

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, Director, Division of Land Resource Regulation, Bureau of Land & Water Quality

RE: Appeals filed by Champlain Wind, LLC and Douglas E. Humphrey and Bowers Mountain, LLC, of Site Location of Development Act and Natural Resources Protection Act Denial #L-25800-24-A-N, #L-25800-TE-B-N, #L-25800-IW-C-N for Champlain Wind, LLC, in Carroll Plantation and Kossuth Township

DATE: April 2014

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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 (the Site Law), 38 M.R.S. § 484; the Site Law Rules, Chapter 375 § 14; the Natural Resources Protection Act (the NRPA), 38 M.R.S. § 480-D; and the Maine Wind Energy Act (WEA), 35-A M.R.S. §§ 3451-3455. 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 standards of the law. The WEA also narrows and further specifies the Site Law and NRPA licensing criteria relevant to the scenic character issues raised in this appeal.

Procedures for appeals before the Board are outlined in the Department’s Rules Concerning the Processing of Applications, Chapter 2 § 24 (B).

Location: The proposed project would be located in Carroll Plantation and Kossuth Township.

Procedural History and Project Description:

On October 3, 2012, the Champlain Wind, LLC submitted Site Law and NRPA applications proposing the construction of 16 Siemens 3.0 megawatt (MW) model or the Vestas 3.0 MW model turbine for a total 48 MW of generation capacity in Carroll Plantation and Kossuth Township. The proposal also included the construction of 3.0 miles of access roads, 4.0 miles of crane paths, an electrical substation, an operation and maintenance building, one permanent meteorological tower, and a 5.2 mile 34.5 kilovolt (kV) express collector line.

The Department held a public hearing on April 30, 2013 and May 1, 2013 in the Town of Lee at Lee Academy. The Department granted intervenor status to the Conservation Law Foundation (CLF)/Maine Renewable Energy Associates (MREA), Partnership for the Preservation of the Downeast Lakes Watershed (PPDLW), and David Corrigan, and they participated in the public hearing process.

The Department issued a draft order for public comment on July 24, 2013. After consideration of the comments received, the Department denied the applications on August 5, 2013.

A timely appeal to the Board was filed on September 4, 2013 by the applicant, Champlain Wind LLC, and the owners of the property on which the proposed project would be located, Douglas E. Humphrey and Bowers Mountain, LLC.

The Department received many responses to the appeal, including from the interveners PPDLW, CLF and MREA.

Environmental Issues Raised by the Appellants and Discussion:

1. The appellants argue that the WEA criteria required the Department to balance economic benefits of a project against its scenic impacts.
 - A. The appellants assert that the intent of the WEA is to facilitate development of wind energy and realize energy, economic and environmental benefits that such developments can provide. Areas of expedited permitting were delineated which would have a modified regulatory process. This included a modified scenic impact standard.

The Department agrees that this project is proposed to be located in an expedited permitting area, which was defined by the Legislature, and is therefore subject to the modified scenic impact analysis. However, the WEA does not allow wind energy developments other special considerations for approval solely due to the fact that the project would be located in an expedited permitting area. The burden of proof remains on the applicant to demonstrate that the proposed project meets all the applicable regulatory standards, specifically, the standards of the Site Law, and the NRPA.

- B. The appellants assert that the Department was required to balance the project's potential adverse scenic impacts against its potential benefits and the failure to do so was legal error. The appellants also contend that the Department did not consider the wind energy development's purpose and the context.

The Department disagrees that it committed legal error by not balancing the project's potential adverse scenic impacts against the project's potential benefits. The WEA specifies certain language of the Site Law and the NRPA but the Department finds no language in the WEA requiring a balancing of a wind energy development's adverse scenic impacts with the development's benefits. An applicant for a permit must demonstrate that the proposed project complies with each of the applicable review standards under the Site Law, and the

NRPA, as further refined by the WEA. The Department is obligated to make a determination as to whether each of the applicable review standards has been met. However, the WEA does not direct or even allow a balancing of one standard against another standard, or a balancing of a proposed project's overall benefits against the proposed projects overall adverse impacts.

The wind energy development's purpose and the context of the proposed activity must be considered in the assessment of the proposed project's potential impacts on scenic character or existing uses related to scenic character. The purpose of the proposed development is to generate energy using the wind. The context of the proposed activity, in the physical sense, is the nature of the general area surrounding the project. In a practical sense, the context includes the size of turbines generally used in grid-scale developments and the fact that such projects must be located in areas with significant wind resources. This is consistent with the Legislature's acknowledgement of the unusual nature of a grid-scale wind energy development. The Department considered the topography, level of development, and scenic quality of the surrounding area as visible from the SRSNS, the size of grid-scale turbines, and the need to locate the project where there will be wind available, in its assessment of the scenic impacts of a proposal.

- C. The appellants assert that the proposed project is supported by the host communities, landowners in the vicinity, recreational organizations, environmental organizations and businesses and the Department should have given weight to the economic interests of the host communities in determining whether the scenic impacts are unreasonable.

Support from the host community is not one of the statutory licensing criteria of the Site Law or the NRPA, nor is it a factor listed to be considered in the WEA. The Department agrees with the appellants that host communities' testimony with regard to economic benefits of the proposed project should be given consideration, however, such evidence goes to the analysis of the project's tangible benefits under the Site Law criterion pertaining to tangible benefits.

During the public hearing, Senator Bartlett and Representative Fitts testified on the issue of whether such balancing is required by the WEA. However, the former legislators' testimony does not carry the weight of law, and the Department was guided by the language of the applicable statutes.

2. The appellants contend that the Department improperly concluded that the proposed project would have an unreasonable adverse effect on scenic character or existing uses related to scenic character.
 - A. The appellants argue that the Department concluded that the impact of the project's visibility on any single lake was not unreasonable, and therefore the Department could not deny the permit applications based on adverse scenic impacts. The appellants assert that the applicant's evidence on scenic impacts demonstrated that the proposed project would not

result in an unreasonable adverse effect on the scenic character or existing uses related to scenic character of any specific SRSNS.

As part of the licensing review process, the Department retained a scenic expert, Dr. James Palmer, to assist the Department in its analysis of the technical aspects of the submittals pertaining to scenic impacts. Both of the applicant's experts and the Department's expert opined on the reasonableness of the scenic impacts of this proposed project. However, the Department is the fact finder and the entity with the legal authority to make that determination under the law. It is not the scenic expert's responsibility of either the applicant or the Department to make that determination. However, the Department is not obligated to agree with the opinion of the scenic experts, and reach the same conclusions. The Department reached its own conclusion based on its assessment of all the evidence in the record.

To assess whether the scenic impacts criteria of the Site Law, the NRPA, and the WEA have been met, the Department used the six statutory evaluation criteria related to scenic impacts, as set forth in the WEA. The Department considered the public comments in the record regarding the proposed project, and used its discretion in applying more weight to testimony from those existing uses most impacted by the proposed project.

- B. The appellants assert that since there are ten wind energy developments now operating in Maine, the Department was required to consider and give significant weight to certain evidence it submitted regarding the impact of turbine visibility on recreational users near other wind energy developments. The appellants assert that their post-construction intercept survey on Baskahegan Lake provides proof that visibility of turbines is not adversely impacting scenic quality or recreational users of that resource. The appellants assert this evidence is probative of the impacts on uses which result from this proposed development, and that these results show that wind energy developments are compatible with sporting camps.

The Department utilizes a consistent review process in the review of wind energy development applications. However, each wind energy development must be judged on its own merits against the licensing criteria, because each development contains unique characteristics of scenic character. The Department reviewed the applicant's post-construction intercept survey to gather information about the Stetson Wind development's scenic impacts, but saw limited value in extrapolating its results to a wind energy development in another location, with different topography, a different array of turbines, and different SRSNS. The intercept survey information the applicant submitted from Baskahegan Lake has many significant differences from the proposed Bowers development, so was therefore given little weight by the Department. The Department reviewed the Baskahegan Lake survey but did not give it significant weight as it is not probative of the reasonableness of the scenic impact with regard to the proposed development.

The record contains numerous letters in opposition to this project from people that were extremely frustrated with the scenic impacts of the nearby Rollins Wind project. The record

contains comments and testimony that are both negative and positive in regards to existing wind energy developments. In its analysis, the Department gave the most weight to testimony and intercept survey data that could be used to evaluate the expectations of the typical user of the SRSNS that would have visibility of the proposed Bowers Wind project.

- C. The appellants assert that the majority of evidence in opposition to this project comes from guides and commercial camp owners in the Grand Lake Stream area which is approximately 18 miles from the proposed Bowers Wind project. The appellants assert that there is little data to show that guides are using the project lakes. The appellants assert that even if there were evidence of economic harm to the guides, such economic harm cannot be a basis for a denial of a permit.

The evidence in the record regarding adverse scenic impacts of the proposed project came from many different sources. While a number of recreational and sporting camp businesses that voiced concern about the potential adverse scenic impacts of the proposed project are located further than eight miles from the proposed project, the evidence reflects notable use by the clients of these businesses of the SRSNS within eight miles of the proposed project. The camp owners on the SRSNS lakes frequently use the SRSNS lakes and they testified on the impacts the proposed project would have on their use and enjoyment of the SRSNS. The Department gave greater weight in its review to comments and testimony from people who actually use the SRSNS lakes impacted by this proposed project. The applicant's user surveys for the specific SRSNS showed that the actual users would be impacted.

In the applicant's VIA, a methodology was selected by the applicant's consultant to demonstrate the level of the project's scenic impacts by assigning values of low, medium, or high to the each of the six statutory requirements of the WEA, in order to reach an overall scenic impact rating for each SRSNS. The applicant's scenic consultant concluded that the project would not have an unreasonable adverse impact on the scenic character or existing uses related to scenic character of the SRSNS within eight miles of the project. The Department's scenic consultant disagreed with the applicant's conclusions on overall scenic impacts. Dr. Palmer concluded that eight of the fourteen SRSNS within an eight mile radius of the proposed project would sustain an overall scenic impact of 'medium' or higher. The appellant argues that one or more SRSNS would have to sustain a high adverse impact rating in order to support a conclusion that a proposed project would result in an unreasonable adverse effect on scenic character.

The Department found that the adverse scenic impacts of this proposed project were widespread in nature, and this characteristic of the scenic impacts is a factor that may be considered in the ultimate determination of the reasonableness or unreasonableness of the impacts under the Site Law, NRPA and WEA licensing criteria. Whereas a medium level of adverse impact on one SRSNS might not rise to the level of unreasonableness, a medium level of adverse impact to several SRSNS is significant. Such a level of impact on the scenic character or existing uses related to scenic character of eight SRSNS supports a finding that the proposed project would result in an unreasonable interference with existing

scenic and aesthetic uses under the NRPA and an adverse effect to existing uses and scenic character under the Site Law.

- D. The appellants assert that the Bowers Wind project is located within a working forest landscape and emphasize that the majority of the area surrounding the project is subject to the Sunrise Conservation easement, which is a working forest easement. They note that there is a 66 lot subdivision just north of Shaw Lake with houses and associated roads.

The WEA requires the Department to make a finding whether the proposed project will have an unreasonable adverse effect on scenic character or existing uses related to scenic character on the affected SRSNS. Specifically, the WEA specifies that the determination must be made as to whether 'the development significantly compromises views *from* [emphasis added] a scenic resource of state or national significance...'. Therefore, the Department and Dr. Palmer conducted their analysis of the project's potential effects on scenic character on views from the affected SRSNS. However, based on the applicant's VIA, Dr. Palmer's review, and the site visits by Department staff, the Department observed the overall lack of development that was visible from the SRSNS that were visited, which contributed to the Department's finding on scenic impacts.

3. The appellants took issue with the Department's application review process.

- A. The appellants contend that the Department's procedure in the processing of this permit application did not comply with the protections provided by the Administrative Procedure Act. They argue the Commissioner's denial of the application is legally flawed and should be reversed because the Department should have promulgated rules further specifying the scenic impact criteria under the Site Law, the NRPA and the WEA, and the Commissioner did not attend the public hearing and her designee did not prepare written findings or recommendations. The appellants also contend that the Commissioner and DEP staff should not have done a site visit without the parties and without the Department's scenic consultant in attendance.

The Department disagrees with the appellants' contention that regulations further specifying the scenic impact criteria are legally required. The Department's analysis does not include a new standard pertaining to scenic impacts. The criteria are set forth in the Site Law and the NRPA and are made more specific by the WEA for wind energy developments' review. These criteria give sufficient direction for the Department to assess the nature and the severity of impacts of wind energy developments.

The Department's Chapter 3 Rules were utilized in the conduct of the public hearing held April 30 and May 1, 2013. In accordance with the Chapter 3 Rules, the Commissioner designated a Presiding Officer for the public hearing, and Department staff assisted the Presiding Officer in gathering facts, identifying issues, analyzing evidence and making recommendations regarding licensing criteria. Department staff also wrote a draft order summarizing the information in the record, including testimony gathered through the public hearing process, for the Commissioner's consideration. The draft Department order was

issued on July 24, 2013, after the public hearing. There is neither requirement in Chapter 3 or elsewhere that the Commissioner attend the public hearing nor a requirement that a written report of the hearing be filed by the Presiding Officer.

The Department has the discretion to inspect the site of a proposed development when reviewing permit applications. Department staff conducted a site visit with the Department's scenic expert on December 13, 2012, and a site visit which included the Commissioner on May 21, 2013. The Commissioner had all of the evidence pertaining to scenic impact, including the applicant's reports and information that the Department's consultant had compiled, available to her before and after the site visit.

4. The appellants assert that the scenic impacts must be balanced against the landowner rights and the financial interests of the forestry community, that the Department improperly denied the project based on an aggregation of impacts, and that the Department created a new standard with its analysis of the impacts as a whole.
 - A. The appellants assert that the scenic impacts of the project must be balanced against landowner rights and the financial interests of the forestry community. The appellants assert that wind power is critical to the long term sustainability of Maine's working forests and the continued use of those lands by Maine's recreating public.

The Department agrees that the timber industry is important to the economy of this region. However, the Department finds no language in the WEA regarding a leasing landowner's financial benefits or the financial interests of any particular industry being balanced against potential scenic impacts of a project. The criteria that the WEA directs the Department to consider are specific to scenic character and existing uses of the SRSNS related to scenic character. The possibility of changes in nearby landowners' public access policies is not relevant to whether the construction of this project meets the scenic impact criteria under the relevant statutory provisions.

The Department considered the testimony of sporting camp owners, guides, and business owners regarding their concerns that are related to scenic character and existing uses related to scenic character of the SRSNS, as required by the WEA. Consideration to the project's economic benefits occurs under the review of the tangible benefits of the project as outlined in the tangible benefits standard of the WEA, not under the scenic impact criteria. The proposed project would provide tangible benefits to the neighboring communities and working forest landowners, but the project would also cause unreasonable adverse effects on scenic character, and these two standards must be reviewed separately and independently.

The Department reviewed the information in the record regarding the project's proposed tangible benefits and the project's potential impacts to scenic character. The Department made a positive finding regarding the project's tangible benefits, in addition to the negative finding on impacts to scenic character.

- B. The appellants assert that the Department improperly denied the project based on an aggregation of impacts which they argue is not allowed under the applicable laws. The appellants assert that the WEA states that the Department must consider the scenic impact on each single resource independently, not as a collection of resources. They claim that the Department found that each individual SRSNS met the scenic impact criteria, but then the Department improperly considered the overall impacts on the SRSNS as a whole.

The Department disagrees that it aggregated or created a new category of SRSNS in their denial. The Department discusses on page 23 of the August 5, 2013 order that:

“...the Department concludes that since a majority of the SRSNS (eight lakes out of the fourteen SRSNS, or 57%) received an overall scenic impact of Medium, and the Department concludes this is a *significant impact* [emphasis added] on SRSNS by the proposed project, then that must be factored into the Department’s analysis. The Department, however, further considered evidence in the record with regard to whether the proposed project would have an unreasonable adverse effect on scenic character and existing uses related to scenic character.”

The Department did not conclude that the proposed project would cause an unreasonable adverse effect solely on the basis of there being eight SRSNS that would sustain a medium level of overall scenic impact.

The WEA requires the Department to consider the number and extent of turbines visible from a SRSNS. There are 14 SRSNS within eight miles of the project, nine of which have views of the project. Six of the 14 SRSNS are connected by water and an additional six are connected by a short portage. The applicant’s user surveys demonstrate that users were traveling from one resource to another. The evidence in the record reflects that the only public boat launch facility to Junior Lake is from a boat launch on either Bottle Lake or Scraggly Lake. Therefore, the Department finds that the boating users of Junior Lake would have to travel through Bottle Lake or Scraggly Lake and would see views of the proposed project from multiple SRSNS. In addition, the applicant’s user survey also showed that 49% of the users had used at least two lakes on the day they were interviewed, indicating usage of the lakes. The evidence also reflects that there is a loop canoe/kayak trail throughout many of these lakes with primitive campsites.

- C. The appellants assert that the Department created a new standard with its analysis of the impacts as a whole and that this analysis was arbitrary. They also contend that the alleged new standard is unconstitutional due to vagueness.

The applicant’s VIA utilized a methodology for evaluating the project’s effects on scenic character by assigning values of low, medium or high to each of the WEA’s six statutory requirements. The Department and Dr. Palmer supported this approach, but disagreed with the applicant’s conclusions. There is other credible evidence in the record pertaining to adverse scenic impacts to support the eight SRSNS receiving overall scenic impact ratings of ‘medium’. The additional evidence in the record regarding scenic impacts, specifically,

the applicant's user surveys, the Department site visits, and the significance of the SRSNS, support the conclusion that the scenic character and existing uses related to scenic character of eight SRSNS would sustain medium adverse impacts.

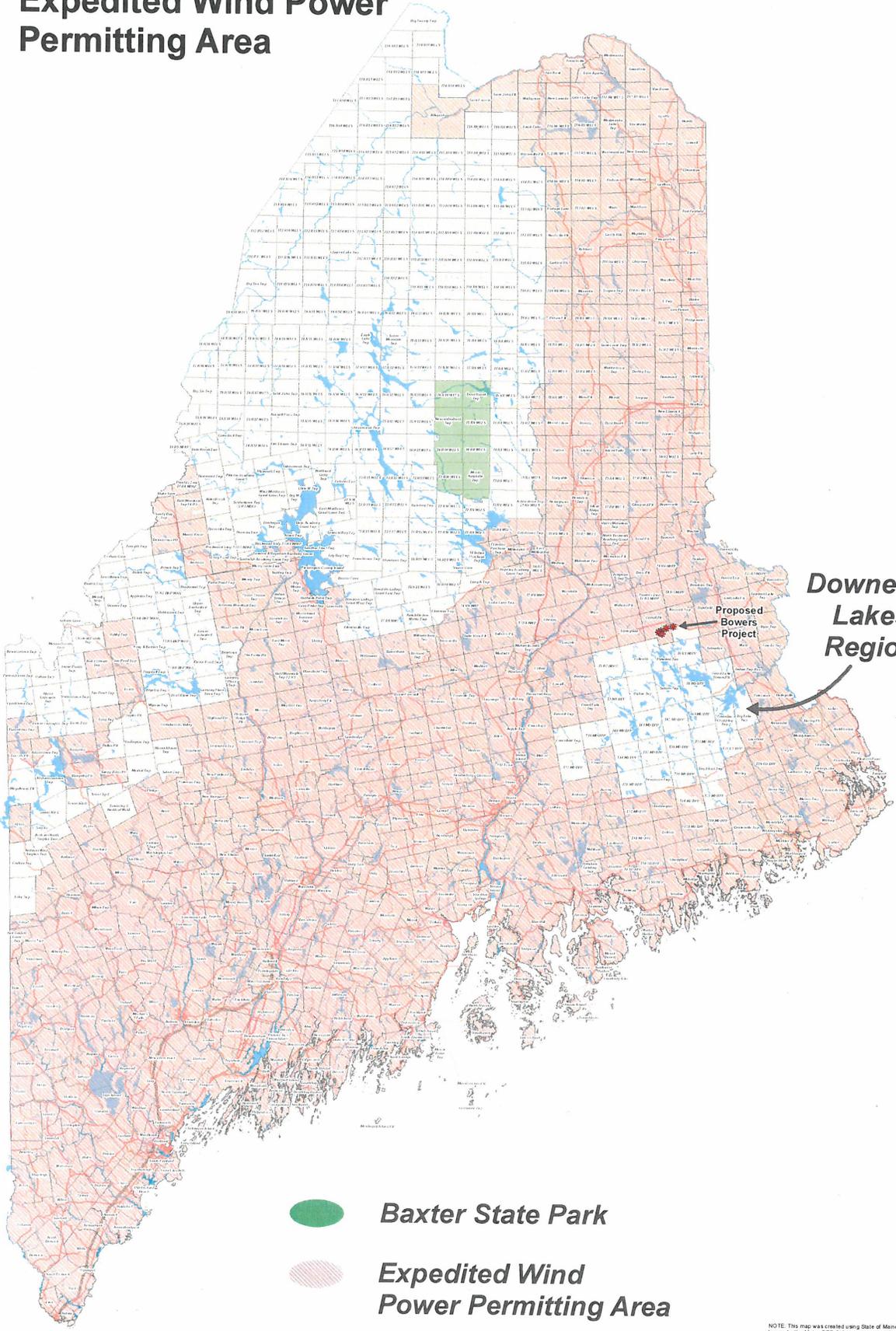
The Department considered the review methodology created by the applicant's own scenic expert. This methodology was supported by the Department's consultant, Dr. Palmer, but this methodology by itself was not used to guide the Department in its final determination.

Department Recommendation: The Department recommends that the Board deny the appellants' appeal and affirm the Department's decision to deny the proposed wind energy development in Department Order #L-25800-24-A-N, #L-25800-TE-B-N, and #L-25800-IW-C-N.

Estimated Time of Presentation: 1 hour

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Expedited Wind Power Permitting Area

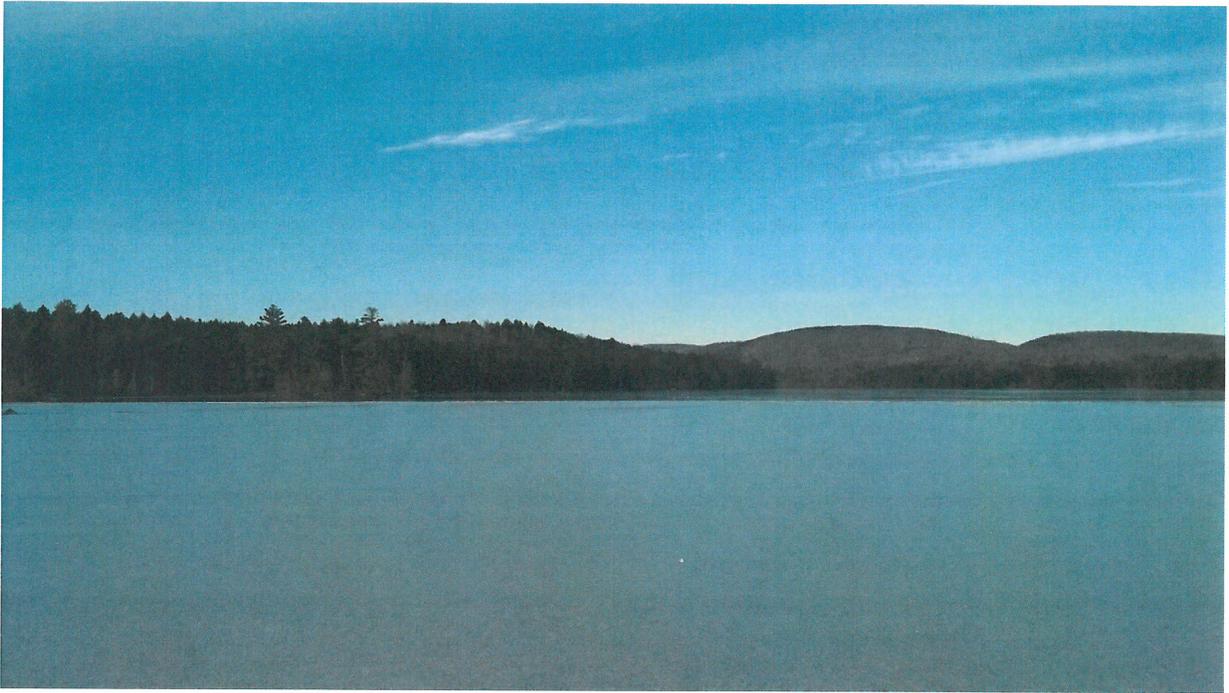


**Downeast
Lakes
Region**

**Proposed
Bowers
Project**

-  **Baxter State Park**
-  **Expedited Wind Power Permitting Area**

NOTE: This map was created using State of Maine GIS base layers, by the Maine DEP GIS Unit, Augusta, ME. The content and layout were inspired by map figures found on pages 11 and 49 of the pre-filed testimony of the "Partnership for the Preservation of the Downeast Lakes Watershed", March 2013. This map is to be used for reference purposes only and does not represent authoritative locations of displayed features.
Map Date: April 8, 2014



Site Visit - December 13, 2012
Shaw Lake



Site Visit – May 21, 2013
Pleasant Lake