

Appeal In The Matter Of Department Permits L-24572-24-C-N, L-24572-TF-D-N, L-24572-IW-E-N, L-24572-24-F-N and L 24572-TF-G-N // Approval for Oakfield Wind Project Expansion

- Appeal as Submitted by Lynne Williams

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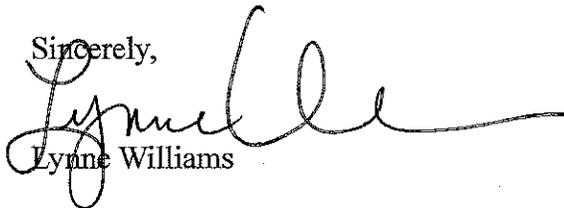
February 16, 2012

Susan Lessard, Chair  
Board of Environmental Protection  
17 State House Station  
Augusta, ME 04333-0017

Dear Chair Lessard:

Attached please find an appeal of the Oakfield Wind Project Expansion Order, dated January 17, 2012, which is being submitted on behalf of my clients Protect our Lakes, and Island Falls resident Donna Davidge. Hard copies will be mailed today.

Sincerely,

  
Lynne Williams



STATE OF MAINE

BOARD OF ENVIRONMENTAL PROTECTION

IN RE:

EVERGREEN WIND POWER II AND	)	
MAINE GENLEAD LLC	)	
OAKFIELD, CHESTER, WOODVILLE,	)	
MATTAWAMKEAG, MOLUNKUS	)	
TOWNSHIP, MACWAHOC PLANTATION,	)	
NORTH YARMOUTH ACADEMY GRANT,	)	APPEAL OF DEPARTMENT ORDER
REED PLANTATION, GLENWOOD	)	BY PROTECT OUR LAKES AND
PLANTATION, T3R3 WELS, T4R3 WELS,	)	ADDITIONAL AGGRIEVED PARTIES
AND LINNEUS, AROOSTOOK AND	)	
PENOBSCOT COUNTIES	)	
WIND POWER AND GENERATION	)	
LEAD LINE	)	
L-24572-24-C-N (approval)	)	
L-24572-TF-D-N (approval)	)	
L-24572-IW-E-N (approval)	)	
L-24572-24-F-N (approval)	)	
L-24572-TF-G-N (approval)	)	

Protect our Lakes and Donna Davidge (Aggrieved Parties) appeal the Order of the Department of Environmental Protection (DEP) dated January 17, 2012, approving the application of Evergreen Wind Power II and Maine Genlead LLC, (Applicants) for what is commonly called the Oakfield Wind Project Expansion (Project), pursuant to 38 M.R.S.A. Section 344.2-A and 341-D.4 and 06-096 CMR ch. 2 (DEP Procedural Rules Section 24.B(1)). The Aggrieved Parties request a public hearing, pursuant to Section 7.B of the DEP Procedural rules, on the grounds that there is credible conflicting technical information regarding the licensing criteria for this project, and it is likely that a public hearing will assist the BEP in understanding the evidence in this matter.

**STANDING**

Protect our Lakes is a non-profit association of individual landowners and business owners in the towns of Oakfield, Island Falls and surrounding communities and is incorporated in the State of

Maine. There are members who own lakefront property or other non-lakefront property that will have views of at least some of the turbines. The association also includes business owners and managers who will be impacted by the project, including the Sewall House Yoga Retreat Center and the Va Jo Wa golf course, both in Island Falls. Other members live in various Maine towns and cities but recreate in the project area. The members of the association will be negatively impacted by the Project and are therefore aggrieved parties.

Donna Davidge is the proprietor of the Sewall House Yoga Retreat in Island Falls, Maine. Sewall House is on the National Register of Historic Properties and Ms. Davidge utilizes lakefront locations on Mattawamkeag Lake for yoga exercises with her retreat participants. She also recreates in the area, and as a small business owner and landowner in the area, she will be impacted negatively by the project and is thus an aggrieved party.

Ms. Davidge and numerous association members participated during the DEP process by submitting written comments and a petition of over 700 people who are against the project.

### **FINDINGS AND CONCLUSIONS OBJECTED TO**

The Aggrieved Parties object to, and appeal, the DEP Order's Findings and Conclusions on Scenic Character (Section 6), Wetlands Impacts (Section 16), Wildlife (Section 7), and Financial Capacity (Section 3).

### **ARGUMENT**

#### **I. SCENIC CHARACTER**

##### **Visual Impact of the Generator Facility and Associated Facilities**

The Aggrieved Parties challenge the findings and conclusions regarding the visual impacts of the project and the basis for such findings and conclusions. The visual impacts of this industrial wind project will fall for the most part on two lakes, Pleasant Lake and Mattawamkeag Lake, the recreationists who use those lakes, the property owners on those lakes and the recreational businesses

who are either located on those lakes or frequent those lakes for business purposes, including yoga retreat activities and golfing on a highly rated public golf course.

The applicants' Visual Impact Assessment (VIA) for the generating facility and associated facilities, not including the generator lead transmission line, addressed the following criteria, as set forth in 35-A § 3452(3):

- (A) The significance of the potentially affected scenic resource of state or national significance;
- (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 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 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.

The Order issued by the DEP, based on Visual Impact Assessment submissions by the Applicant, a review of those submissions by the DEP consultant, James Palmer, and the Applicant's "user survey" concluded that "the generator facility will not unreasonably, adversely affect the scenic character of any SRSNS." Order at 22. The Aggrieved Parties contest that finding, given that it is contrary to the evidence in the record.

**A. The User Survey is Neither Valid nor Reliable**

Initially, the Applicant attempted to extrapolate from a user study done for the Bull Hill project in Hancock County. The Aggrieved Parties, through their attorney, noted that "the recreational uses of the Oakfield expansion area, particularly Pleasant Lake and Mattawamkeag Lake, are very different

from the uses at the Donnell Pond unit, in the Bull Hill area. Not only are the Oakfield expansion uses mainly water-based, the Bull Hill survey was solely hiker based, and hikers are not a significant contingent of the recreational users in the Oakfield expansion area.” Comments submitted to the DEP dated October 26, 2011, at 2.

A few days after these comments were submitted, on November 3, 2011, DEP staff distributed a user survey of Pleasant and Mattawamkeag Lakes, noting that it had just been received by the DEP. The date of the report, however, is October 2011, so it is curious that it had not been submitted at an earlier date, but rather was submitted a few days after the October 26<sup>th</sup> comments were submitted, which criticized the Applicant's attempt to generalize conclusions from the Bull Hill User Survey to the recreational users of Pleasant and Mattawamkeag Lakes.

The Aggrieved Parties submitted supplemental comments on the newly submitted survey, criticizing it on the same basis as the previously submitted survey, in that it lacked reliability and validity, and failed to meet the standards of a scientifically designed survey instrument. Its conclusions can hardly be taken more seriously than the conclusions of the daily online poll in the Bangor Daily News, which includes a disclaimer stating that “this is not a scientific poll.” In essence, it was the Aggrieved Parties' contention that the Market Decisions Survey sample was self-selected, and included less than 23% of the total number of visitors actually observed during the survey period.<sup>1</sup> The opinions of those who chose not to be interviewed may be very different from those who agreed to be interviewed. However, even this flawed survey indicated that, if the turbines were erected, and with respect to Mattawamkeag, 34% of the current users who were surveyed would experience decreased enjoyment of this lake, and 25% would be less likely to return. Of those surveyed at the Pleasant Lake

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<sup>1</sup> “A total of 271 people were observed during the survey period at the two lake locations. In addition, interviewers observed 81 boats, 19 canoes or kayaks and 5 jet skis on the two lakes over the data collection period (many of these are also included in the 271 people observed at the survey locations). In all, 60 interviews were completed among adults at Pleasant Lake and Mattawamkeag Lake (40 at Pleasant Lake and 20 at Mattawamkeag Lake).” Market Decisions Survey dated October 2011, at 2.

boat launch, 23% said they would be less likely to return.<sup>2</sup>

**B. The VIA Process Currently Used is Inconsistent with the *Wildlands Lake Assessment* and *Maine's Finest Lakes Survey***

We ask the Board to recognize that whether or not recreational users will continue to visit a water body that is ringed with 473 feet tall turbines is not the only criteria by which visual impact should be evaluated. The state, by conducting the *Wildlands Lake Assessment* and the *Maine's Finest Lakes Survey*, recognized that remote, lightly used lakes and ponds are not to be judged by their usage numbers; quite the opposite. Mainers value these water bodies for their remote nature, their beauty, their relative lack of development and their peacefulness. Such value is independent of whether users say they will return if these turbines are erected. Rather, the visual impact of the project on these lakes must be judged by the degree to which this industrial development will forever change the nature of these lakes, and the essence of why Mattawamkeag and Pleasant Lakes were rated, respectively, as Class 1-A and Class 1-B lakes. The broader question, therefore, is how impacts of such development on remote ponds and lakes is most properly analyzed and whether other values should be taken into consideration.

As Section F of 35-A § 3452(3) states, consideration must be given to:

“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 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.”

The *Wildlands Lake Assessment* has rated Mattawamkeag Lake as Class 1A. *Wildlands Lake*

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<sup>2</sup> The analysis of whether or not people will return to utilize the recreational opportunities in this area is muddied by the fact that an unidentified number of respondents either own camps or other property in the area, or have family that do, and may not have a choice about returning to the area. The sample should have been divided up by whether or not the respondent or the respondent's family owned property on or near one of these lakes. If a respondent said they would return, and they owned property on the lake, would that return be voluntary or involuntary? There is no way of knowing.

*Assessment* dated June 1, 1987. The ratings of this lake are Outstanding for wildlife, shore character, cultural features and physical features.<sup>3</sup> This is one of the highest quality waterbodies in the state. The Applicant concedes that “[t]he views of up to 30+ turbines on the horizon at distances of over 2.7 to 8.0 miles will have a *moderate to strong* effect on the scenic character of Mattawamkeag Lake by introducing man-made elements in a largely natural landscape. The presence of the turbines will not affect the ability to fish, boat, or camp on or near the lake. The primary impact will be on those who visit the lake for its *remote* character.”<sup>4</sup> Application at 30-22. (Emphasis added).

Underlying the survey methodology in the *Wildlands Lake Assessment* is an assumption that remoteness is one of the highest values given to the waterbodies. The Applicant itself concedes that visitors to Mattawamkeag come for its remoteness, while the presence of the turbines will have a “moderate to strong” impact on the scenic values of the lake. A key component of remoteness is scenic quality. It is the Aggrieved Parties contention that this statement alone, and the findings underlying it, are enough to cause this Board to take a serious look at whether, in fact, permitting this expanded facility is a rejection of the values expressed and implied in the *Wildlands Lake Assessment*.

Likewise, the value of Mattawamkeag Lake as a scenic resource is elevated substantially by the acquisition in 2003 by the Bureau of Parks and Lands, using state and federal tax dollars, of conservation easements on 7 miles of lakefront, 3 miles of riverfront, and fee purchase of Big Island and 27 acres at Bible Point. Neither the Applicant, nor Mr. Palmer discussed the importance of this acquisition by the State of Maine and by not doing so they greatly undervalued the significance of Mattawamkeag Lake. From the joint announcement of the US Forest Service and Maine Dept of Conservation about the acquisition:

<sup>3</sup> The *Wildlands Lake Assessment*, on page 3, states that “[i]t should be pointed out that in fact these ratings are minimum ratings...” and were more information available, “many of these lakes might receive a higher value class rating.” There is, of course, no higher value class rating than 1A.

<sup>4</sup> However, the DEP Order cites Dr. Palmer as noting that “neither of the lakes would be considered “remote” because they have road access, boat launches, and residential development.” Order at 19. Obviously the Applicant and Dr. Palmer disagree on the remoteness of these two lakes.

“The three part acquisition valued at \$894,700-- a 3,148-acre conservation easement, the 126-acre fee purchase of Big Island, and the 64-acre fee purchase of Long Point—was acquired by the State of Maine with a Forest Legacy grant of \$500,000 and a Land for Maine’s Future Program grant of \$256,200. The remaining value was covered through a bargain sale by the landowners. Over 7 miles of undeveloped lakeshore is included in the purchase, along with 3 miles of frontage on the West Branch of the Mattawamkeag River. “Through this purchase, **we have ensured that Lower Mattawamkeag Lake will forever retain its wild character** and guaranteed future public access to these lands for fishing, hunting, boating, and camping,” stated Maine Department of Conservation Commissioner Patrick McGowan. “ (Emphasis added)

Given its recognition as a legacy to be protected by the state and the federal government on behalf of the people of the state of Maine, the DEP was incorrect in concluding that the admitted adverse impacts on Mattawamkeag Lake were not unreasonable.

According to the *Wildlands Lake Assessment*, Pleasant Lake is class 1B, and is rated outstanding for its fishery and significant on the values of scenic character and cultural character. Applicant concedes that “[p]eople who use Pleasant Lake are expected to have moderate to high expectations of scenic quality.” James Palmer Review of the Oakfield VIA (Palmer), dated September 9, 2011, at 9. This, too, is a high quality, very scenic lake, where “[t]here is a potential for turbines to be visible from nearly 90 percent of the lake; the closest turbine tips visible from the lake will be 1.5 miles away, and the hubs of up to 22 turbines will be visible from most of the lake.....” Yet “this scenic impact was determined to be low tending toward medium and would not be an unreasonable adverse impact.”

Order at 18. Likewise, the Applicant itself notes that “[p]eople who fish...are attracted to the lake for its outstanding fisheries resource...as well as its significant *scenic value*.” Application at 30-18.

To then state, as did the Applicant, that if someone wants to fish without seeing turbines they can fish along the northern shoreline is, again, an acknowledgment of the extent to which these industrial developments are gradually, but definitely, changing the character of Maine's traditional recreational activities. There is simply no evidence that the fishery along the northern shoreline is the same as the fishery in other parts of the lake, and sending those who fish, and wish to avoid viewing turbines, to one part of the lake will diminish the experience for all concerned.

Likewise, to conclude that “the Project should have a relatively minor impact on the public's continued use and enjoyment of Pleasant Lake,” is not based in any factual evidence. And, with respect to the statement that there is “some evidence that scenic quality may be less important to people engaged in fishing or motor boating,” there is also no evidence to support such a statement, as noted in the discussion of Mattawamkeag Lake, above. Application at 30-18.

The Order states that “Mr. Palmer found that the scenic impact of the Oakfield Wind project from the “worst case” photo simulations shown to the respondents for Pleasant Lake and Mattawamkeag Lake will be very large and can be expected to be controversial. Mr. Palmer noted, however, that the “worst case” viewing conditions are limited to a restricted area, and from most of the lakes’ area, there will be less visibility or no visibility of the proposed project.” However, that statement by Mr. Palmer is inconsistent with the facts, and his own statement, that on Mattawamkeag “[t]he turbines will have a *significant visual presence* above the horizon line from approximately *two-thirds* of Mattawamkeag Lake, including as close as 3.2 miles.” Palmer at 23. Likewise, on Pleasant Lake, “the hubs of up to 20 turbines will be visible from most of the lake.” Palmer at 9.

Mr. Palmer concluded that despite the adverse impacts on recreation and scenic values on both Mattawamkeag and Pleasant Lakes, those adverse impacts are not unreasonable. This is his

conclusion, despite the fact that, as noted above, the turbines will have a “significant visual presence... on two-thirds of Mattawamkeag,” “will be visible from up to 90%” of Pleasant Lake,” will decrease visitor enjoyment for 34% of those surveyed at Mattawamkeag, resulting in 25% of the respondents to be less likely to return to Mattawamkeag, and 23% less likely to return to Pleasant Lake. It is extremely difficult to understand how these adverse impacts can be considered to be reasonable.

It is about time for someone to look closely at how these industrial facilities are impacting scenic character and traditional recreation in this state, and hopefully that will be this Board. A visit to this site shows that the canopy is not at all tall enough to shield the turbines, and that the rolling hills are not very tall, in comparison to the 470 foot turbines/blades that will be thrust upon them. Likewise, a visit to a currently operating wind facility will show that the turbines are not nearly as unobtrusive as the airy, cloud-colored structures that appear in the photosimulations.

The approval of the earlier Oakfield Wind project does not mandate approval of the expanded project, since the expanded project is now encroaching on lands that have significantly higher scenic value and that are more remote than the original project.

## **II. WILDLIFE**

The Order fails to address numerous defects in the Applicant's submissions, although these defects were highlighted by the Maine Department of Inland Fisheries and Wildlife (MDIFW) and we enumerate these concerns below.

### **A. Post-Construction Monitoring of Bat Mortality**

While the Applicant has agreed to seasonal curtailment, it was strongly suggested by MDIFW that the Applicant develop a bat mortality study in consultation with MDIFW, Bat Conservation International, and the Bat and Energy Cooperative. In their November 15, 2011 comments, the MDIFW stated:

“Using this approach, a detailed study design, which will

follow a similar study for a wind energy project that is currently under construction in Sheffield, VT, will be submitted to LURC<sup>5</sup> staff for review and approval prior to commencing turbine operation. Annual reports of the bat study results for the first two years will be submitted to LURC, MDIFW, and BCI for review. Without such a mutually agreed to study design in place, MDIF&W cannot agree to changes in curtailment procedures as outlined above.”

MDIFW comments to the DEP, dated November 15, 2011, Comment VII.

The Applicant had agreed to such a study as part of the permitting of the Bull Hill Wind Project by LURC. However, the final Order in this matter only states that “[t]he applicants responded that the post-construction monitoring is an evolving science, and they will work with MDIFW to finalize methodologies prior to the start of operation.” Order at 27. Likewise, the conditions of the permit only reference a study yet to be done, with no requirements for consultation with experts on bat mortality. (“The applicants shall submit a finalized post-construction avian, bat, and raptor monitoring plan to the Department for review and approval prior to operation.”) Order at 48.

It is the Aggrieved Parties contention that the bat mortality protocol is inadequate, particularly given the discovery this summer that white nose disease, implicating cave dwelling bats, is now present in Maine. There is evidence in the scientific literature that any additional stressors on bats susceptible to white nose disease will have extremely serious impacts on the species. It behooves this Board to address this issue and determine whether the loosely defined monitoring that the Order requires is adequate to protect the species, given that LURC required post-construction studies involving scientists experienced with bat mortality as a condition of the Bull Hill Wind Project permit.

#### **B. Eagle Mortality**

The Aggrieved Parties recognize that the U.S. Fish and Wildlife Service is the final authority over take of eagles. (“The U.S. Fish and Wildlife Service (a federal agency) has sole authority for take evaluations under the Bald Eagle – Golden Eagle Protection Act.” MDIFW Comments, dated

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<sup>5</sup> It is assumed that the MDIFW meant the DEP, rather than LURC, in these comments.

November 15, 2011, Special Considerations.). However, given that the MDIFW has been involved with the federal review of the suggested Eagle Conservation Plan, and approval of an Adaptive Management Plan for wind power facilities, and given that eagles are a species of special concern in the State of Maine, the DEP should have given some consideration to the impacts that this project will have on bald eagles. Yet, the Order only mentions eagles two times, noting that a bald eagle had been observed in the area, and that “MDIFW has no record of any bald eagle nests located within the proposed transmission line corridor.” Order at 26. There is no mention, in either the order or the MDIFW Comments, that there is in fact an eagle's nest within the project area. However, on January 19, 2012, the undersigned received the following email (copy attached) from Mark McCullough, Ph.D., Endangered Species Specialist for the U.S. Fish and Wildlife Service: “DEP is not correct if they say there are no eagle nests near the Oakfield project. There is an eagle nest within 1 mile of the closest turbines (MDIFW knows that).” Attachment 1.

While we are not arguing that MDIFW said there were no eagles nests near the Oakfield project, we are pointing out that their silence on this fact creates an inference that there are, in fact, no eagle's nests near the project. Dr. McCullough's email belies this inference. While we realize that the USFWS is working with the applicant to create an Eagle Conservation Plan, given that the bald eagle is a species of special concern in the State of Maine, this Board should address whether the Project will have an unreasonable adverse impact on bald eagles.

While the Expedited Wind Law made it more difficult for the permitting authority to consider potential visual impacts of an expedited wind project, the permitting authority continues to have the same discretion as before to consider Maine's Site Location of Development Law in the same ways it would review the permitting standards for a non-wind project of similar size and scope. This is particularly salient when considering the potential impacts on wildlife.

The Site Location of Development Law requires that there be no adverse effect on the natural

environment....”<sup>6</sup> Although the Maine Department of Inland Fisheries and Wildlife (MDIFW) expressed serious concerns in their comments submitted to the DEP about threats to the bat population in Maine, the Aggrieved Parties are concerned that insufficient evidence was submitted to enable the DEP to find that the non-migratory bats population will be protected. Likewise, there is no evidence on the record that a plan is in place to protect bald eagles, a state species of special concern. In addition, habitat fragmentation was not discussed at all during the application process, even though fragmentation of any kind threatens birds and their survival, as does each cumulative change to Maine's forest systems.

### **III. WETLAND IMPACTS**

#### **A. Vernal Pools as Compensation**

The Applicant proposed, and the DEP accepted, a compensation area containing “277 acres of rare and exemplary habitat along Meadow Brook,” a parcel that contains, as noted in the Order, “four known potential vernal pools.” Order at 39. While the parcel, part of a larger 2,100 mitigation parcel, seems to include appropriate functions to qualify it as compensation, neither the Applicant nor the Order addresses a concern stated by MDIFW, ie. the status of the “potential vernal pools.” In their November 15, 2011 comments, the MDIFW reiterated “its comment that the four potential vernal pools identified by the applicant on the 2,100 acre mitigation parcel should not be considered as compensation for any lost vernal pool values without field verification of both status and level of biological significance. [This comment was not addressed by the applicant.]” Comment V: Mitigation and Compensation.

We ask this Board to specifically address whether this mitigation parcel can be considered compensation for altered wetlands, particularly whether it can be considered compensation for lost

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6 38 Sec. 483-A (3)

vernal pool values, given that MDIFW twice requested – and never received - field verification of both the status and the level of biological significance of the pools.

#### IV. FINANCIAL CAPACITY

While the DEP accepted and apparently found reliable the financial capacity documents submitted by the Applicant, those documents are completely lacking as a basis for a finding of financial capacity. In short, the submitted documents fail to provide adequate data to allow anyone to make a reliable judgment of Evergreen Wind II's, or its parent entity First Wind's, financial capacity to build the Oakfield Wind Project. Application, Appendix 3-2.

There is far too little data provided in the letter from Michael Alvarez and the *unaudited* balance sheet from almost a year ago to even begin to make a decision on First Wind's current financial capacity. First Wind has basically bundled together all of its subsidiaries – probably worldwide – and reported it as a single aggregate figure. Without having access to, or a breakdown of, all of the subsidiaries, it is impossible to analyze their financial situation.

In addition to the \$394,920,000 in current liabilities, First Wind has another \$439,327,000 in long-term debt, and ostensibly all of these debts (\$834,247,000) have to be paid using cash on hand or revenue coming in. A glance at their liquid/fungible assets reveals that they do not have anywhere near that much on hand to cover the debt that's on First Wind's books. (This would become a crisis situation for First Wind if the long-term debt can be 'called' prior to maturity – something that is usually a common feature of most debt obligations, to protect investors if any form of default or non-payment occurs.) The financials provided here give virtually no information about the terms, conditions or caveats behind each of their short-term and long-term debt obligations, including what 'coverage', collateral or backing exists for each of these debt instruments.

It should also be noted that a financial statement doesn't show what amount of revenue the company is earning, or even whether they are profitable or not. First Wind should be required to submit

an audited Profit and Loss statement for several years in a row, in order to assess whether they are profitable or not. Without that type of review, it's feasible that a company could be bleeding money like a sieve without this being clearly evident from the financial statements. If, for example, they had received government loans, grants, or subsidies and these funds were included in the financial statements, this new incoming capital might disguise the fact that they had significant net operating losses from various of their entities and subsidiaries. Mr. Alvarez himself notes that government grants have been received.

The vast bulk of their "assets" is apparently comprised of "hard assets," such as turbine deposits, plants, factory, construction, etc. (And note that the financial statement does not elaborate or provide any specific detail about the nature of these "hard" assets.) Also please note that hard assets do not have a fixed or liquid fair-market value, or trading value, or fungibility.

There are no footnotes that describe how these 'assets' were valued, or by whom, since this appears to be an unaudited statement with no reference to an accounting firm being involved. In short, the appearance that First Wind is financially strong could be completely arbitrary or inflated, depending on how those illiquid/hard assets were valued and by whom. This Board should require a series of audited financial statements and Profit and Loss statements, not just for the aggregate financials, but for the subsidiaries – and most importantly, for the specific subsidiary under review here, Evergreen Wind II.

An additional point regarding the reliability of these figures is the fact that First Wind has four projects on the drawing board -- three permitted (Oakfield 1 and the Oakfield expansion, as well as Bull Hill) and one before LURC (Bowers). It would be appropriate to consider whether there is financial capacity for all three projects, and possibly four projects, since they are being undertaken simultaneously by First Wind. Even assuming, for the sake of argument, that First Wind has the financial capacity to build the Oakfield expansion, do they have the financial capacity to build three or

four projects with a significant cost for each? In summary, it is our belief that it would be a failure of due diligence on the Board's part to uphold the DEP's finding of financial capacity based on submissions that are as flimsy and unverified the financial statement and letter from Mr. Alvarez.

There is another consideration in addition to the First Wind submissions. Last month a PUC hearing examiner issued a draft decision in the matter of the Bangor Hydro, et al Petition to create an affiliate that would be jointly owned by Emera, parent company of Bangor Hydro, et al, and First Wind. This draft decision denies the Petition to create this entity, and is referred to here not for its substance but for the statements made in the Petition, to wit:

“Petitioners note that the Proposed Transactions will result in a *capital infusion* in First Wind, thereby, Petitioners contend, making First Wind a more competitive business. While Emera is not the only source of capital available to First Wind, Petitioners argue that *it is unlikely that alternative financing would be comparable to the financing offered through the Proposed Transactions.*”

Draft PUC Decision at 10. [Emphasis added] (Excerpt attached).

The Aggrieved Parties recognize that the record is closed in this matter, but ask that this Board require the Applicant to submit additional, audited current and historical financials for at least two years, and also address the issue of what their financial capacity will be if the the transaction currently before the PUC is not approved. As 06-096 CMR ch. 373(1)(B) states regarding the financial capacity standard of the Site Location of Development law:

“Applications for approval of proposed developments shall include evidence that affirmatively demonstrates that the developer has the financial capacity to undertake the proposed development, including information such as the following, when appropriate:

- (1) Accurate and complete cost estimates of the development.
- (2) The time schedule for construction and for satisfying pollution abatement measures.
- (3) A letter from a financial institution, governmental agency, or other funding agency indicating a commitment to provide a specified amount of funds and the uses for which the funds may be utilized.
- (4) In cases where funding is required but there can be no commitment

of money until approvals are received, a letter of "intent to fund" from the appropriate funding institution indicating the amount of funds and their specified uses.

(5) The most recent corporate annual report indicating availability of sufficient funds to finance the development together with explanatory material interpreting the report, when requested.

(6) Copies of bank statements or other evidence indicating availability of funds, when the developer will personally finance the development.”

First Wind has not submitted documentation anywhere near what is required by this rule. Even if, for the sake of argument, funding cannot be secured prior to the grant of the permit, First Wind has not submitted an “intent to fund” statement from an *appropriate funding institution*. First Wind has stated that they will be funding the project and that they have a history of securing funding but, as the common disclaimer goes, past performance is no guarantee of future performance. Again, at the very least, this Board should order the DEP to require further documentation from First Wind regarding their financial capacity.

### **REQUEST FOR A PUBLIC HEARING**

As noted above, the Aggrieved Parties are requesting that the Board hold a public hearing on this matter. While it is recognized that whether or not to hold a public hearing is discretionary with this Board, there are aspects of this process that we feel compelled to address. While both the DEP, BEP and LURC are bound by the same Expedited Wind Act, neither the DEP nor the BEP have seen fit to hold a public hearing on any application falling under the Expedited Wind Law. Meanwhile, LURC has held a hearing on every application submitted under the Expedited Wind Law. Were it not for the Expedited Wind Law, however, it is highly likely that the BEP would have assumed jurisdiction and held a public hearing on some, if not all, of the Expedited Wind applications. The projects are no less worthy of close scrutiny and technical analysis than other massive BEP projects, such as the Downeast Energy LNG project, which was given at least five days of technical hearings that included submissions of written direct and cross-examination testimony and oral cross examination of expert witnesses.

In denying public hearings for the Expedited Wind Law projects, both the DEP and the BEP have noted that whether or not to grant a public hearing is dependent on whether there is credible, conflicting scientific evidence, per DEP Procedural Rule Section 7-B. The inference, therefore, is that there is no credible, conflicting scientific evidence regarding any of the Expedited Wind projects that came before the DEP and the BEP – not on noise, not on wildlife, not on visual impacts, and that all of the science surrounding these projects has been settled.

However, if there is doubt about whether the science has been settled, then the most efficacious way of receiving and understanding the evidence is an evidentiary hearing. While it is recognized that parties have no right to an evidentiary hearing, the Maine Law Court has recognized the value of evidentiary hearings. (“As this Court has stated, a party may challenge opposing evidence by exercising the right to cross-examine adverse witnesses, an opportunity that “is constitutionally required in ‘almost every setting where important decisions turn on questions of fact.’” *In re Maine Clean Fuels, Inc.*, 310 A.2d 736, 746 (Me. 1973)(quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970)).

While administrative agencies are not required to adhere to the same due process procedures as the judicial system, “the minimal requirements of administrative ‘fair play,’ [is] something less than that demanded of our courts but something more than unfettered administrative action, [and] are to be determined ‘from case to case in accordance with different circumstances.’” *Federal Communications Com'n v. WJR, The Goodwill Sta.*, 337 U.S. 265, 276, 69 S.Ct. 1097, 1103, 93 L.Ed. 1353 (1949).

Challenges to the denial of a public hearing on these matters are typically countered with an argument that a public meeting was held, and that was sufficient for the opposition to get their information into the record. That is not the point. The Maine Law Court has recognized the value of cross-examination as an element of due process, even if that cross-examination is required to be in writing, such as pre-filed written direct testimony.

“This is not to say, of course, that the right of oral

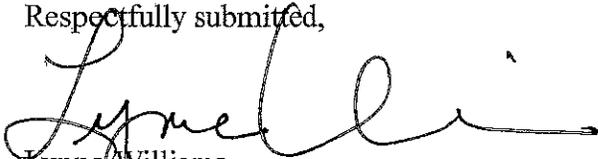
cross-examination should be restricted or entirely precluded as a matter of course. We are fully aware of the advantages of oral cross-examination of an adverse witness; for us to insist that written cross-examination is as effective would be sheer folly. But, under the circumstances we feel that any tactical advantage lost to the applicant was recovered to a large extent by the commission's rule permitting the applicant to file rebuttal evidence."

*In Re Maine Clean Fuels*, 310 A.2d 736, 748 (Me. 1973).

### REQUEST FOR RELIEF

The Aggrieved Parties request that this Board void the DEP Order and conduct a public hearing on the visual impact and wildlife issues raised in this Petition. It has been demonstrated that there is "credible conflicting technical information regarding licensing criteria" as required by DEP Procedural Rule Section 7-B. At a hearing, the Aggrieved Parties will present direct and rebuttal testimony from ornithologist Michael Good on wildlife issues and will also present rebuttal testimony from an independent visual impact specialist.

Respectfully submitted,



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ATTACHMENT 1

On Jan 9, 2012, at 9:57 AM, Mark\_McCollough@fws.gov wrote:

DEP is not correct if they say there are not eagle nests near the Oakfield project. There is an eagle nest within 1 mile of the closest turbines (MDIFW knows that). We have recently been in a series of meetings with First Wind concerning Eagle Act and their wind project (MDIFW has been present). We believe the project has moderate to high risk to eagles. First Wind has completed two risk analyses for eagles.

ACE process - Oakfield is in review and ACOE is seeking our comments on lynx, eagles, migratory birds. I am working on responses of wind project in the order received - Kibby II, Saddleback, and Oakfield - all of which have Eagle Act issues.

Mark

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