



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PAUL R. LEPAGE
GOVERNOR

PATRICIA W. AHO
COMMISSIONER

MEMORANDUM

TO: The Board of Environmental Protection

FROM: Jessica M. Damon, Project Manager and Mark Bergeron, Division Director, Division of Land Resource Regulation, Bureau of Land & Water Quality

RE: Appeal filed by Protect our Lakes, Donna Davidge, and other Aggrieved parties, of Site Location of Development Act and Natural Resources Protection Act Approval #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 for Evergreen Wind Power II and Maine Genlead LLC, Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Lineus

DATE: April 11, 2012

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Statutory and Regulatory References: The applicable statutory and regulatory framework for the issues raised in this appeal are the Site Location of Development Law (Site Law), 38 M.R.S.A. § 484; Site Location of Development Rules, Chapter 373 and Chapter 375 §§ 14 and 15; the Maine Wind Energy Act, 35-A M.R.S.A. §§ 3451-3455, The Natural Resources Protection Act (NRPA), 38 M.R.S.A. §§ 480-A to 480-HH and The Wetland Protection Rules, Chapter 310. The Site Law Rules interpret and elaborate on the Site Law criteria. In the section pertinent to this appeal, the Site Law Rules provide guidance for the determination of whether a project will be in compliance with the scenic character, wildlife, wetlands impact and financial capacity standards of the law. The Wind Energy Act sets forth additional licensing criteria specific to the scenic character issues raised in this appeal. The Wetland Protection Rules contain standards for the mitigation of unavoidable impacts to protected natural resources. Procedures for appeals before the Board are outlined in the Department's Rules Concerning the Processing of Applications, Chapter 2 § 24 (B).

Location: The turbine portion of this project is located in the Town of Oakfield and T4R3 WELS. The generator lead transmission line is proposed to run through the Town of Chester, the Town of Woodville, the Town of Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, the Town of Linneus and the Town of Oakfield.

Procedural History and Project Description: In Department Order #L-24572-24-A-N and L-24572-TF-B-N, dated January 12, 2010, the Department approved a Site Location of Development Act (Site Law) and Natural Resources Protection Act (NRPA) permit for the construction of a 51-megawatt (MW) wind energy development, known as Oakfield Wind Project. The applicant for the

original application was Evergreen Wind Power II, LLC. The proposed development consisted of 34 wind turbines in 36 potential locations, with associated turbine pads, electrical collection infrastructure, an electrical interconnection substation, meteorological (met) towers, and an Operations & Maintenance (O & M) building. The original proposal was appealed to the Board, which affirmed the Department's approval of the project, and subsequently to the Maine Supreme Judicial Court, which affirmed the Board's decision. This project was never constructed.

On June 10, 2011, the licensees submitted Site Law and NRPA applications, proposing the construction of a revised project on the site of the previously approved project and additional adjacent lands in the Towns of Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Linneus ("project"). The revised applications propose the construction of 50 Vestas 3.0 MW turbines, increasing the number of turbines from 34 to 50 and the capacity of the project from 51 MW to 150 MW. The revised proposal includes a new substation and point of interconnection with the electrical grid which requires the construction of a 59-mile generator lead transmission line. The Department treated these applications as new because the licensees now propose a layout for the project that is entirely different than what the Board previously reviewed and approved.

The Department approved the applications on January 17, 2012. A timely appeal to the Board was filed on February 16, 2012 by the appellants listed above. On February 24, 2012 the licensees filed their response to the appeal. On March 6, 2012 the Town of Oakfield also submitted a response to the appeal.

Environmental Issues and Discussion:

1. SCENIC CHARACTER ISSUES RAISED IN APPEAL:

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

- (A) The user survey is neither valid nor reliable;
- (B) The Visual Impact Assessment (VIA) process currently used is inconsistent with the *Wildlands Lake Assessment* and *Maine's Finest Lakes Survey*.

A. Appellants argue that the user survey completed for the Bull Hill project surveyed recreationalist that were hiker based, while the recreationalist that use Pleasant Lake and Mattawamkeag Lake are mainly water-based. Appellants claim that a second user survey of Pleasant and Mattawamkeag Lakes lacked reliability and validity and failed to meet the standards of a scientifically designed survey instrument.

The appellants do not provide any basis for their assertion that the user survey was flawed. Both survey's methodology were reviewed by Dr. Palmer, an expert on scenic impacts, who determined that the surveys followed standard practice for recreational surveys.

- B. Appellants argue that the visual impact of the project on Mattawamkeag Lake and Pleasant Lake should be judged by the degree to which the project will change the nature of these lakes and alter the factors that led to them being rated as Class 1-A and Class 1-B, respectively, in the *Wildlands Lake Assessment*. The appellants argue that the expanded project would be a rejection of the values expressed and implied in the *Wildlands Lake Assessment*.

The Wind Energy Act (WEA), 35-A M.R.S.A. § 3452 (1), provides in pertinent part that:

In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to [the Site Law] or [the Natural Resources Protection Act,] the [Department] shall determine, in a manner provided in subsection 3, whether the development significantly compromises views from a scenic resource of state or national significance. Except as otherwise provided in subsection 2, determination that a wind energy development fits harmoniously into the existing natural environment in terms of potential effects on scenic character and existing uses related to scenic character is not required for approval under [the Site Law.]

As described in the Department Order and the draft Board Order, the Department's finding that the scenic impacts to these two lakes is not unreasonable was based on its thorough and careful review of the totality of the evidence submitted by the licensees and interested persons, including a VIA conducted by TJD&A, on the comments submitted by SQC, and on the Department's interpretation of the applicable laws.

The Department recommends that the Board find that the licensees have adequately assessed the proposed project's potential visual impacts as set forth under the Wind Energy Act (WEA) and have demonstrated that the project will not significantly compromise views from a scenic resource of state or national significance, and that project will not have an unreasonable adverse effect on the scenic character or existing uses related to scenic character of scenic resources of state or national significance.

2. WILDLIFE ISSUES RAISED IN APPEAL:

The appellants argue that the applicants did not address issues highlighted by the Maine Department of Inland Fisheries and Wildlife (MDIFW) described below:

- (A) The applicant did not develop a bat mortality study as suggested by MDIFW.
 - (B) The Department has not given enough consideration to the potential impacts on bald eagles.
- A. The appellants' argue that the applicant did not develop a bat mortality study as suggested by MDIFW comments submitted November 15, 2011. The licensees did agree to operational control measures as recommended to the Department by MDIFW. MDIFW further stated in the November 15, 2011 comments to the Department that MDIFW would

recommend not requiring post-construction bat mortality studies with the curtailment recommendations in place. The Department determined that by following the suggested operational control measures the applicant was not required to do the post-construction bat mortality study specified in MDIFW's comments.

- B. The appellants' argue that the Department did not give enough consideration to the potential impacts of the project on bald eagles. The bald eagle is listed in the State of Maine as a species of special concern. The United States Fish and Wildlife Service (USFWS) has sole authority for take evaluations under the Bald Eagle – Golden Eagle Protection Act, review of suggested Eagle Conservation Plan, and approval of an Adaptive Management Plan for windpower facilities. MDIFW did work with the applicant to develop preliminary surveys for raptors within the project area which were submitted with the application and reviewed by MDIFW. MDIFW did not note any concerns regarding the proposed project and bald eagles in their review comments submitted to the Department.

The Department recommends that the Board find that the project satisfies the no unreasonable impact to the protection of wildlife and fisheries.

3. FINANCIAL CAPACITY ISSUES RAISED IN APPEAL:

The appellants' argue that the financial documents submitted by the applicants are lacking in basis for a finding of financial capacity and that the Board should require the licensee to submit an audited Profit and Loss statement. Finally the appellants argue that the Board should require the licensee to demonstrate that it has the financial capacity to construct the four projects that the licensee's parent company has currently permitted, but has yet to construct.

Chapter 373(1) sets forth several forms of financial capacity demonstration which may be acceptable, but does not limit an applicant to the listed forms. The applicant submitted a description of its financial capacity and a letter from Michael Alvarez, the President and Chief Financial Officer of First Wind outlining the company's history of successfully financing wind power projects throughout the country and in Maine. The Department found that the applicant demonstrated adequate financial capacity to comply with Department standards provided that prior to construction of the project, the applicant submitted final evidence of financial capacity.

The Department recommends that the Board find that the information submitted by the applicant is adequate subject to the permit condition requiring final evidence of financial capacity prior to the commencement of construction.

4. WETLANDS ISSUES RAISED IN THE APPEAL:

The appellants' assert that the applicant failed to address the status of potential vernal pools in the compensation area. The applicants' noted that the compensation area contained four known potential vernal pools. The licensees are not required to compensate for any impacts to vernal pools and therefore the Department did not require the assessment of vernal pools in the compensation area. The licensees filed three Permit-By-Rules (PBR) for small impacts to the

Significant Vernal Pool (SVP) critical terrestrial habitat areas (not the vernal pool depression itself), but these impact did not require any compensation by the Department. The compensation package was required for impact to other wetlands, not impacts to significant vernal pools.

The Department recommends that the Board find that the Project satisfies that there were no unreasonable impacts to Significant Wildlife Habitats (SWHs).

5. PUBLIC HEARING REQUEST:

The appellants request that the Board hold a public hearing because there was no public hearing and because there is credible conflicting technical information regarding licensing criteria as required by the Department. However, the appellants did not file any credible conflicting technical information with their appeal or provide a list of any technical experts that they would call to testify as required by Chapter 2 Rules.

The Department held a public meeting on August 3, 2011 in the Town of Oakfield. The Department sent letters to all abutters of the project notifying them of the meeting as well as to all town offices and it published a notice in a local newspaper. The Department did not receive any requests for a public hearing during the 20 day period specified in the Departments rules governing the processing of applications for such request to be submitted.

The Department issued a draft order for public comment on January 6, 2012. The comment period on the draft order closed on January 13, 2012. The appellants and other members of the public also submitted comments on the draft order.

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

6. STANDING:

The appellants' standing has been questioned by the Town of Oakfield, based in part on POL's incorporation as a non-membership organization. Protect our Lakes ("POL") is a Maine non-profit corporation, organized for the purpose of educating the public about, and taking action against, this project. While it does not have voting members it does have members in the form of people who support the goals of POL and who may or may not also make financial contributions to the non-profit. POL is comprised of individual landowners and business owners in the towns of Oakfield, Island Falls and surrounding communities. There are members who own lakefront property or other non-lakefront property that will have views of at least some of the turbines. POL also includes business owners and managers who may be impacted by the project. Donna Davidge is the proprietor of the Sewall House Yoga Retreat in Island Falls, Maine. The Sewall House is on the National Register of Historic Properties, and Ms. Davidge utilizes lakefront locations on Mattawamkeag Lake for yoga exercises.

The Department finds that POL's designation as a non-membership organization for the purpose of incorporating is not determinative of standing in this proceeding. Rather, POL has demonstrated that it has members, including Ms. Davidge, who own properties and business interests near the project area that will have views of the project's turbines, and therefore this licensing decision may cause injury to them in the form of negative visual impacts. Accordingly, the Department recommends that the Board find that POL, as an organization, and Ms. Davidge, individually, have demonstrated they are aggrieved persons for the purpose of this appeal, as defined in Chapter 2 § 1(B) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

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

Estimated Time of Presentation: 3 hours