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April 29, 2013

VIA Electronic and U.S. Mail

Robert Folely, Chair
c/o Cynthia Bertocci, Executive Analyst
Maine Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Remand Proceedings for the Saddleback Ridge Wind Project

Dear Chair Foley and Members of the Board:

Friends of Maine's Mountains and the other appellants in the Law Court case of *Friends of Maine's Mountains v. Board of Environmental Protection*, 2013 ME 25, -- A.3d--- (the "Law Court case" or "decision") object to the "Suggested Procedure" for addressing the remand required by the Law Court case circulated by Ms. Bertocci by email dated April 19, 2013 and appended to the Board Memorandum on this subject dated May 2, 2013, on jurisdictional grounds. As pointed out in the Board Memorandum at 2, the Law Court decision "requires changes to the application" of Saddleback Wind LLC to account for the 42 dBA nighttime noise limit mandated by the Law Court decision. Under applicable statutory provisions, the Commissioner, not the Board, is the initial decisionmaker for any and all license application amendments for wind projects, including the one required by the Law Court decision.

The Law Court decision at ¶17 states that "[w]e vacate the Board's order and remand for further review using the 42 dBA nighttime sound level limit as introduced by 2 C.M.R. 06 096 375-15 § 10(I)(2)(b) (2012)." The Law Court decision did not specify who should conduct the review, but it did point out that for wind projects the Commissioner has the sole responsibility for making "expedited wind energy development decisions" as the primary siting authority with the Board's role limited to "conduct[ing] appellate review." *Id.* at ¶6.

The statutory basis for this allocation of responsibility cited by the Law Court decision is 38 M.R. S.A. §341-D(2) (removing jurisdiction from the Board for making initial licensing decision for wind projects) and §341-D(2)(D)(providing for review of the administrative record of the Commissioner on an appeal), enacted by the Wind Energy Act. *Id.* See also, 38 M.R.S.A. §344(2-A)(A)(1) (The Commissioner may not ask the board to assume jurisdiction of an application for any permit or other approval required for an expedited wind energy development....").

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The limitation of the Board's role to appellate review is confirmed by the *Report of the Governor's Task Force on Wind Power Development* (February 2008) at 21, which states that the Wind Energy Act proposal (adopted by the Legislature) intended to "[m]ake the Commissioner of DEP responsible for issuing all original permits for wind power projects," limiting "the BEP function [to] an appeals board."

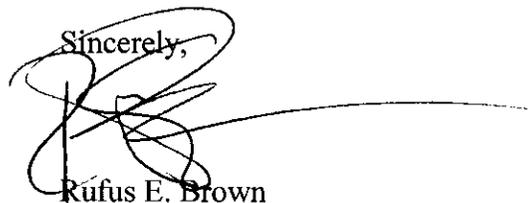
The final leg of the statutory analysis is 38 M.R.S.A. §344, which specifies how applications for wind projects are to be processed. Section 344(2-A)(A)(1) states that only the "[C]ommissioner shall issue a decision on an application for an expedited wind energy development." Critically, Section 344(9) declares that, for purposes of Section 344, an "amendment" to an application "is considered an application that, unless specifically exempted by law, is subject to a decision by the department" meaning the Commissioner only. There is no specific exemption in the law allowing the Board to take jurisdiction from the Commissioner on application amendments.

The suggestion in Gordon Smith's letter to the Board on April 9, 2013, that the new Noise Report for the Project submitted with his letter can be considered "supplemental evidence" under the Board's procedural rules, is an invitation to ignore the mandates of the statutory scheme. "Supplemental evidence" can be taken by the Board in defined circumstances on an appeal of the Commissioner's decision, similar to the authority of the Superior Court to take "additional evidence" in an appeal under the Maine Administrative Procedure Act in defined circumstances. In this case there has been no decision yet by the Commissioner on an amended application. In fact we are not aware that the Applicant has even submitted an amended application.

Based on the foregoing, the law is clear. The Board, as an appellate body, cannot assume jurisdiction over a license amendment, any more than the Superior Court could entertain license amendments on remand from the Law Court of a reversal of decision by the Board or Commissioner on a license other than a wind project. Under the amendments enacted by the Wind Energy project, only the Commissioner can do that. The procedure mandated by the Wind Energy Act is for the Applicant to submit an amendment to its application to the Department, meaning the Commissioner, for the Department to conduct a peer review of the amendment, for the Department to then issue a draft decision, with the normal time for comment, and then for the Department to issue a final decision, which can then be appealed to the Board by the Appellants. Any departure from this mandated process in the nature of a shortcut, as urged by the Applicant, will render the license defective on jurisdictional grounds.

I would be happy to address this issue further at the Board's May 2, meeting.

Sincerely,

A handwritten signature in black ink, appearing to be 'Rufus E. Brown', written over the word 'Sincerely,'. The signature is stylized and somewhat illegible due to the cursive style.

Rufus E. Brown

REB/

cc: Commissioner Patricia Aho
Assistant Attorney General Peggy Bensinger
Gordon Smith, Esq.
Clients