

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

- Licensee Reply to Appeal as Submitted by Juliet Browne

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February 24, 2012

Via Electronic Mail and U.S. Mail

Board Chair Susan M. Lessard
c/o Terry Dawson
Board of Environmental Protection
#17 State House Station
Augusta, ME 04333-0017

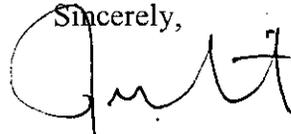
Re: Evergreen Wind Power II, LLC and Maine GenLead, LLC
L-24572-24-C-N, L-24572-TF-D-N, L-24572-IW-E-N, L-24572-24-F-N
and L-24572-TF-G-N

Dear Chair Lessard:

Enclosed please find Evergreen Wind Power II, LLC's and Maine GenLead, LLC's response to the appeal filed by Protect Our Lakes and Donna Davidge. Please note that the exhibits, all of which are part of the record, are not included electronically but will be sent by regular mail.

Thank you for your attention to this matter.

Sincerely,



Juliet T. Browne

JTB/prf
Enclosures

cc: Cynthia S. Bertocci (via e-mail and U.S. Mail)
Peggy Bensinger (via e-mail and U.S. Mail)
Jessica Damon (via e-mail and U.S. Mail)
Lynne Williams, Esq. (via e-mail and U.S. Mail)

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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

EVERGREEN WIND POWER II, LLC AND)	
MAINE GENLEAD, LLC)	
OAKFIELD, CHESTER, WOODVILLE,)	
MATTAWAMKEAG, MOLUNKUS)	
TOWNSHIP, MACWAHOC PLANTATION,)	
NORTH YARMOUTH ACADEMY GRANT,)	LICENSEE’S RESPONSE
REED PLANTATION, GLENWOOD)	TO APPEAL BY PROTECT
PLANTATION, T3R3 WELS, T4R3 WELS,)	OUR LAKES AND DONNA
AND LINNEUS, AROOSTOOK AND)	DAVIDGE
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))	

Evergreen Wind Power II, LLC and Maine GenLead, LLC (collectively “Licensee”) hereby respond to the appeal by Protect our Lakes and Donna Davidge (collectively “Petitioners”).

INTRODUCTION

The Department has thoroughly reviewed the scenic, wildlife and other impacts associated with both an initially proposed 34-turbine wind energy development and then, more recently, the amended 50-turbine wind energy development located in and around Oakfield, Maine. The initial project was appealed to this Board, which affirmed the Department’s approval of the project, and subsequently to the Maine Supreme Judicial Court, which affirmed the Board’s decision. Moreover, during the course of its review on the initial project, and then again on the amended project, the Department sought input from its sister review agencies, retained outside experts, and solicited and reviewed comments from the public. The Town of

Oakfield undertook its own independent review of both the initial and amended projects. Simply put, the Department, this Board, the Maine Law Court, and the Town of Oakfield have evaluated the siting of this project and each and every time concluded it is an appropriate site for wind power and the impacts are acceptable and comport with applicable regulatory standards.

In its review of the amended project that is before the Board, the Department has specifically evaluated the issues raised by Petitioners in their appeal and addressed them during the permitting process. The Department's review was informed by input not only from the Licensee and members of the public, including Petitioners, but Inland Fisheries and Wildlife and Dr. James Palmer, a visual consultant hired by the Department to review the amended project. The Department's review was thorough and their conclusion that all the applicable review criteria have been met is amply supported by the evidence. Accordingly, the Licensee respectfully requests that the Board deny the appeal and affirm the Department's decision.

BACKGROUND

A. Project Overview

The Department Order under appeal approves an amendment to the Original Oakfield Project, which was fully reviewed and approved by the Department and its sister review agencies, this Board, and the Maine Law Court. Specifically, in January, 2010, after an exhaustive review process, the Department approved a 51 megawatt (MW) expedited wind energy development in Oakfield, Maine. Department Order #L-24572-24-A-N and L-24572-TF-B-N. That project included 34 wind turbines and associated turbine pads, electrical collection infrastructure, an electrical interconnection substation, meteorological towers, access roads, and an operations and maintenance building (the "Original Project"). The Department's review of the Original Project addressed, among other things, scenic impacts and the applicant's financial

capacity to construct and operate the Original Project, two issues that Petitioners seek to revisit here. The Original Project was appealed to this Board, which upheld the Department's decision, including with respect to scenic impacts and financial capacity. June 11, 2010 Board Order Denying Appeal (attached as Exhibit A). The Board's decision was appealed to the Maine Law Court, which upheld the Board's decision, including on scenic impacts and financial capacity. Martha A. Powers Trust v. Board of Environmental Protection, 2011 ME 40.

The amendment applications, which were filed on June 10, 2011, proposed a change in the turbine type from GE 1.5 MW turbines to Vestas 3.0 MW turbines and increased the total number of turbines from 34 to 50, with a resulting increase in generating capacity from 51 MW to 150 MW.¹ Although the Original Project was located entirely in the Town of Oakfield, 10 of the 50 turbines in the Amended Project are located in the adjacent unorganized area of T4R3 WELS. Additionally, the Amended Project includes a new point of interconnection with the electrical grid at the Keene Road substation in the Town of Chester, and an associated 59-mile generator lead line connecting the generating facilities to the Keene Road substation.

The Amended Project, like the Original Project, is an expedited wind energy development.

B. Department Review Process

Although the applications for the Amended Project were filed as amendments to an existing permit, the Department utilized the same review process required for a new application. Specifically, the Department required the applicant to submit information on all of the regulatory

¹ Evergreen Wind Power II, LLC ("Evergreen") is the applicant for the wind energy generating and associated facilities, including the turbines, collector lines, substation and roads but excluding the generator lead line. Maine GenLead, LLC ("Maine GenLead") is the applicant for the generator lead line. Evergreen filed a complete application for the generating and associated facilities excluding the generator lead line ("Evergreen Application"), and Maine GenLead filed a complete application for the generator lead ("Maine GenLead Application"). The applications were filed as separate stand-alone amendment applications, although the Department issued a single order for the entirety of the Amended Project.

review criteria, provide public notice as if it were a new application, sent the applications out for review by sister agencies, utilized the same time frames applicable to review of new projects, held public informational meetings and sought and responded to information from the public on all aspects of the Amended Project. The review process was not limited to changes from the Original Project, but reviewed the entirety of the Amended Project.

Neither Petitioners nor any other member of the public requested that the Department hold a public hearing on the Amended Project. Nonetheless, as it has done in its review of other wind energy developments, on August 3, 2011, the Department held a public meeting at which it sought input from interested persons. The Department sent letters to all abutters notifying them of the public meeting and published a notice of the meeting in a local newspaper. Five members of the Department attended, along with the visual and sound consultants hired by the Department to review the Amended Project. Prior to the start of the general public meeting, the Department met with individuals who had specific concerns. The public meeting was well attended. In addition, the Department received public comment on the application throughout the processing period, including from Petitioners and their counsel, Ms. Williams. The Licensee provided numerous submissions in response to Department and agency review comments and responded to comments from the public, including Petitioners. Moreover, to ensure the Department had an adequate opportunity to review and respond to comments from the public, the Licensee agreed to extend the review period beyond the statutory maximum of 185 days.

The Department issued a draft order for public comment on January 6, 2012, received written comment on the draft order from numerous interested persons, including Petitioners, and issued a final order on January 17, 2012.

C. Municipal Review Process

In addition to the Department's review of the Amended Project, the Town of Oakfield, which hosts 40 of the 50 turbines as well as additional project infrastructure, undertook its own due diligence review of both the Original and the Amended projects. The Town's Wind Energy Review Committee (the "Committee"), which was formed to review the Original Project, reconvened to review local siting and environmental issues associated with the Amended Project, report to the Selectmen and make recommendations regarding any local concerns. The Committee retained outside experts for independent evaluation of the Amended Project, held a series of six public meetings at which experts presented information and answered questions and members of the public provided comment and had an opportunity to ask questions, and deliberated on issues associated with the Amended Project. The Committee prepared a final report that identified local concerns, provided information about those concerns to the community, and identified specific recommendations for how to address those concerns. See generally October 19, 2011 Town of Oakfield Wind Energy Review Committee 2011 Final Report ("WERC Report"). The Committee provided its report to the DEP, and the Licensee modified its application to incorporate the Committee's recommendations. See November 28, 2011 Letter from J. Browne to J. Damon.

At a Town meeting held on November 21, 2011, the residents of Oakfield voted overwhelmingly in support of the Amended Project and specifically approved the Committee's report by a vote of 80-9.

DISCUSSION

I. THE DEPARTMENT PROPERLY DETERMINED THAT THE AMENDED PROJECT COMPLIES WITH ALL APPLICABLE VISUAL IMPACT STANDARDS

Petitioners' objections to the evaluation and conclusions regarding the Amended Project's potential visual impacts are unfounded, and based on selective citations to the record and a misreading of the applicable review criteria. The Licensee prepared a comprehensive visual impact assessment ("VIA") of the Amended Project's visibility and demonstrated that the Amended Project will not have an unreasonable adverse impact on scenic character or existing uses related to scenic character, as required by the Wind Energy Act visual impact standards. In fact, the vast majority of the area surrounding the site is private, actively-logged commercial timberland, and only three regulated scenic resources will have any views at all of the Amended Project. There will be no project visibility from any rivers, parks, hiking trails, mountains or other similar scenic resources of state or national significance. See VIA at 1 (Evergreen Application, Section 30)(attached as Exhibit B).

The VIA is supported by a professional user intercept survey (i.e., field surveys asking users of the Amended Project area how they would react to views of turbines) as an additional source of data for evaluating the Amended Project's compliance with two of the five criteria contained in the regulatory standard. Such intercept surveys are not required by law but were conducted by the Licensee to provide additional information on the effect of the Amended Project on scenic resources and uses. The Department also retained an outside visual expert to peer-review the Licensee's work and to assess visual impacts. That expert, Dr. James Palmer, similarly concluded that the Amended Project complied with the applicable visual impact standard. See Review of the Oakfield Wind Project Visual Impact Assessment by Dr. James F. Palmer, September 9, 2011 ("Palmer Review") at 25 (attached as Exhibit C). None of

Petitioners' arguments undermine the finding of compliance in the Licensee's comprehensive VIA, the independent finding of compliance by the Department's expert visual consultant, or the finding of compliance ultimately made by the Department itself. As discussed below, the Department's determination that the Amended Project will not have an unreasonable adverse impact under the Wind Energy Act visual impact criteria is supported by extensive record evidence.

A. Regulatory Structure: The Wind Energy Act Establishes Specific Review Criteria for Scenic Impacts of Expedited Wind Energy Developments

The Legislature has determined that wind energy development "is unique in its benefits to and impacts on the natural environment [and] makes a significant contribution to the general welfare of the citizens of the State," and that, given the realities of constructing grid-scale wind power projects, there are going to be necessary, but acceptable, visual impacts. 35-A M.R.S.A. § 3402(1). As a result, the Legislature has established a focused scope of review using a defined methodology that applies to expedited wind energy developments such as the Amended Project.

Pursuant to the Wind Energy Act, the scope of review for impacts to scenic character is limited to expressly identified "scenic resources of state or national significance," and seeks to determine whether a proposed project "significantly compromises views" from these resources "such that the development has an unreasonable adverse effect on scenic character or existing uses related to scenic character" of these resources. *Id.* § 3452(1). Unlike scenic impact analyses for other types of development, the Wind Energy Act provides a specific set of standards for assessing scenic impacts to the identified resources. The Act requires that the Department consider the following criteria: 1) significance of the potentially affected scenic resource, 2) the character of the surrounding area, 3) the expectations of the typical viewer, 4) the extent, nature and duration of potentially affected public uses of the scenic resource, and 5) the potential effect

of views of the turbines on the public's continued use and enjoyment of the resource. Id. § 3542(3).

The Wind Energy Act further states that “[a] finding . . . that the development’s generating facilities are a highly visible feature in the landscape,” is not by itself a “sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character.” Id. Additionally, there is a presumption that visual impacts to areas beyond three miles are less significant and do not require a visual impact assessment. Id. § 3542(4).

B. The Department Undertook a Comprehensive Review of Visual Impacts and Correctly Concluded that there Is No Undue Adverse Impact on Scenic Resources

The VIA provides a comprehensive analysis of the Amended Project’s potential impacts on scenic resources and demonstrates that the impacts will not be unreasonably adverse. Although only required to address impacts to scenic resources of state or national significance within a three-mile radius, the Licensee identified all scenic resources of state or national significance within an eight-mile radius of the Amended Project and evaluated visual impacts on all of those resources with potential views of the Amended Project. See Permit at 17; VIA at 13-23. Within eight miles, there are only two lakes and four historic properties that qualify as scenic resources of state or national significance under the Wind Energy Act.² Permit at 18-19. Of these six places, only three – Mattawamkeag Lake, Pleasant Lake and the Oakfield Grange – will have views of the Amended Project. VIA at 13-23.

² The sole named Petitioner, Donna Davidge, is the proprietor of one of the historic properties, the Sewall House in Island Falls, which has no visibility of the Amended Project. See Permit at 18. Furthermore, Dr. Palmer notes that none of the four historic properties permit public access and therefore they do not qualify as scenic resources under the Wind Energy Act. See Palmer Review at 13-14.

For each scenic resource that was indentified, the VIA evaluates the resource's significance, viewer expectations, project impacts and potential effects on public uses. Id. Additionally, the VIA provides viewshed maps showing areas of potential visibility (VIA Figures 3(A-C), 4(A-C), and 5(A-C)), photographs of scenic resources and other noteworthy locations with potential views of the Amended Project (VIA Appendix A), and photosimulations to illustrate the Amended Project's visibility at scenic resources (VIA Appendix B). Finally, the VIA assigns values to each evaluation criterion for each scenic resource in order to determine the Amended Project's overall scenic impact. See VIA at 25-26.

In order to assist in assessing the extent of public use of a resource, user expectations with respect to scenic quality, and the effect that the Amended Project would have on users' enjoyment and continuing use of the resource, the Licensee took the additional step of conducting user intercept surveys to address several of the evaluation criteria in the Wind Energy Act. See Pleasant Lake/Mattawamkeag Lake Wind Power Project Intercepts by Dr. Brian Robertson, October 2011 ("Intercept Survey Report")(attached as Exhibit D). Surveys were conducted by trained interviewers over the course of eight days in late August and early September near public boat launches – the primary public access points – on Mattawamkeag Lake and Pleasant Lake. Id. at 1-2. The surveys asked a targeted series of question of 60 users of the two lakes to help understand how the Amended Project would affect their use and enjoyment of those resources. Id. Prior to conducting the surveys, the survey methodology was reviewed by the Department's visual expert. See Review of the Pleasant Lake/Mattawamkeag Lake Wind Power Project Intercepts by Dr. James F. Palmer, Dec. 2, 2011 ("Palmer Intercept Review")(attached as Exhibit E). Importantly, sixty-two percent of respondents thought that views of the Amended Project would have either no effect or a positive effect on their use and

enjoyment of Pleasant Lake. See Intercept Survey Report at 34. Twenty percent of all respondents indicated that the Amended Project would improve their experience of the lake. Id. Similarly, sixty-six percent of respondents thought that views of the Amended Project would have either no effect or a positive effect on their use and enjoyment of Mattawamkeag Lake. See Intercept Survey Report at 44. Twenty-three percent of all respondents indicated that the Amended Project would improve their experience of the lake. Id. The majority of respondents (over seventy percent in all categories) similarly indicated that the Amended Project would not adversely affect their use of either lake for the specific activities of boating, canoeing or kayaking, fishing, ice fishing or swimming. Id. at 38-40 and 47-50.

In addition to the work done by the Licensee, Dr. Palmer prepared a comprehensive report that evaluated the VIA and independently evaluated the Amended Project's impact on scenic resources. He identified regulated scenic resources, prepared viewshed maps and visualizations, and conducted a field review of both the land-based and water-based resources. See Palmer Review at 13-14, 16, Appendix 2 (viewshed maps) and Appendix 3 (visualizations). Dr. Palmer also independently evaluated the Amended Project's visual impact on each scenic resource within the statutory viewshed according to the Wind Energy Act evaluation criteria. See Palmer Review at Table 2. Dr. Palmer concluded that the Amended Project would have no visual impact on any scenic resource except for Pleasant Lake, where there would be a medium impact, and Mattawamkeag Lake, where there would be a low-to-medium impact. Id. Such impacts are consistent with the recognition by the Wind Energy Act that wind power projects are a highly visible feature on the landscape.

In summary, the VIA prepared by the Licensee, coupled with user intercept surveys conducted at the two scenic resources with any visual impact, and the analysis and conclusions

of the Department's independent visual expert demonstrate that the Amended Project will not have an unreasonable adverse impact on scenic character or existing uses related to scenic character.

As discussed below, Petitioners' arguments regarding visual impacts provide no basis for the Board to set aside the Department's conclusion that the Amended Project complies with all applicable permitting requirements.

C. Petitioners' Objections Are Unsupported by the Record

Petitioners claim that the Department erred by utilizing the Intercept Survey Report as evidence in its determination on visual impacts. Petitioners also disagree with the Department's ultimate determination that the Amended Project will not have an undue adverse visual impact, arguing that the Department should have arrived at the opposite conclusion after reviewing the evidence. However, these claims are not supported by the facts in the record or by a correct application of the Wind Energy Act visual standards.

1. The Department Reasonably Relied on the Intercept Survey Report to Provide Additional Information from Actual Resource Users Regarding Viewer Expectations and Potential Impacts to Public Use

Petitioners' claim that the Intercept Survey Report is unreliable is devoid of factual support and misapprehends the relevance of the Report to the Department's review. Appeal at 4. As noted above, the methodology of the Intercept Survey Report was reviewed and approved by Dr. James Palmer, the Department's independent third-party expert, who found that "the methods used appear to follow standard best practice for recreation surveys" of this type and that the "survey questions were tailored to address the WEA evaluation criteria." See Palmer Intercept Review at 2. Petitioners raised these same objections to the intercept surveys during the Department's review of the Application, and in response Dr. Palmer noted that Petitioners

had presented no evidence to support the assertion that the intercept surveys were invalid or unreliable. See E-mail from James Palmer to Jessica Damon, Oct. 27, 2011 (attached as Exhibit F). Dr. Palmer goes on state that the reliability and validity of similar intercept surveys conducted for other wind power projects was “VERY high” and that “there is no evidence that there was significant respondent bias.” Id. (emphasis in original). Dr. Palmer’s review is based on his training, expertise and experience in the use of surveys and statistical analysis to assess visual impacts. Id.; Palmer Intercept Review at 21. By contrast, Petitioners do not cite to any authority or provide any alternate expert peer review of the Licensee’s survey design that would provide a credible basis to question the validity of the Intercept Survey Report.

Furthermore, the results of the Intercept Survey Report are consistent with the results of user surveys completed for other Maine wind power projects. For example, user surveys completed for the Redington Wind Project, the Highland Wind Project, the Bull Hill Wind Project, the Bowers Wind Project and the Spruce Mountain Wind Project found that visibility of wind projects is viewed as positive or neutral by the majority of respondents, that visibility of wind projects overall does not have a substantial negative impact on recreational users, and that visibility of wind turbines does not significantly affect the likelihood of users to return. See Evergreen Response to Visual Impact Comments, Dec. 22, 2011 (attached as Exhibit G). The results of the Intercept Survey Report conducted for the Amended Project are also consistent with a growing body of evidence beyond Maine that visibility of wind turbines does not adversely impact use and enjoyment of recreational resources. Id.

Finally, the Intercept Survey Report is one piece of evidence among many that the Licensee and the Department considered in assessing visual impacts with respect to Wind Energy Act criteria regarding viewer expectations and continued use and enjoyment of resources.

Even without the surveys, the conclusions of the VIA and the Palmer Review are supported by published reference materials, studies and other credible authority. See, e.g., VIA at 18 n.16, 21 n.25. Accordingly, Petitioners' objections regarding the Intercept Survey Report are without merit.

2. Scenic Impacts to Mattawamkeag Lake Will Not Be Unreasonable

Contrary to Petitioners' claims, the Department properly concluded that under the Wind Energy Act evaluation criteria, scenic impacts to Mattawamkeag Lake will not be unreasonably adverse. Although turbines will be visible from parts of the lake, the lake receives minimal use and is not considered an outstanding scenic resource. Further, most users of the lake are unlikely to be negatively impacted by views of the Amended Project, and, under the Act, visibility alone is not a sufficient basis for finding impacts to be unreasonable.

First, Petitioners exaggerate the remoteness and significance of Mattawamkeag Lake, stating that the lake is one of the "highest quality waterbodies in the state." Appeal at 6. In fact, there are many lakes in the state that are rated higher for scenic quality than Mattawamkeag Lake. In 1986, the State Planning Office published the Scenic Lakes Character Evaluation in Maine's Unorganized Towns, which evaluated the scenic characteristics of all 1,509 lakes and great ponds in LURC jurisdiction on a scale of 0-100. Mattawamkeag Lake is ranked only as "significant," not outstanding, for scenic quality and received a score of 30 out of a possible 100 points in the scenic rankings. See VIA at 15, 19-20. There were a total of 118 lakes in the unincorporated part of the state that scored 50 points or higher and therefore were identified as outstanding. Id. at 15. Mattawamkeag Lake is not managed for or protected as a remote pond by LURC, nor does it exhibit the characteristics of remoteness that form the basis for management

as a remote pond.³ Id. at 20. For example, there are public motorized boat and road access points to the lake, as well as some development, principally along the northeastern shore. Id. at 19-21.

This assessment was corroborated by Dr. Palmer, who stated that “The scenic value of both [Mattawamkeag and Pleasant] lakes is ‘significant,’ not ‘outstanding.’ Among the state’s scenic resources of state or national significance, they are toward the lower end.” See E-mail from James Palmer to Jessica Damon, Oct. 27, 2011. Dr. Palmer also stated that “neither of these lakes should be considered ‘remote.’ They have road access, boat launches, and residential development.” Id. Thus, Petitioners’ claim that Mattawamkeag Lake is one of the “highest quality waterbodies in the state” is simply wrong.

Furthermore, Petitioners’ contention that the Licensee did not consider impacts to conservation land surrounding Mattawamkeag Lake, Appeal at 6, is also inaccurate. In its analysis of impacts to Mattawamkeag Lake, the VIA specifically discusses the 2003 joint federal-state acquisition of 3,026 acres of conservation lands at the southern end of Mattawamkeag Lake. VIA at 20-21. The acquisition does not prevent all activity on the land, but rather allows for multiple uses such as sustainable timber harvesting and recreation. Id. at 20. The VIA also describes the Amended Project’s visibility from the conservation lands, including Long Point, Bible Point and Big Island, which are over 4 miles from the nearest turbine. Id. at 21-22. The VIA evaluated these impacts even though the 2003 conservation acquisition does not contain any scenic viewpoints that qualify as a scenic resources of state or national significance under the Wind Energy Act.

³ LURC has assigned Mattawamkeag Lake to Management Class 7, which includes all lakes not assigned to the other six management classes. Class 7 lakes are managed for multiple uses, including conservation, recreation and timber harvesting. VIA at 16, 20. Lakes that LURC deems remote and that LURC manages to preserve their remote values are specifically assigned to Management Class 6. See LURC Comprehensive Land Use Plan at Appendix C-10.

Mattawamkeag Lake is not a well known scenic or recreation destination in Maine and the recreational usage of the lake is low. Palmer Review at 22. The lakeshore is developed with approximately 50 houses or cottages. Id. at 21. The lake is categorized by LURC as Management Class 7, meaning that it is managed by for multiple uses (commercial as well as recreational) and the area surrounding the lake is actively logged. Id. Based on the user intercept surveys and reference materials on the subject, many users of the lake, including boaters and anglers, do not place as high a value on scenic quality as other types of users. Id. at 22. The best available information (i.e. the Intercept Survey Report) indicates that the Amended Project would not significantly affect users' likelihood of returning to the lake. Id.

Although the VIA and Dr. Palmer acknowledge that turbines will be visible from much of the lake, the nearest turbines will be almost three miles distant, with the majority of turbines beyond four miles. VIA at 21-22. Furthermore, from any given location on the lake, users will have only partial views of the Amended Project that are confined to a limited segment of the horizon. See VIA at Photosimulations 4-5. As a result, the turbines "will generally appear to be relatively small to moderate-sized objects on the horizon," id. at 22, and "will be too distant to create the feeling that they are 'looming' over users of the lake." Palmer Review at 23. Additionally, the Original Project approved by the Department would have been visible from approximately the same percentage of Mattawamkeag Lake. As noted above, the Wind Energy Act dictates that "[a] finding . . . that the development's generating facilities are a highly visible feature in the landscape," is not by itself a "sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character." 35-A M.R.S.A. § 3542(3).

Accordingly, an application of the Wind Energy Act scenic impact evaluation criteria to the projected Amended Project visibility led the Licensee to conclude in its VIA that the impact to Mattawamkeag Lake would be “medium-high” and led Dr. Palmer to conclude that the impact to Mattawamkeag Lake would be “low-medium.” VIA at 25; Palmer Review at 24. Based on this thorough evaluation of the Amended Project is visibility, the Department properly found that scenic impacts to Mattawamkeag Lake would not be unreasonably adverse.

3. Scenic Impacts to Pleasant Lake Will Not Be Unreasonable

Similarly, the Department properly concluded that under the Wind Energy Act evaluation criteria, scenic impacts to Pleasant Lake will not be unreasonably adverse. Although Pleasant Lake is rated “significant” for scenic quality, it received a score of only 20 in the Scenic Lakes Character Evaluation in Maine’s Unorganized Towns, which placed the lake at the very low end of the significance scale.⁴ See VIA at 15. Likewise, as noted above, Pleasant Lake is neither remote nor undeveloped. There are approximately 150 camps and houses concentrated at the western end of the lake, as well as a public boat launch with a large gravel parking lot, a year-round resort and a golf course. See VIA at 15-16; E-mail from James Palmer to Jessica Damon,

⁴ Petitioners reference Mattawamkeag and Pleasant lakes as Class 1A and 1B lakes with “outstanding” resources and claim that the Department’s licensing of the Amended Project is “a rejection of the values expressed and implied in the Wildlands Lake Assessment.” Appeal at 5-6. These claims are misleading and reveal a misunderstanding of the relevance of the Maine Wildlands Lake Assessment (classifying lakes in LURC jurisdiction) and the Maine’s Finest Lakes Study (classifying lakes in DEP jurisdiction), and the impact of the Amended Project on the values expressed in those studies. Specifically, these studies ranked lakes in a number of categories, including fisheries, wildlife, shoreline character, scenic quality, botanic features, cultural features, and geologic features. Lakes were assigned ratings of outstanding, significant, or no rating for each category. Lakes rated “outstanding” in two or more categories were classified as 1A. Lakes rated “outstanding” in one category were classified as 1B. See Maine Wildlands Lake Assessment at 3. Mattawamkeag Lake received a rating of “outstanding” for wildlife and shoreline, and a rating of “significant” for scenic, cultural and geologic features. Id. at 38. Pleasant Lake received a rating of “outstanding” for fisheries, and a rating of “significant” for scenic and cultural values. Id. at 42. Because both lakes received a rating of significant for scenic quality, they were required to be evaluated and were evaluated under the Wind Energy Act. Moreover, and contrary to Petitioners’ suggestion, the values for which the lakes received “outstanding” ratings – fisheries, shoreline and wildlife – will not be impacted by the Amended Project.

Oct. 27, 2011. Like Mattawamkeag Lake, Pleasant Lake is assigned by LURC to Management Class 7, which allows for multiple uses (commercial, recreation and conservation). See VIA at 15. According to Dr. Palmer, Pleasant Lake “and the surrounding area are not a well-known scenic or recreation destination in Maine” and “it is anticipated that there is only a very modest level of recreation use on Pleasant Lake.” Palmer Review at 19, 21. Furthermore, the effect of the Amended Project on the continued use and enjoyment of the lake is expected to be low. Id. at 20.

While turbines will be visible from much of the lake’s surface, most areas of the lake will only have partial views of the Amended Project with intervening topography and vegetation screening many of the turbine clusters. See VIA at Photosimulations 1-3. The VIA notes that despite the visibility of the Amended Project, “none of the turbines will dominate the landforms that line the lake or the sky backdrop.” VIA at 17. In his peer review of impacts to Pleasant Lake, Dr. Palmer found that, although a number of the Amended Project’s turbines will be visible from the lake, the scope of the views “is not sufficient to create a sense of being surrounded by turbines” and that “the turbines will be too far away to give a sense of ‘looming’ over users of the lake.” Palmer Review at 20.

Accordingly, the Department properly concluded that under the Wind Energy Act evaluation criteria, the Amended Project will not have an undue adverse effect on Pleasant Lake.

II. PETITIONERS’ CLAIMS REGARDING WILDLIFE IMPACTS ARE UNFOUNDED

Petitioners make the unsupported claim that there are “numerous defects” in the application materials that were highlighted by IFW and not addressed by the DEP. Appeal at 9. In fact, in each of the areas discussed by Petitioners, the Licensee has provided comprehensive

information that has been reviewed by IFW and DEP, and which demonstrates the Amended Project's compliance with all regulatory criteria.

A. Measures to Minimize Risks to Bats

Petitioners' complaints about the measures to minimize bat mortality are completely unfounded and appear premised on a misunderstanding of what has been proposed by the Licensee, agreed to by IFW, and required as a condition of the Permit. Specifically, the Licensee has voluntarily agreed to and the Permit requires seasonal curtailment of the turbines over the life of the Project to minimize potential impacts to bat species that may be present in the area. *The agreed upon seasonal curtailment - - the first on any wind project in Maine - - is in lieu of, and eliminates the need for, a study to determine whether seasonal curtailment would be effective and therefore required.*

Field acoustic surveys for bat activity were conducted in the fall of 2007 (four detectors), and the spring and summer of 2008 (six detectors), resulting in 830 detector-nights of recordings. The sound of a bat is measured as a detection; it may be the same bat, or multiple bats. The mean detection rate of all detectors was 4.1 detections per detector-night during the fall sampling period, 3.8 detections per detector-night in the spring, and 15.0 detections per detector-night in the summer. These results are generally similar to the results of other bat acoustic surveys in Maine and the region. Evergreen Application, Section 7, Appendices 7-4 and 7-5 (attached as Exhibit H). Nonetheless, because of potential risks to bat populations from white-nose syndrome, IFW has begun recommending seasonal curtailment of wind turbines on projects in Maine. Seasonal curtailment involves increasing the threshold speed at which the turbines begin to rotate. IFW initially recommend that the minimum cut-in speed be increased to 5.0 m/sec. between April 20 and October 15 from one-half hour before sunset to one-half hour

after sunrise. Permit at 26. When wind speeds are less than 5.0 m/sec. during these timeframes, the turbine blades would not be rotating, thereby minimizing risks to bats. Id. When speeds exceed 5.0 m/sec., the blades would be free to rotate (as wind speeds increase bat activity decreases).

In the Bull Hill project described by the Petitioners in their comments, the applicant proposed and is required as a condition of its LURC permit to implement a two-year study during which half the operating turbines will be curtailed during specified time periods and half will be allowed to operate normally (i.e., with cut-in speeds below 5 m/sec.). This study will allow comparison of mortality rates between curtailed turbines and normally operating turbines and provide a basis for determining the need for, and, if so, refining the time periods for, implementing curtailment beyond the initial two-year study period.

After receiving comments from IFW, the Licensee initially proposed a study approach for the Amended Project. See Licensee's October 21, 2011 Response to IFW Comments at pp. 5-7 (attached as Exhibit I). In their November 15, 2011 review comments, IFW continued to recommend curtailment, but acknowledged the acceptability of a specific study (similar to what is required in the Bull Hill project) to determine whether curtailment was needed. See November 15, 2011 IFW Review Comments at 2-3 (attached as Exhibit J). Following further consultation with IFW, the Licensee agreed to curtailment from one-half hour before sunset to one-half hour after sunrise from May 1 to September 30 whenever wind speeds are less than 5.0 m/sec. and air temperatures are above 32 degrees during the months of May and September and above 50 degrees in the months of June, July and August, for the life of the Amended Project. See Licensee's December 7, 2011 Response to IFW Review Comments at 3 (attached as Exhibit K);

Permit at 26.⁵ This is in lieu of, and more conservative than, implementing a study to determine whether curtailment is needed.⁶

B. Risks to Eagles

Petitioners' claims regarding potential impacts to eagles are similarly misplaced. The Licensee has completed extensive eagle assessments, including aerial surveys for bald eagle nests, raptor migration surveys, and eagle activity surveys. Evergreen Application, Section 7, Appendix 7-8; Maine GenLead Application, Section 7, Appendix 7-4 (collectively attached as Exhibit L). These assessments were prepared and completed in consultation with IFW and the United States Fish and Wildlife Service (USFWS), and the results reviewed by both agencies.

Specifically, between 2009 and 2010, in consultation with IFW and USFWS, the Licensee conducted three aerial assessments of all lakes within three to four miles of turbines in order to evaluate eagle nesting activity, including one flight with Charlie Todd of IFW. Of eleven lakes searched within the search area, one bald eagle nest three quarters of a mile north of the project area, near Drews Lake, was found to have some activity. This nest was active in 2009 and inactive in 2010. Evergreen Application, Section 7, Appendix 7-8. In connection with the generator lead, again in consultation with IFW and USFWS, the Licensee conducted two aerial surveys. The surveys covered a quarter mile corridor along the generator lead path, and one mile up and down the Penobscot River from the line crossing. No eagle nests were identified in the project area, and only one active nest was identified within a mile of the Penobscot River crossing. Maine GenLead Application, Appendix 7-4. The Penobscot River

⁵ Although the period and conditions differ slightly from IFW's original recommendation, the revised period and weather thresholds track conditions in Maine that correlate with increased bat activity, and IFW commented that this level of curtailment was adequate. Permit at 26.

⁶ The Licensee is still required to conduct post-construction avian, bat, and raptor monitoring. See Permit at 27 and Special Condition 26 at p.48.

crossing will be marked with marker balls, and is co-located with an existing MEPCO transmission line crossing in order to minimize risk to eagles and overall project impact. Maine GenLead Application, Section 6, Appendix B (attached as Exhibit M).

Between 2008 and 2010, again in consultation with IFW and USFWS, raptor migration surveys and ground surveys of eagle activity for the summit were conducted for a total of 128 days (900 hours) at three locations within the project area. This effort covered seven seasons of potential migration and foraging activity. During 2009 and 2010, surveys documented the minutes of flight time over ridges at heights less than the maximum turbine height. During 611.5 hours of survey in these two years, eagles were observed flying at heights less than the maximum turbine height for 23.94 minutes, or 0.065% of total survey time. Evergreen Application, Appendix 7-8.

The assessments demonstrate a relatively low level of use of the area by eagles and, importantly, do not reveal unique risks or factors that have not been taken into account in the risk assessment for eagles. See Evergreen and Maine GenLead Applications, Section 7, Appendix 7-8 (Eagle Summary Report) and Appendix C (Summary of Best Available Information about Interaction between Bald Eagles and Wind Turbines). IFW has not identified concerns with the results of the raptor survey or potential impact of the Amended Project on eagle populations but, as Petitioners note, is providing technical support to USFWS in its review and approval of an adaptive management plan for wind power facilities. See November 15, 2011 IFW Review Comments at 4. It is simply inaccurate to suggest that the DEP and IFW have not thoroughly reviewed the Amended Project's potential impacts to bald eagles, or that IFW has identified defects in the application that have not been addressed.

C. Habitat Fragmentation

Finally, Petitioners make a passing reference to alleged concerns over potential habitat fragmentation and claim that the issue is not addressed. Appeal at 12. In fact, habitat fragmentation is discussed in the application for the generator lead as well as the application for the generating facilities. See Evergreen and Maine GenLead Applications, Section 7, Subsection 5.0.

III. THERE ARE NO IMPACTS TO SIGNIFICANT VERNAL POOLS THAT REQUIRE MITIGATION AND THEREFORE PETITIONERS' PURPORTED CONCERNS ABOUT THE STATUS OF VERNAL POOLS ON THE MITIGATION PARCEL ARE MISPLACED

As noted in the Permit, there are six significant and one potentially significant vernal pools within the turbine project area and eleven significant vernal pools within the generator lead portion of the Amended Project. Permit at 22. There are no impacts to these vernal pools that require mitigation and therefore Petitioners' request that the Licensee field verify and assess the biological significance of vernal pools located on a mitigation parcel associated with the Amended Project are misplaced.

Specifically, within the turbine project area, there will be no impacts to the pool depressions of any of the significant or potentially significant vernal pools and only minor impacts within the 250-foot critical terrestrial habitat associated with two of the significant vernal pools (the impacts occur to three percent of the habitat of the potentially significant vernal pool and four percent of the habitat of one of the documented significant vernal pools). Permit at 22. Additionally, a portion of the habitat of a third significant vernal pool will be impacted by an access road that follows an existing road.⁷ In all three cases the activity impacts less than 25% of

⁷ The Permit does not reference the vernal pool impact associated with the access road. The impacts associated with each of the three vernal pools are addressed in PBRs submitted to the Department.

the critical terrestrial habitat and therefore mitigation is not required. See 06-096 CMR Chapter 305, Section 19 (PBR standards for significant vernal pools).

Likewise, for the generator lead portion of the Amended Project, there will be no impacts to any of the significant vernal pool depressions and with the exception of selective topping of taller trees, no clearing within the 250-foot buffer and no placement of poles within the 250-foot buffer of any of the significant vernal pools. Permit at 22-23. Three of the significant vernal pools have been completely avoided and seven remain within the transmission line corridor but will be minimally impacted due to the use of taller poles that minimize clearing in the critical terrestrial habitat. Because the Licensee has successfully avoided and minimized impacts to significant vernal pools along the transmission corridor, there is similarly no requirement to mitigate for impacts to those vernal pools.

Petitioners mistakenly assume that the Licensee is required to mitigate for impacts to significant vernal pools and therefore argues that the status of the vernal pools on the mitigation parcel must be field verified and their biological significance assessed. Appeal at 12-13. The mitigation parcel, however, is provided to address impacts to wetlands (principally along the generator lead corridor) and other significant wildlife habitat including Deer Wintering Areas (DWAs) and Inland Wading Bird and Waterfowl Habitat (IWWH). Maine GenLead Application, Section 7, Appendix 7-6 ("Mitigation and Compensation Report")(attached as Exhibit N). Because the Licensee successfully minimized impacts, no mitigation is required for impacts to significant vernal pools.⁸ The Licensee is, however, voluntarily revegetating significant vernal pool habitat in two locations by retiring and revegetating existing roads. Evergreen Application, Exhibit 1, Sheets C-S1.06 and C-S1.12.

⁸ As originally designed, the Amended Project included 0.09 acres of vernal pool habitat clearing that would have required mitigation. See Table 1 of Mitigation and Compensation Report. Those impacts were subsequently reduced below thresholds requiring mitigation.

Moreover, the ecological values present in the mitigation parcel vastly overcompensate for the Amended Project's impacts, and include ancillary benefits in the form of vernal pools and their buffers that will be protected from future impacts. Specifically, the compensation parcel is a 2,100 acre parcel adjacent to the existing Mattawamkeag River Wildlife Management Area (WMA) that was chosen for the richness of ecological resources and value to Maine's ecosystem protection. It includes the following:

- Adjacent to the Mattawamkeag River WMA;
- 459 acres of wetland preservation comprised of:
 - approximately 216 acres of scrub-shrub wetland,
 - approximately 39 acres of emergent or open water wetland, and
 - approximately 204 acres of forested wetland.
- 425 acres of mapped Inland Waterfowl and Wading Habitat wetland and upland buffer habitat;
- 253 acres of regulated Deer Wintering Area habitat;
- at least 4 potential vernal pools (PVPs);
- over 15,000 linear feet of mapped USGS stream habitat in the critical habitat area for the Gulf of Maine Atlantic Salmon;
- Brook trout (*Salvelinus fontinalis*) habitat in the mapped perennial streams; and
- 277 acres of Rare and Exemplary habitat along Meadow Brook and two other unnamed USGS streams, an Unpatterned Fen Ecosystem.

Mitigation and Compensation Report, Section 3.0.

Because the mitigation parcel was identified after vernal pools season, the four PVPs that are noted as a value of the parcel have no field data available. They are identified based on photo interpretation and many years of biological field experience in this area of the state. The parcel represents approximately seven times the calculated compensation acreage required and its diverse ecological attributes make it a prize for habitat and wetland restoration, land preservation, and public protection. Id., Section 4.0. There can be no serious claim that the mitigation parcel is inadequate.

IV. PETITIONERS' CLAIMS REGARDING FINANCIAL CAPACITY ARE UNFOUNDED AND IMMATERIAL

The Licensee has submitted substantial evidence demonstrating its commitment and ability to finance construction of the Amended Project. Moreover, because the Department is requiring the Licensee to submit evidence of final financing prior to commencement of construction, Petitioners' claims regarding the sufficiency of the evidence are moot.

A. First Wind has Demonstrated its Ability and Commitment to Secure Financing for the Project

First Wind has an unparalleled track record of success in developing, financing, constructing and operating wind power projects in and beyond Maine. As set forth in the Application, First Wind successfully financed the construction of the Mars Hill, Stetson I, Stetson II, and Rollins projects in Maine. Evergreen and Maine GenLead Applications, Section 3 and Appendix 3-1 (the entirety of Section 3 is attached as Exhibit O). As a result, at the time the Amended Project applications were filed, First Wind was operating nine wind energy projects across the country, with a generating capacity of 635 MW, and had four more projects under construction with a combined rated capacity of 136 MW. Evergreen and Maine GenLead Applications, Section 3. Additionally, as of June, 2011, First Wind had raised over \$4.5 billion including project debt financings, tax equity, corporate financings and government grants, and as March 31, 2011, held assets in excess of \$1.8 billion. Evergreen and Maine GenLead Applications, Appendices 3-1 and 3-2.⁹ First Wind President and Chief Financial Officer, Michael Alvarez, submitted a letter indicating First Wind's intent to develop and finance the Amended Project. Evergreen and Maine GenLead Applications, Appendix 3-1. Thus, the Department properly concluded that the Licensee had the financial capacity to "develop the

⁹ Since the Application was filed, First Wind has successfully financed other projects that are not reflected in the June, 2011 numbers.

project in a manner consistent with state environmental standards and with the provisions of [the Site Law].” 38 M.R.S.A. § 484(1).

Petitioners’ principal objection appears to be the lack of specificity in the financial statements. For example, Petitioners claim that it is inappropriate for First Wind to provide consolidated financial statements and argue that there needs to be additional information provided on the terms, conditions or caveats behind short-term and long-term debt obligations. Appeal at 13-14. First Wind’s financial statements are prepared in accordance with generally accepted accounting principles, which include provisions addressing, among other things, valuation of assets and classification of debt. These financial statements are audited annually by First Wind’s independent auditors. Although First Wind is not a publicly traded company and its financials are not public, First Wind provided its balance sheet along with evidence of successful third-party financings for many other projects as evidence of its ability to successfully finance the Amended Project. Neither the Department nor the public are being asked to invest in the equity of First Wind, so there is no need for the full financial statements that would be appropriate for an investment level decision, nor is an applicant required to provide such full financials to meet the requirements of the Site Law.

Indeed, the identical claim made by Petitioners here was made and rejected by this Board and the Law Court in the Original Project. Specifically, in the Original Project application First Wind stated its commitment to finance construction and operation of the project and submitted evidence of its financial assets and track record of successfully financing other projects. There, like here, the opponents objected based on their unsupported belief that First Wind’s financial condition was “precarious” and First Wind was not “a going concern.” BEP Order on Original Project at 4. The Board and the Law Court rejected petitioners’ claim and concluded that the

evidence submitted by the applicant supported the Department's findings on financial capacity.

Id.; Martha A. Powers Trust v. Bd. of Env'tl. Prot., 2011 ME 40, ¶¶ 15-16, 15 A.3d 1273, 1279.

B. Petitioners' Claims are Irrelevant Because the Licensee Must Submit Additional Evidence of Financial Capacity Prior to Commencement of Construction

Additionally, Petitioners' challenges regarding First Wind's financial strength are irrelevant in light of the condition the Department included in the Permit. Specifically, the Department is requiring the Licensee to submit evidence that it has secured final financing for the Amended Project prior to commencement of construction. Permit, Special Condition 5 at pp. 46-47. This is consistent with a change made to the Site Law in 1995, which expressly allows the Department to issue a permit based on a threshold showing of financial capacity and which conditions any site alterations on the developer providing further evidence that it has the capacity to construct the project.¹⁰ 38 M.R.S.A. § 484(1). This condition renders Petitioners' claim regarding First Wind's financial strength immaterial. Indeed, Petitioners' sole requested relief is that the Board order the Department to require further documentation regarding financial capacity, which the Department has already done.

C. Petitioners' Supplemental Evidence Should be Excluded Because it is Neither Material Nor Relevant

Petitioners seek to introduce supplemental evidence that they argue is relevant to consideration of First Wind's financial strength. Specifically, they seek to introduce information from a proceeding pending before the Maine Public Utilities Commission ("PUC") in which Bangor Hydro Electric Company, Maine Public Service Company and certain affiliates seek approval for their ultimate parent company, Emera, Inc., to invest in certain operating and in-

¹⁰ Petitioners do not challenge the sufficiency of the evidence for this threshold showing of financial capacity.

construction First Wind projects through the formation of a new affiliate, JV Holdco. See Maine PUC Docket No. 2011-170.

First, any supplemental evidence submitted in an appeal must be “relevant and material.” 06-096 CMR Chapter 2, Section 24(B)(5). The examiner’s report in the PUC proceeding is neither. As a threshold matter, the examiner’s report quoted by Petitioners contains a summary of the process to date, positions of the parties, and the recommendations of the advisory staff. The three-member PUC has yet to deliberate and make a final decision in the matter.

Moreover, Petitioners have taken language out of context to support their claim that if the transaction currently before the PUC is not approved, then First Wind will not be able to finance the Amended Project. In fact, the examiner’s report found that “First Wind has done an admirable job of developing wind projects in the state (sic) and based on their proven record of performance will continue to pursue investment worthy development projects in the State.” Examiner’s Report at 73. If approved, the transaction now under review at the PUC would provide First Wind with enhanced certainty and efficiency when it comes to securing financing, see Examiner’s Report at 36, but that transaction is by no means the only way First Wind could satisfy the pre-construction financing requirement the Department has made a condition of Oakfield’s permit, and there is nothing in the examiner’s report that supports Petitioners’ claim that if the contemplated transaction does not occur First Wind will be unable to finance the Amended Project.

Finally, as discussed above, the Department has included a condition in the Permit that requires the Licensee to submit evidence of final financing prior to commencement of construction. Therefore, the information Petitioners seek to introduce is not relevant or material at this time. Instead, the relevance, if any, of the examiner’s report (or subsequent PUC

decision) may be considered when the Licensee submits evidence in accordance with Special Condition 5 of the Permit.¹¹

V. THERE IS NO BASIS FOR THE BOARD TO HOLD A PUBLIC HEARING ON THE APPEAL

Petitioners have failed to identify any basis for the Board to hold a public hearing on the appeal. It is well established, and acknowledged by Petitioners, that there is no right to cross examination or an adjudicatory public hearing on agency licensing actions. To the contrary, public hearings on Department applications and appeals of Department licensing decisions are discretionary. Although Petitioners argue the Department should have held a public hearing, Appeal at 17, no member of the public, including Petitioners, requested that the Department do so. Nonetheless, the Department held a public meeting and took additional steps to ensure the public had ample opportunity to comment on the Amended Project.¹² Petitioners have not alleged, nor can they, that they did not have a full and complete opportunity to participate in the review process. Although they advocate for a different outcome, that is not a basis for the Board to hold a public hearing on what has been a comprehensive and fair review by the Department.

Likewise, although they make the conclusory assertion that there is credible conflicting technical information, Petitioners have not identified any conflicting technical information. Nor

¹¹ In the event that the Board allows the proposed supplemental evidence, Licensee requests that the entirety of the examiner's report be included as opposed to the one page excerpt attached to the Appeal. The entirety of the report may be found at http://mpuc.informe.org/easyfile/easyweb.php?func=easyweb_query&getparamsfromsession=1&querytype by entering "2011170" in the "Case ID" field and selecting "Examiners Report" in the "Doc Type" field drop-down.

¹² Petitioners mistakenly assert that the Land Use Regulation Commission always holds public hearings on wind power projects. Appeal at 16. In fact, LURC did not hold a public hearing on the Stetson II project that it permitted. See Stetson Wind II, LLC Development Permit DP 4818. Moreover, LURC staff, following direction from the Commission, has proposed an alternative approach for processing wind power applications in which a public meeting format is utilized (similar to what the DEP does) in lieu of holding adjudicatory public hearings. See <http://www.maine.gov/doc/lurc/calendar.shtml> (follow link to Commission agenda item for March 3, 2012 meeting).

have they provided any argument on how a public hearing would “assist the decisionmaker in understanding the evidence.” 06 096 CMR Chapter 2, Section 7(B).¹³ Additionally, the rules specifically require that a person requesting a public hearing on an appeal of a Department licensing decision provide “summaries of all proposed testimony, including the name and qualifications of each witness.” 06 096 CMR Chapter 2, Section 24(B)(5). Petitioners have not done so. Petitioners state only that they will call an ornithologist to testify on “wildlife issues.” Appeal at 18. This does not provide a basis for the Board to assess whether there is conflicting technical information and if so, whether a public hearing would assist it in evaluating that information. Petitioners’ discussion of their visual testimony is even less specific. They state only that they will call an “independent visual impact specialist” but do not identify him or her, and disclose only that he or she will provide “rebuttal testimony.” Appeal at p. 18. Again, this does not meet the requirements of the Board’s rules and, importantly, does not provide any basis for holding a public hearing on a wind power project that has undergone two complete Department reviews, a comprehensive local review, and on which the public did not request a public hearing.

Finally, the scope of any hearing held by the Board on an appeal of a permit for an expedited wind energy development is limited to evidence that meets the test for supplemental evidence and therefore Petitioners’ request for a public hearing should be denied on the independent basis that the evidence they seek to introduce does not and cannot meet the test for “supplemental evidence.” 38 M.R.S.A. § 341-D(4).¹⁴ Supplemental evidence is permitted only

¹³ Petitioners repeatedly reference only the first part of the two-prong test for holding a public hearing. Not only must there be credible conflicting technical evidence on a licensing criteria, but “it must be likely that a public hearing will assist the decisionmaker in understanding the evidence.” 06 096 CMR Chapter 2, Section 7(B).

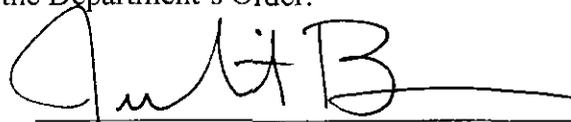
¹⁴ A more complete discussion of the legal basis for this argument is set forth in Appendix A.

when (a) the person seeking to submit such evidence showed “due diligence” in attempting to bring the information to the attention of the Department; or (b) the evidence is newly discovered and could not have been provided to the Department. 38 M.R.S.A. § 341-D(4)(A) and D(5); 06-096 CMR Chapter 2, § 24(B)(5)(a), (b). The purpose of this provision is to ensure certainty and predictability of decisions by requiring that all relevant information be brought forward and considered by the Department during review of the application and that parties not wait to present evidence in the first instance during an appeal to the Board. Petitioners have not made and cannot make any showing that the evidence they seek to introduce in a public hearing was not or could not have been presented to the Department during the application review.

CONCLUSION

As demonstrated by the foregoing, the Petitioners’ claims are without merit and Evergreen II and Maine GenLead respectfully request that the Board DENY the appeal and request for a public hearing and AFFIRM the Department’s Order.

Dated: February 24, 2012



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APPENDIX A

**THE WIND ENERGY ACT LIMITS PUBLIC HEARINGS ON APPEALS OF
COMMISSIONER LICENSING DECISIONS TO CONSIDERATION OF
SUPPLEMENTAL EVIDENCE**

When the Legislature enacted the Wind Energy Act, it limited the scope of any public hearing by the Board on an appeal of an expedited wind energy development to consideration of evidence that meets the “supplemental evidence” standard set forth in the Department’s rules. Accordingly, Petitioners’ request for a public hearing must be denied on the independent basis that the evidence they seek to introduce does not meet the test for “supplemental evidence.” 38 M.R.S.A. § 341-D(4).

A. Hearings on Board Appeals of Expedited Wind Energy Developments Are Limited to Consideration of Supplemental Evidence

Appeals of expedited wind energy developments are governed by Section 341-D(4)(D), which provides that in an appeal of an expedited wind energy development, the Board *shall* base its decision on (1) the Commissioner’s record; and (2) any supplemental evidence, which is evidence that could not have been presented during the initial review process. This is in contrast to appeals of other licensing decisions, in which the Board may base its determination on (1) the Commissioner’s record; (2) any supplemental evidence admitted by the Board; and (3) any evidence submitted during any hearing held by the Board. See 38 M.R.S.A. § 341-D(4)(A) (appeals by aggrieved parties of Commissioner decisions), (B) (appeals initiated by the Board) and (C) (appeals to the Board under other provisions of law); see also 06-096 CMR 2(24)(B)(7). Thus, while the Board may hold a public hearing in an appeal of an expedited wind energy development, the hearing is limited to the consideration of supplemental evidence.¹

¹ In Martha A. Powers Trust v. Board of Environmental Protection, 2011 ME 39, ¶ 9 the Law Court held that public hearings on appeals of expedited wind-energy developments to the Board were

The contrast between appeals of expedited wind energy developments and other licensing decisions is also reflected in the different standards of review. For appeals of licensing decisions other than on expedited wind energy developments, Section 341-D(4)(A) states that:

The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner.

This provision, which does not apply to expedited wind energy developments, indicates a *de novo* standard of review, with the Board free to ignore the Commissioner's factual or legal findings and to substitute its judgment for that of the Commissioner. This language is absent from the provision governing Board review of expedited wind energy developments. See 38 M.R.S.A. § 341-D(4)(D).²

B. Petitioners' Hearing Request Is Not Limited to Consideration of Supplemental Evidence

Supplemental evidence is evidence that is "relevant and material." It may be allowed only when (i) the interested party has shown due diligence in bringing it to the licensing process at the earliest possible time, or (ii) it is newly discovered and could not, by the exercise of due diligence, been discovered in time to be presented earlier in the licensing process. 38 M.R.S.A. § 341-D(5)(C); 06-096 CMR 2(24)(B)(5). Petitioners' request for a public hearing is not based on nor limited to consideration of supplemental evidence. Instead, Petitioners request that the Board hold a public hearing to consider testimony regarding the same issues and information that had been presented or could have been presented to and considered by the Commissioner during the licensing process.

"discretionary." The Law Court may have implicitly rejected but did not specifically address the argument here that the Wind Energy Act limits the scope of any hearing by the Board.

² That the Legislature intended the Board to serve solely in an appellate capacity is also evidenced by the fact that the Board may not assert primary jurisdiction over any expedited wind energy development, but may act only as an appellate body. See 38 M.R.S.A. § 341-D(2).

INDEX OF EXHIBITS

- Exhibit A June 11, 2010 Board Order Denying Appeal on Original Project
- Exhibit B Visual Impact Assessment (Evergreen Application, Section 30) (“VIA”)
- Exhibit C Review of the Oakfield Wind Project Visual Impact Assessment by Dr. James F. Palmer, September 9, 2011 (“Palmer Review”)
- Exhibit D Pleasant Lake/Mattawamkeag Lake Wind Power Project Intercepts by Dr. Brian Robertson, October 2011 (“Intercept Survey Report”)
- Exhibit E Review of the Pleasant Lake/Mattawamkeag Lake Wind Power Project Intercepts by Dr. James F. Palmer, December 2, 2011 (“Palmer Intercept Review”)
- Exhibit F October 27, 2011 E-mail from James Palmer to Jessica Damon
- Exhibit G December 22, 2011 Evergreen Response to Visual Impact Comments
- Exhibit H Evergreen Application, Section 7, Appendices 7-4 (Fall 2007 Bat Migration Survey Report) and 7-5 (Spring and Summer 2008 Bird and Bat Migration Survey Report)
- Exhibit I Licensee’s October 21, 2011 Response to IFW Comments
- Exhibit J November 15, 2011 IFW Review Comments
- Exhibit K Licensee’s December 7, 2011 Response to IFW Review Comments
- Exhibit L Evergreen Application, Section 7, Appendix 7-8 (Eagle Summary Report); Maine GenLead Application, Section 7, Appendix 7-4 (2010 Bald Eagle Aerial Flight Survey Memo)
- Exhibit M Maine GenLead Application, Section 6, Appendix B (Penobscot River Crossing)
- Exhibit N Maine GenLead Application, Section 7, Appendix 7-6 (“Mitigation and Compensation Report”)
- Exhibit O Evergreen and Maine GenLead Applications, Section 3 and Appendices 3-1, 3-2 (financial capacity documentation)