

Response to the Appeal by Alexander and Rhonda Cuprak

Alexander F. and Rhonda Cuprak***P. O. Box 1836 · Bangor, Maine 04402-1836***

January 7, 2013

Robert A. Foley, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

In re: Notices of Appeal Filed by
Appellant-Applicant Passadumkeag Windpark, LLC and
Appellant-Landowner Penobscot Forest, LLC of
DEP's Order Denying Site Law and NRPA Permits for Passadumkeag Windpark
#L-25597-24-A-N / #L-25597-TH-B-N

Dear Chairman Foley:

Reiteration of Request to be Noticed as Interested Persons

Pursuant to Chapter 2, Section 1(I) (Definitions) of the Maine Department of Environmental Protection's current *Rules Concerning the Processing of Applications and Other Administrative Matters*, we are Interested Persons in the above-mentioned matter, as we requested, by the attached letter to the Commissioner dated July 26, 2012, that we be treated as such, and we submitted the attached written comments that same day with regard to the application in question. Would you please use our mailing address provided above for this purpose.

Submission of Responses of Interested Persons

Pursuant to Chapter 2, Section 24(B) (Appeal to the Board of a Commissioner's decision) of the Maine Department of Environmental Protection's current *Rules Concerning the Processing of Applications and Other Administrative Matters*, we submit, as Interested Persons, the following response to arguments raised in the written appeals of Appellant-Applicant Passadumkeag Wind Park, LLC and Appellant-Landowner Penobscot Forest, LLC.

Our response focuses solely on assertions made by both the Appellant-Applicant and the Appellant-Landowner regarding the criteria of Title 35-A M.R.S. § 3452(3)(D) (The expedited

wind energy development's purpose and the context of the proposed activity) and its use in determining the effect of a proposed development on scenic character and related existing uses.

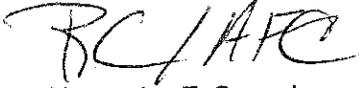
On page 20 of its Notice of Appeal, the Appellant-Landowner makes the general assertion that the proposed development is "meant to provide renewable energy to further the State's objectives of energy independence." Similarly, the Appellant-Applicant states on page 21 of its Appeal of Department Order that an "ancillary purpose" of the proposed development would be its "contributing to the Legislative goal to install 2000 MW of capacity by 2015." These assertions were provided as arguments by the Appellants to support their claims under Title 35-A M.R.S. § 3452(3)(D). However, these particular assertions, and their like with which the written appeals are peppered, are provided without comprehensive discussion or citation of either the relevant law or the claimed Legislative goal or intent. At best, they pull piecemeal from those sources and, in doing so, diminish and otherwise change the full meaning of the Legislature's intent in enacting the Maine Wind Energy Act.

In fact, the Legislature's purpose and goals for enacting the Maine Wind Energy Act are clearly identified in Title 35-A M.R.S. § 3402 (Legislative findings). We have attached for your consideration a copy of our comments provided to the Commissioner on July 26, 2012. The extensive arguments laid out under "Comment One," "Comment Two," and "Comment Three" of that document thoroughly and comprehensively analyze Section 3402 and conclude that ***only a wind energy development that provides its electrical energy to the citizens of the State of Maine may be presumed to meet the Legislature's intent in enacting the Maine Wind Energy Act.***

Therefore, in response to the present appeal before the Board of Environmental Protection, we reiterate, and incorporate herein, the arguments as laid out in the attached "Comment One," "Comment Two," and "Comment Three," which were previously submitted to the Commissioner on July 26, 2012, and are part of the existing Department record in this matter. In conclusion, we assert that the Appellants have not met their burden of establishing by a preponderance of the evidence the claims they have raised in their written appeals in connection to Title 35-A M.R.S. § 3452(3)(D).

We appreciate this opportunity of public participation in the submission of our responses for consideration by the Chair and Members of the Board of Environmental Protection.

Respectfully submitted,



Alexander F. Cuprak
Rhonda Cuprak

Attachment

pc (w/attachment) to:
Patricia W. Aho, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Alexander F. and Rhonda Cuprak

P.O. Box 1836, Bangor, ME 04402-1836 - [REDACTED]

July 26, 2012

Patricia W. Aho, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

In Re: Applications for the Passadumkeag Wind Farm by Passadumkeag Wind Park, LLC
(L-25597-24-A-N/L-25597-TH-B-N/L-25597-IW-C-N)

Dear Commissioner Aho:

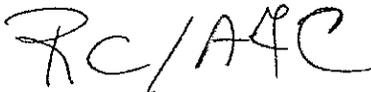
Our enclosed analysis of the above-mentioned matter is in follow-up to a conversation with you at the close of the public hearing, in Greenbush, on July 12, 2012.

Our primary observation is that the above application does not qualify for DEP's consideration under the expedited wind energy development permitting process, because the proposed development fails to meet the Legislature's objective for establishing the expedited process.

Please consider us Interested Persons and inform us at [REDACTED] of future filings, drafts, etc., as regards the above mentioned application, and also notice, if possible, as to when you anticipate issuing a final decision in this matter.

We appreciate this opportunity to submit comments.

Respectfully Yours,



Rhonda Cuprak
Alexander F. Cuprak

Enclosure

cc: James R. Beyer, Project Manager, Maine DEP
Senator Richard W. Rosen
Representative Beth P. Turner
Rufus E. Brown, Esq.
Philip C. Worden, Esq.
Lynne A. Williams, Esq.
Peter R. Roy, Esq.

**COMMENTS CONCERNING
PASSADUMKEAG WINDPARK, LLC'S
EXPEDITED WIND ENERGY DEVELOPMENT APPLICATION
FOR PASSADUMKEAG MOUNTAIN**

COMMENT ONE

The primary siting authority must deny the applicant's expedited wind energy development application, because the proposed development does not qualify for the expedited wind energy development process.

Discussion of Comment One

At both the July 10, 2012, Penobscot County Commissioners' meeting and the Department of Environmental Protection's public meeting held in Greenbush on July 12, 2012, members of the public commented that the power generated by the applicant's proposed expedited wind energy development would be transmitted out of the State of Maine and would not be made available for use by Maine citizens. This assertion was affirmed by the Commissioners' chairman and was not countered by the Department. However, the expedited wind energy development process under Maine law is intended for wind energy developments proposed for locations within the expedited permitting area that will make their generated energy available to the citizens of Maine.

Title 35-A M.R.S. § 3454 instructs the primary siting authority (in this case, DEP) that it "shall presume that an expedited wind energy development provides energy and emissions-related benefits described in Section 3402." Section 3402 states: "The Legislature finds that the development of the wind energy potential in the State needs to be integrated into the existing energy supply and transmission systems in a way that achieves system reliability, total capital cost-effectiveness and optimum short-term and long-term benefits to *Maine people*." (Emphasis added.)

In Section 3402(1), the Legislature further finds and declares that wind energy development “makes a significant contribution to the *general welfare of the citizens of the State* for the following reasons:

A. Wind energy is an economically feasible, large-scale energy resource that does not rely on fossil fuel combustion or nuclear fission, thereby displacing electrical energy provided by these other sources and avoiding air pollution, waste disposal problems and hazards to human health from emissions, waste and by-products; consequently, wind energy development may address energy needs while making a significant contribution to achievement of *the State’s* renewable energy and greenhouse gas reduction objectives, including those in Title 38, section 576;

B. At present and increasingly in the future with anticipated technological advances that promise to increase the number of places in the State where grid-scale wind energy development is economically viable, and changes in the electrical power market that favor clean power sources, wind energy may be used to displace electrical power that is generated from fossil fuel combustion and thus reduce *our citizens’* dependence on imported oil and natural gas and improve environmental quality and *state and regional energy security*; and

C. Renewable energy resources within the State and in the Gulf of Maine have the potential, over time, to provide enough energy *for the State’s homeowners and businesses* to reduce *their* use of oil and liquid petroleum-fueled heating systems by transition to alternative, renewable energy-based heating systems and to reduce *their* use of petroleum-fueled motor vehicles by transition to electric-powered motor vehicles. Electrification of heating and transportation has potential to increase *the State’s* energy independence, to help stabilize total residential and commercial energy bills and to reduce greenhouse gas emissions.”

(Emphasis added.)¹

¹ While the term “regional” in ¶B above is not defined in this section, or any other section associated with the expedited permitting of wind energy development, the term clearly refers to a geographical area larger than the State of Maine. However, we assert that ¶B must be interpreted in the context of the repeated overall thrust of section 3402, that clean energy generated within the State, derived from an energy source indigenous to the State, and used by the citizens of the State reduces Maine’s dependence on imported energy. That reduction in Maine’s dependence on imported energy is how the “state and regional energy security” would benefit from the development. Improvement to regional security through the exportation of energy generated by a Maine-sited wind energy development would not provide a “significant” (section 3402) “energy and emissions-related benefits” (Title 35-A M.R.S. § 3454) “contribution to the welfare of the citizens of the State.” (Section 3402(1)). (Emphasis added.)

Based upon the Legislature's findings in sections 3402 and 3402(1), the Legislature asserts under section 3402(2) the need for the modification of existing regulatory process as the basis for creating expedited permitting procedures for proposed wind energy development within the State. The Legislative body does not normally include extensive descriptive language explaining its purpose when it constructs a statute. Thus, the inclusion of the Legislators' findings (section 3402) in *The Maine Wind Energy Act* (Title 35-A § 3401 *et. seq.*) is unusual and, therefore, underscores the significance of section 3402.

In section 3402, the Legislature clearly describes its basis for creating an exception to the siting authority's normal review and approval permitting process for developments within the State. The Legislature's basis is directly predicated on the significant contribution of wind energy development to the "general welfare of the citizens of the State" by displacing and thereby reducing "our citizens'" dependence on imported oil and natural gas. However, a wind energy development constructed and operated to export its electrical energy outside of the State cannot meet the Legislature's intended objectives for energy and emissions-related benefits, because the electrical energy generated by the development does not displace fossil fuel energy or any other energy used by the citizens of the State.

The energy and emissions-related objectives of section 3402 are reiterated in the Legislature's instructions to the siting authority for considering an application for an expedited wind energy development in section 3454. By instructing the primary siting authority to presume that an expedited wind energy development provides the energy and emissions-related benefits described in section 3402, section 3454 reaffirms that the Legislature intends the expedited wind energy development process to be used for developments that will provide the significant contributions identified in section 3402 to the general welfare of the citizens of the State. Only a wind energy development that provides its electrical energy to the citizens of the State of Maine could be presumed to provide the energy and emissions-related benefits of section 3402.

A siting authority cannot claim that the presumption of section 3454 prohibits it from making findings regarding the energy and emissions-related benefits to the citizens of the State of Maine and, thereby, preclude itself from considering whether the application meets the Legislature's intent for affording access to the expedited wind energy development processes. Such an interpretation adopts fallacious, circular reasoning that contradicts the Legislature's intent for establishing the expedited wind energy development processes. Likewise, it would be arbitrary and capricious to adopt an interpretation of section 3454 that the siting authority must presume the energy and emissions-related benefits of section 3402 simply because the applicant filed an application for an expedited wind energy development.

For these reasons, the primary siting authority must determine that the energy to be produced by a proposed wind energy development will be for the use of the citizens of the State of Maine in order to confirm jurisdiction to consider the development under the expedited wind energy development processes. If the primary siting authority determines that the energy to be produced will be for the use of the citizens of Maine, then the development may be presumed to provide the energy and emissions-related benefits of section 3402 and the application may be placed into the expedited permitting process. However, if the primary siting authority determines that the energy to be produced will *not* be for the use of the citizens of Maine, then the primary siting authority must determine that the development does not meet the energy and emissions-related benefits of section 3402. In that case, the primary siting authority must deny the application's admittance into the expedited permitting process, because the development fails to meet the Legislature's intent as to whom should be utilizing that process.

The expedited process does not prohibit industrial wind energy developments which propose to export the energy they create, because the pre-existing application process remains in place for those developments. In creating the expedited wind energy development process, it was the Legislature's intent to create a "fast track" option for those developments that would be generating and keeping their energy within the State, thus helping the State to meet its own energy goals. It is incumbent upon the primary siting

authority to further the Legislature's intent by directing wind energy development applications through the appropriate application process depending on each development's objectives. It is inappropriate to use the expedited process for those industrial wind energy developments that fail to uphold the Legislative intent.

Based on the arguments presented above, and upon the pervasive understanding that Passadumkeag Windpark, LLC will be exporting the energy which it generates, the primary siting authority must deny the applicant's application for an expedited wind energy development, because the proposed development fails to meet the presumption of energy and emissions-related benefits required by Title 35-A M.R.S. §§ 3454 and 3402.

COMMENT TWO

The siting authority must interpret the presumption of energy and emissions-related benefits identified in Title 35-A M.R.S. § 3454 as a rebuttable presumption.

Discussion of Comment Two

Should Passadumkeag Windpark, LLC propose to export its electrical energy and the primary siting authority fail to deny the expedited wind energy development application (contrary to the argument in Comment One), the primary siting authority is still left with the problem inherent within the presumption of energy and emissions-related benefits provided in Title 35-A M.R.S. § 3454. As already established in Comment One, the applicant does not meet the presumption of energy and emissions-related benefits contemplated in section 3402. It would be arbitrary and capricious to adopt an interpretation of section 3454 that the siting authority must presume the energy and emissions-related benefits of section 3402 simply because the applicant filed an application for an expedited wind energy development. Therefore, the primary siting authority must interpret the presumption of energy and emissions-related benefits described in section 3402 as a rebuttable presumption.

COMMENT THREE

The primary siting authority must deny the applicant's expedited wind energy development application, because the proposed development fails to meet the presumption of energy and emissions-related benefits required by Title 35-A M.R.S. § 3454 and § 3402.

Discussion of Comment Three

If **a)** Passadumkeag Windpark, LLC proposes to export its electrical energy and the primary siting authority fails to deny the expedited wind energy development application [contrary to the argument in Comment One] and **b)** the primary siting authority finds that the applicant has failed to establish that the proposed wind energy development provides the energy and emissions-related benefits described in section 3402 [as recommended in Comment Two], then **c)** the primary siting authority must deny the applicant's expedited wind energy development application, because the application fails to address the principal objective for a wind energy development under the expedited wind energy development process.

That the energy and emissions-related benefits described in Title 35-A M.R.S. § 3402 are presumed to be provided by an expedited wind energy development (section 3454) underscores the Legislature's fundamental expectation that these benefits will be essential components of the proposed development. The Legislature does not mention any of the "other tangible benefits" (section 3454) in its legislative findings describing the purpose and benefit of wind energy development. This relegates these "other tangible benefits" to a secondary status of *consequential* benefits that might enhance the principle objective of the energy and emission-related benefits.

An application for a proposed wind energy development that fails to provide the energy and emissions-related benefits cannot survive the approval process on the consequential benefits alone, since the development lacks the principle objective established by the Legislature for providing the expediting permitting process. Therefore,

the primary siting authority must deny the applicant's expedited wind energy development application, because the proposed development fails to meet the presumption of energy and emissions-related benefits required by Title 35-A M.R.S. § 3454 and § 3402.

COMMENT FOUR

The primary siting authority must adopt a variable assessment tool for determining the tangible energy and emissions-related benefits of proposed expedited wind energy developments in the State of Maine.

Discussion of Comment Four

The purpose of Comment Four is to afford the primary siting authority the ability to consider the extreme statewide variation in electrical energy that can be generated by a wind energy development, depending on the development's geographical location within the State. This extreme statewide variation is illustrated by the wind power density tables, areal distribution tables, and wind maps provided by the Maine Department of Economic and Community Development Energy Division, in pages 20-23 of its 1998 *Wind Energy* publication.²

The tables and wind maps in the *Wind Energy* publication identify a *tenfold* variation in wind power density throughout the State of Maine. This tenfold variation in wind power density directly corresponds to a tenfold variation in potential electrical energy that could be derived from a wind energy development, depending on the development's geographical location. It may be further suggested that the electrical energy derived from a specific development site is also dependent upon the specific turbine's efficiency and suitability for the specific site.

² Their information was derived from *Wind Energy Resource Atlas: Volume 4, The Northeast Region*, PNL-3195 WERA 4 UC60 September 1980.

Whereas the ultimate determination whether to approve an expedited wind energy development appears to hinge on the comparative benefits and detriments of a development, the assignment of a qualitative value to the energy benefits would assist the primary siting authority in its deliberations regarding the overall suitability of a specific development.

Authority/Mandate for Adopting an Energy Benefit Value

Pursuant to Title 35-A § 3454, the siting authority is instructed to make findings regarding the tangible benefits of the proposed expedited wind energy development. This language also instructs the primary siting authority to presume the energy and emissions-related benefits described in section 3402. This presumption, however, does not prohibit the assessment of the *degree* of energy and emissions-related benefits. Rather, as stated in the Maine Public Utilities Commission's Review Comments to the Department of Environmental Protection, dated March 29, 2012, this is a presumption of the "*general* energy and environmental benefits stated in statute." (Emphasis added.)

Furthermore, the energy related benefits are contemplated as part of the additional findings the primary siting authority is instructed to make regarding tangible benefits. As defined in Title 35-A M.R.S. § 3451(10), "Tangible benefits' means environmental or economic improvements or benefits to residents of this State attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: . . . reduced electrical rates; [or] land or natural resource conservation. . . ." In addition, "[a]s part of any permit application for an expedited wind energy development, the applicant shall include . . . [an] [e]stimated annual generation of wind energy," as part of its information regarding tangible benefits. (Title 35-A § 3454(1) (B)).

Therefore, energy and emissions-related benefits are environmental and economic benefits, affecting electrical rates and the land/natural resource conservation interests of the residents of the State of Maine. Thus, an applicant is required to provide evidence of

the estimated annual generation of wind energy for any permit application, so that the primary siting authority may assess the relative value of these tangible benefits. That there is a tenfold variation in potential wind power dependent upon the development's location mandates the assignment of a low-to-high, qualitative value to the energy benefit, when comparing a development's overall level of benefits to its overall level of detrimental effects.

COMMENT FIVE

The primary siting authority must determine that the applicant has failed to establish the economic benefit alleged in the application on Page 28-1.

Discussion of Comment Five

The applicant's proposal on Page 28-1 asserts:

The project provides a direct economic benefit to the local landowner participating in the project through a land lease. This income stream will significantly supplement revenue from commercial forestry. This additional income stream will help maintain the property in traditional forestry and recreational uses, while creating a new source of clean energy.

Lessor Penobscot Forest, L.L.C., is a Delaware limited liability company with offices at 77 Franklin Street, in Boston, Massachusetts. As such, the lease payments would flow directly from one out-of-state entity to another. The applicant's assertion that the funds will help the landowner to maintain the property is pure speculation as to how the landowner might spend the lease payments, when those lease payments may not be spent in Maine, at all. In addition, contrary to helping to maintain the property in traditional forestry and recreational uses, the wind project would remove from recreational use and traditional forestry (and Tree Growth, if applicable) all land upon which the project's equipment would

sit. It must therefore be found that the applicant has failed to meet its burden of establishing the above claims of benefit.

Respectfully submitted this 26th day of July, 2012.

Rhonda Cuprak
Alexander F. Cuprak

