a community benefit fund that will be administered by the Town of Carthage and be used at the Town's discretion to provide direct economic benefits to its citizens. This is in accordance with 35-A MRSA §3454, paragraph 2, of the Wind Energy Act as amended in 2010.

The Department recommends that the Board find that the Project satisfies the Tangible Benefits standard of the Wind Energy Act

4. PUBLIC HEARING REQUEST:

The appellants request a public hearing to give them the opportunity to present credible, conflicting technical information on the noise and visual impact issues described in their appeal. The appellants propose to present the testimony of Richard James, E-Coustics Solutions, and Dr. Michael Nissenbaum on noise issues and testimony from Michael Lawrence on visual impact issues at the public hearing.

While the Department declined to conduct a public hearing during its processing of the application, in consideration of the level of public interest in wind power projects, the Department held a public meeting on this application pursuant to 38 M.R.S.A. §345-A (5). The purpose of this meeting was to provide interested persons and the general public with an opportunity to comment on the application and submit information into the Department's record. The Department held the public meeting on March 10, 2011 at Dirigo High School in the Town of Dixfield, Maine. Members of the public offered comments and asked questions at the meeting. A transcript of the public meeting was prepared, and this transcript and all documents offered at the public meeting are a part of the record for this application. The Department also received numerous other letters and documents regarding specific aspects of the proposed project during the application review period.

During the 11-month period of the review of the applications, the appellants had the opportunity to present information and argument to the Department and availed themselves of that opportunity both at the public meeting and through the submission of information during the review process. The appellants' submissions included reports and affidavits prepared by Richard James, E-Coustics Solutions, and Dr. Michael Nissenbaum on noise issues, and from Michael Lawrence on visual impact issues.

The Department issued a draft order for public comment on September 27, 2011. The comment period on the draft order closed on October 4, 2011. The appellants and other members of the public also submitted comments on the draft order.

The holding of a public adjudicatory hearing on an appeal is discretionary with the Board. The Department recommends that the Board find that the record for this appeal is adequately developed with regard to the statutory criteria, that the appellants had ample opportunity to submit evidence during the licensing process, and that an adjudicatory hearing is not warranted in this matter.

Department Recommendation: The Department recommends that the Board deny the appellants' request for a public hearing on this appeal and affirm the Department's decision to approve the proposed wind energy development in Department Order # L-25137-24-A-N/L-25137-TG-B-N.

Estimated Time of Presentation: 3 hours