

## **Licensee's Response to the Appeal**

STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

BLUE SKY WEST, LLC &	)	
BLUE SKY WEST II, LLC	)	
Bingham & Mayfield Twp., Somerset County	)	LICENSEES' RESPONSE TO
Kingsbury Plt., Abbot, and Parkman,	)	APPEAL BY FRIENDS OF
Piscataquis County	)	MAINE'S MOUNTAINS
BINGHAM WIND PROJECT	)	
L-25973-24-A-N (approval)	)	
L-25973-TG-B-N (approval)	)	

Blue Sky West, LLC and Blue Sky West II, LLC (collectively "BSW" or "Licensee") provide the following response to the appeal by Friends of Maine's Mountains (FMM) of the Department's approval of the Bingham Wind Project (Findings of Fact and Order, L-25973-24-A-N, L-25973-TG-B-N ("Order")).

**BACKGROUND**

BSW has proposed development of an expedited wind energy development located in Bingham, Moscow, Mayfield Township, Kingsbury Plantation, Abbot, and Parkman in Somerset and Piscataquis Counties, Maine (the "Bingham Project" or "Project"). The Project consists of up to 62 turbines located in Bingham, Kingsbury Plantation and Mayfield Township, permanent and temporary meteorological towers, an operations and maintenance building located in Mayfield Township, electrical collector lines among the turbines (the majority of which will be buried along Project roads) and collector substation, and an approximately 17-mile 115 kV generator lead line connecting the Project to an existing CMP substation in Parkman.

Application, Section 1; Order at 1-2. The Department conducted a comprehensive review of the Project and sought input from its sister review agencies including Maine Inland Fisheries and Wildlife (IF&W), Maine Natural Areas Program (MNAP), Maine Historic Preservation

Commission (MHPC), and the Maine Land Use Planning Commission (LUPC). The Department also retained outside experts to review the sound and scenic impacts associated with the Project. The Department has incorporated the conclusions and recommendations of its sister review agencies and outside reviewers into the final approval for the Project and, in some instances, has required more conservative measures than recommended by such experts in order to minimize potential impacts. See Order at 20.

On July 22, 2013, the Department held the first of two public meetings on the Project. The purpose of the meeting was to allow members of the public to provide comment on the Project. On January 29, 2014, the Department held its second public meeting on the Project. On August 27, 2014, the Department issued a draft approval of the Project and sought public comment on the draft through September 4, 2014. The Department issued its final approval for the Project on September 8, 2014, and included in its approval conditions related to sound, wildlife, financial capacity, and decommissioning.

Throughout the review process FMM has had an opportunity to comment on the Project and in those instances where BSW was aware of the comments, it provided responsive information. See, e.g., January 27, 2014 BSW Response to FMM's Comments on Bingham Wind Project.

### SUMMARY

As shown below, FMM has filed an appeal that is totally devoid of specific objections to findings made by the Department or evidence that contradicts the conclusions reached by the Department. Instead, FMM has made generalized policy objections and identified areas of disagreement, but has not tied its objections to specific review criteria that the Department must consider in its review of the Project and the Board must evaluate in an appeal of the

Department's decision. Nor has FMM identified evidence in the record that demonstrates the Department erred in its conclusion. Instead, FMM suggests that it will present such evidence at a later date in the course of a public hearing on the appeal. The applicable rules, however, require FMM to identify its specific objections in its appeal, including the basis for its objections and evidence that supports its objections. FMM has not done so and therefore its appeal should be denied.

Moreover, the Department's consideration of the general topics identified by FMM in its appeal was thorough, reflects input not only from BSW but from the Department's sister review agencies and outside experts, and is tied to the standards that govern review of expedited wind energy developments. FMM has not identified any legal error (to the contrary it advocates for implementation of new review standards that go beyond the scope of existing law) in the Department's review nor identified evidence that undermines the appropriateness of the Department's conclusion that the Bingham Project satisfies the applicable review criteria. Accordingly, BSW respectfully requests that the Board deny FMM's appeal.

## ARGUMENT

### I. FMM's Request for a Public Hearing Should be Denied

FMM requests that the Board hold a public hearing on the appeal, Appeal at 6, but has failed to comply with the procedural requirements for requesting a public hearing or to demonstrate that a public hearing is warranted, and therefore its request should be denied.

If a public hearing on an appeal is requested the appellant "**must** provide an offer of proof regarding the testimony and other evidence that would be presented at the hearing." 06-096 CMR 002.24.B.4 (emphasis added). The offer of proof "**must** consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any expert or

technical witnesses would testify.” Id. (emphasis added). FMM states only that it “will present testimony in support of the issues raised above, and will offer rebuttal testimony based on testimony of the Applicant and its experts.” Appeal at 6. It has not provided an offer of proof or described the evidence it would present. FMM has failed to comply with the requirements for requesting a public hearing and the request should be denied on that basis alone.

Even if the Board were to consider the request, FMM has failed to demonstrate that the criteria for holding a public hearing have been met. The test for holding a public hearing generally is whether there is credible conflicting technical information regarding a licensing criterion and it is likely that a hearing would assist the decisionmaker in understanding the evidence. See 06-096 CMR 002.7.B. FMM has not identified any conflicting technical information on a licensing criteria nor has it demonstrated how a public hearing would be of assistance to the Board in understanding the evidence. Appeal at 6. In fact, the appeal is silent on both items. Moreover, where, as here, the Department has undertaken a comprehensive review of the Project, obtained input from its sister review agencies and outside experts, held two public meetings to obtain input from the public, and considered comments from the public, including FMM, there is no basis for the Board to hold a public hearing presumably for the sole purpose of re-evaluating the evidence developed and considered during the Department’s review of the Project.

Accordingly, because the licensing record was fully developed during the Department’s review and FMM has failed to comply with the requirements for requesting a public hearing or demonstrate that a public hearing is warranted, BSW respectfully requests that the request for a public hearing be denied.

## II. FMM's Objections Concerning Financial Capacity are Unfounded

FMM has not articulated a specific objection regarding BSW's demonstration of financial capacity nor identified any way in which the Department's order is inconsistent with the applicable review criteria. Instead, FMM's objection seems to be that "a more exhaustive and rigorous financial capacity test is necessary." Appeal at 3. The Department must apply existing law in its review of the Project, however, and to the extent that FMM is requesting that the Board apply a different test than what currently exists (or that the Department applies to all forms of Site Law developments), the claim must fail. E.g., Valente v. Bd. of Envtl. Prot., 461 A.2d 717 (Me. 1983) (holding that Department may not impose standards that are not present in the Site Law). Moreover, as summarized below and as the Department correctly found, the Applicant has demonstrated compliance with the existing requirements related to financial capacity.

The financial capacity standard of the Site Law requires the developer to demonstrate that it has the financial capacity "to develop the project in a manner consistent with state environmental standards and with the provisions of the [Site Law]." 38 M.R.S.A. § 484(1). BSW has submitted substantial evidence of its compliance with this standard. Specifically, BSW submitted First Wind's balance sheet showing it had more than \$2.1 billion in assets, a letter from a bank indicating its interest in and ability to provide financing for the Project, and a summary of First Wind's success in attracting capital and its track record of financing more than 16 wind energy projects across the country. Application, Section 3. This evidence is more than sufficient to demonstrate that BSW has the ability to develop the Project consistent with environmental standards and the terms of its permits. E.g., Martha A. Powers Trust v. Board of Environmental Protection, 15 A.3d 1273, 1279 (Me. 2011) (finding that First Wind had

demonstrated compliance with financial capacity requirement for the Oakfield Project based on a commitment from First Wind to fund the project and a letter from a bank indicating it was likely to provide debt financing).

At the time this application was filed, First Wind had more than 16 operating projects with an installed capacity of 980 MW. Application, Section 3 at 3-2. First Wind had successfully financed those projects, *id.* at Exhibit 3A, and FMM has not and cannot cite to a single example of First Wind defaulting on its financial obligations or a single example of First Wind not having the financial ability to develop its projects consistent with environmental and other regulatory standards. Instead, FMM raises generalized and entirely unfounded claims concerning First Wind's financial strength, and questions whether it is a going concern (it is).<sup>1</sup> All of FMM's challenges regarding First Wind's financial strength are belied by First Wind's actual operating record and success in attracting capital and, in any event, are addressed fully by the requirement to provide evidence of financial capacity prior to commencement of construction.

Specifically, the Department is requiring BSW to submit evidence that it has secured financing for the Project prior to commencement of construction. Order, Findings at 4-5, Special Condition A at 41. 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

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<sup>1</sup> FMM submitted comments challenging First Wind's financial strength on September 4, 2013, after the draft permit was issued. First Wind only learned of and obtained those comments after this appeal was filed. Because all of the objections are mooted by the requirement to demonstrate final financing prior to commencement of construction, BSW is not providing a point by point response to the objections raised in that letter. The objections are, however, a variant on the same objections raised by opponents to other First Wind projects. In each instance, the Board and/or the Law Court has rejected the claims regarding financial capacity and upheld the Department's conclusion that the applicant satisfied the financial capacity requirements of the Site Law.

that it has the capacity to construct the project. 38 M.R.S.A. § 484(1). This condition renders FMM's claim regarding First Wind's financial strength moot.<sup>2</sup>

Additionally, FMM's objections regarding financial capacity are a variant of almost identical claims that have been raised and rejected in other First Wind projects. For example, in the Oakfield Project opponents raised objections based on the unsupported belief that First Wind's financial condition was "precarious" and the company was not a going concern. The Board and the Law Court rejected the claim and concluded that the evidence submitted by the applicant supported the Department's findings on financial capacity. Findings of Fact and Order, L-24572-24-A-Z, L-24572-TF-B-Z (June 11, 2010) at 3-4; Martha A. Powers Trust v. Bd. of Env'tl. Prot., 2011 ME 40, ¶¶ 15-16, 15 A.3d 1273, 1279; see also Findings of Fact and Order, L-24572-24-C-N, L-24572-TF-D-N, L-24572-IW-E-N, L-24572-24-F-N, L-24572-TF-G-N (April 11, 2012) at 12-13 (Board rejects financial capacity challenge to amended Oakfield Project). In the Hancock Project opponents argued that First Wind did not meet the financial capacity requirement in light of evidence of an initial public offering that had been withdrawn and alleged significant debt and negative cash flow. The Board rejected those claims and upheld the Department's finding that the applicant had complied with the financial capacity requirement of the Site Law based on evidence similar to what has been provided here. Findings of Fact and Order on Appeal, L-25875-24-C-Z, L-25875-TF-D-Z (December 6, 2013) at 5-6 (rejecting claims related to financial capacity). In each case, First Wind submitted similar evidence of financial capacity and the Board upheld the Department's findings regarding financial capacity.<sup>3</sup> It should do so here as well.

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<sup>2</sup> FMM appears to mistakenly believe that site work may commence prior to a demonstration of compliance with the requirements of the final financing condition. Appeal at 3.

<sup>3</sup> These prior decisions are included for the convenience of the Board.

### III. FMM's Objections Regarding Scenic Character Have no Basis in Existing Law

FMM's objections to scenic character are premised on the argument that existing law should be modified to take into account cumulative impacts associated with development of multiple wind power projects. As stated above, however, the Department (both the Commissioner and the Board) must apply existing law and cannot apply FMM's proposed changes to existing law.

The Wind Energy Act articulates a specific standard for assessing scenic impacts. It requires the Department to determine whether the development "significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character or existing uses related to scenic character of the [resource]." 35-A M.R.S.A. § 3452(1). The Act defines scenic resources of state or national significance, *id.* at § 3451(9), and identifies specific criteria that the Department must consider when applying the scenic standard. *Id.* at § 3452(3). Of particular relevance here, the Legislature limited the Department's review of project visibility to eight miles from the generating facilities. *Id.* Thus, there is no basis in existing law for evaluating the impact of all wind projects that might be visible from any location along the AT, as FMM suggests. See Appeal at 3-4.

Instead, and consistent with existing law, BSW evaluated the visibility of the Bingham Project on statutorily defined scenic resources within eight miles of project turbines. Order, Section 6.A at 12-15. The Department's third-party expert undertook a similar assessment and concluded that the overall scenic impact was none (for seven scenic resources), low (for four resources) and medium (for one resource). *Id.*, Section 6.B at 16-17. The Department concurred with the conclusions of its scenic expert and found that the scenic standard was met. *Id.*, Section

6.C at 17-18.<sup>4</sup> There is simply no legal basis for the Department to evaluate the type of cumulative impact that FMM's raises in its appeal.<sup>5</sup>

IV. FMM has not Raised any Specific Objections Concerning Wildlife and Fisheries

FMM states that "it will challenge" the findings of eagles and bats, but has not provided any specific evidence or argument in its appeal regarding these findings. Appeal at 5. Instead, FMM appears to believe that it may submit evidence in support of its appeal for the first time during a public hearing on the appeal, which it has requested. *Id.* at 6. The applicable rules, however, require that the appeal include the specific findings objected to and the basis for the objection. 06-096 CMR 002.24.B. FMM has not identified the specific findings it objects to nor, importantly, the basis for any objection, and therefore their claims regarding wildlife and fisheries should be rejected.

Moreover, FMM's general assertion that the "presence of bald eagles requires a higher level of safety" does not provide a basis for setting aside the Department's conclusion regarding eagles. The Applicant undertook extensive surveys for raptors (including bald and golden eagles) in accordance with guidelines established by and consultation with U.S. Fish and Wildlife Service (FWS) and IF&W. See Application, Section 7, Exhibits 7B, 7-C3 and 7-D1. There was no evidence of golden eagles nesting in the Project area and the closest bald eagle nest

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<sup>4</sup> FMM erroneously asserts (without any record citation) that the AT lean-to-site on Bald Mountain Pond "will be dominated by turbines more than 50% the height of the ridge upon which they will sit"). Appeal at 4. In fact, there is no Project visibility from the lean-to site or from the nearby shoreline on Bald Mountain Pond. Up to three turbines are barely visible within eight miles from a small location on Bald Mountain Pond that is not near the AT lean-to-site. See Application Section 30, Visual Impact Assessment (VIA) at 80 (viewshed map), 84 (no visibility from the lean to site) and Exhibit 16 (visual simulation). In fact, the turbines are so difficult to see from Bald Mountain Pond that during surveys conducted for the Project respondents asked the interviewer to point out the location of the turbines in the simulations because they could not readily identify them. Application Section 30, VIA, Exhibit 30B at 11.

<sup>5</sup> BSW did evaluate cumulative impacts associated with other wind projects that might be visible from statutorily defined scenic resources. Application, VIA § 4.5 at 102. There are no other past, present or reasonably foreseeable wind power projects that would be visible from any scenic resource of state or national significance located within eight miles of the Bingham Project. *Id.*

is approximately five miles away. Id., Order at 21. IF&W reviewed the results of the surveys and concluded that there was no evidence that golden eagles are nesting in the Project area and only a small number of transients may visit the area in any given year, and that the Project would not impact the species. Order at 21. Likewise, IF&W concluded that based on the abundance and distribution of bald eagles and distance to the nearest nest, it did not anticipate adverse impacts to the species. Id. FMM has not identified any evidence that undermines the comprehensive work done by the applicant and the careful review undertaken by IF&W of that work, or the conclusions reached based on the survey results and other known data on the potential interaction of raptors and wind projects.<sup>6</sup>

V. FMM's Objections to Decommissioning are Without Merit

FMM makes a generalized objection to BSW's assessment of decommissioning costs and salvage value that were included in the overall decommissioning estimate, but fails to identify any specific deficiencies in those estimates. Appeal at 5. The decommissioning cost estimates were developed by a Maine consultant with significant wind power project experience and information gathered from contractors with experience building wind projects in Maine. Application, Section 29, Exhibit 29A and updated estimates dated August 20, 2013. Sewall based its budget on the civil and electrical site plans for the Project, discussions with contractors familiar with this type of construction, their experience with other wind projects and their professional judgment. Id. Sewall provided a breakdown in its estimate for the major components of the decommissioning process, and the budget includes a contingency of 10% of

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<sup>6</sup> FMM references without any record citation "anecdotal hiker observations of nesting golden eagles at such nearby mountains as Mosquito and Little Kineo." Appeal at 5. There is no evidence to substantiate the alleged anecdotal observation and, in any event, Mosquito is approximately 14 miles and Little Kineo is approximately 38 miles from the closest Project turbine.

the total cost as an additional measure of conservatism. Id. Scrap values were based on discussions with local dealers. Id.; February 7, 2014 Letter from Sewall to First Wind.

During the review process, FMM submitted comments objecting to the decommissioning budget, and BSW provided a comprehensive response to those objections. See January 27, 2014 BSW Submission Responding to FMM's Comments. BSW provided additional documentation and follow-up on the scrap values, which had been challenged by FMM. See February 7, 2014 Letter from Sewall to First Wind. The material submitted by BSW demonstrates that the analysis of decommissioning costs, including salvage value, is objective and well-supported. Moreover, in its appeal FMM has failed to identify any evidence to the contrary or specify any particular shortcomings in the information submitted by BSW and relied on by the Department in its decision. Accordingly, its decommissioning claims should be rejected.

VI. FMM's Objections Regarding Tangible Benefits are Generalized Policy Issues and are not Tied to Specific Department Findings

FMM raises a number of generalized policy objections on tangible benefits that are not specific to any Department finding or licensing criterion. Specifically, the Wind Energy Act states that the review agency "shall presume that an expedited wind energy development provides energy and emissions-related benefits" described in the Act, 35-A M.R.S.A. § 3454, and therefore an applicant is not required to demonstrate the existence of such benefits in individual applications. Nonetheless, BSW provided information on the energy and environmental benefits of the Project and responded to specific claims raised by FMM during the review process. See January 27, 2014 BSW Submission Responding to FMM's Comments. FMM's generalized policy objections regarding tangible benefits are outside the scope of the Department's review of the Project and should be rejected.

Moreover, BSW has demonstrated and the Department correctly found that the Project will “provide significant tangible benefits” as that term is defined in the Wind Energy Act. Specifically, to demonstrate that a project provides significant tangible benefits the applicant must establish a community benefits package valued at no less than \$4,000 per turbine per year. 35-A M.R.S.A. § 3454(3), 38 M.R.S.A. § 484(1). BSW established community benefit agreements with the Towns of Bingham, Moscow, Abbot and Parkman and Kingsbury Plantation, in a combined amount of \$5,530 per turbine per year for 20 years. Order at 39. FMM has not challenged the adequacy of the Community Benefits Packages. See Appeal at 5-6.

FMM’s complaints about tangible benefits are general policy objections and do not relate to specific criteria the Department must consider in its review of the Project. For that reason, the tangible benefits claims should be rejected.

#### CONCLUSION

For the reasons set forth above, FMM has failed to identify specific findings that it objects to or, importantly, specify the basis for such objections, as the rules require. Moreover, the Department’s findings in each of the areas raised in FMM’s appeal are well supported by substantial and credible record evidence, including information provided by sister review agencies and independent experts, and should be upheld by the Board. Accordingly, BSW respectfully requests that the Board uphold the Department’s Order and deny the appeal.

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On February 22, 2010, the appellants filed timely appeals of the Department's decision to the Board, and a request for a public hearing on the noise issue. Brian Raynes joins and adopts the appeal filed by the Powers Trust. The appeal filed by Daniel Koerschner is based solely on the issue of impact to property values, which is also raised in the Powers Trust appeal.

2. STANDING:

The appeals were filed in the names of a family trust and two individuals who own property in Oakfield and the adjoining T4 R3 WELS, all in the vicinity of the Oakfield Wind Project.

The Martha A. Powers Trust owns property in Oakfield, Island Falls, and T4 R3 WELS, and controls the eastern portion of Pleasant Lake in T4 R3 WELS where it maintains family camps. The Board finds that the Martha A. Powers Trust is an entity with standing as defined in Chapter 2, Section 1(B) and may bring this appeal before the Board.

Brian Raynes and Daniel Koerschner are owners of property in the Town of Oakfield and described specific concerns regarding the Oakfield Wind Project. The Board finds that these individuals have demonstrated standing as aggrieved persons as defined in Chapter 2, Section 1(B) and may bring this appeal before the Board.

The trust and individuals listed above will collectively be referred to as "appellants" or by their individual names. The findings set forth above are made only in regard to the appellants' administrative standing before this Board. Since the identified appellants properly demonstrated their standing, the Board proceeds to the merits of the appeals.

3. FINDINGS & CONCLUSIONS OBJECTED TO:

The appellants object to the Department findings and conclusions relating to the following:

- A. Financial capacity
- B. Noise
- C. Scenic character
- D. Decommissioning

4. BASIS FOR APPEAL:

The appellants assert that the Department erred in its findings that:

- A. The applicant demonstrated adequate financial capacity to comply with Department standards;
- B. The applicant made adequate provisions to ensure that noise standards pursuant to the Site Location of Development Rules, Chapter 375(10) were met and that noise from the proposed project will not result in unreasonable adverse effects on existing uses and the natural environment;

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- C. The proposed project will not have an unreasonable adverse effect on the scenic character of scenic resources of state or national significance; and
- D. The applicant demonstrated an adequate decommissioning plan and a means to execute the plan.

The appellants also assert that the proposed wind energy development will have an unreasonable adverse impact on the value of their property.

5. REMEDY REQUESTED:

The appellants request that the Board reverse the January 21, 2010, Department decision approving a permit for the construction of the Oakfield Wind Project. The appellants further request that the Board declare that Chapter 375, Section 10 is inadequate for protection against the noise impacts from wind power projects, hold a public hearing on the noise issue, and review the impacts of noise for this project without the limitations of those rules.

6. REQUEST FOR A PUBLIC HEARING:

The permit applications were filed on April 7, 2009 and the Department received no request that a public hearing be held. However, due to the amount of public interest in wind projects in general, and in accordance with 38 M.R.S.A § 345-A(5), the Department conducted a public meeting in the Town of Oakfield to provide all interested parties an opportunity to provide information to or ask questions of the Department.

During the nine month period of the review of the applications, the appellants had the opportunity to present information and argument to the Department and availed themselves of that opportunity through submittal of comments and documents during the review process. Appellants submitted information related to specific design details of the project, financial condition of the applicant, noise impacts of the project, scenic issues, decommissioning plans, and the impact of wind power projects on property values.

Evidentiary public hearings are discretionary in appeals to the Board. The Board finds that the record in these applications is adequately developed with regard to the statutory criteria, and that the appellants did not demonstrate that a public hearing is warranted due to conflicting technical evidence on a licensing criterion or in order for the Board to understand the evidence.

7. DISCUSSION AND RESPONSE TO APPEAL:

A. FINANCIAL CAPACITY:

Appellants Powers Trust and Brian Raynes contend that the applicant has not demonstrated adequate financial capacity to construct the proposed wind energy development. The appellants submitted opinions which allege that the applicant's

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financial condition is precarious, and argue that the applicant should have been required to submit additional evidence of financial capacity.

The Site Law requires that an applicant demonstrate financial capacity to develop the project consistent with State environmental standards and the provisions of the Site Law. The Site Law allows a permit to be issued with a condition that prior to any alterations to the site, the permit holder provide evidence of a line of credit or a loan by a financial institution authorized to do business in Maine or evidence of some other form of financial assurance allowed under the Board's regulations. 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 letter from HSH Nordbank (HSH), dated March 13, 2009, which states that HSH has arranged over \$900 million in financing for First Wind Holdings, LLC (First Wind), including an approximately \$267 million turbine supply loan a portion of which was used to purchase the turbines for the Oakfield project. According to the application, the applicant is a wholly-owned project subsidiary of First Wind. The March 13 letter also states that HSH is a likely candidate to provide financing for the remainder of the Oakfield project, subject to various reviews and approvals.

In its January 21, 2010, decision 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 that the applicant has been granted a line of credit or a loan by a financial institution authorized to do business in this State, or evidence of another form of financial assurance determined by the Department to be adequate pursuant to Chapter 373(1).

The Board has considered the information in the permitting record, including the appeals, the applicant's response to the appeal, and all other information submitted regarding the financial capacity of the applicant. The Board finds that the evidence submitted by the applicant adequately meets the Site Law standard for financial capacity provided that the applicant submits to the Department for review and approval final documentation of financial capacity prior to construction.

**B. NOISE:**

Appellants Powers Trust and Brian Raynes contend that the Department erred in its conclusion that the noise generated from the proposed project will not have an unreasonable adverse effect on the surrounding environment, based on the following contentions:

- A. The sound model used to develop the sound level study for the proposed project was not designed for wind turbines;
- B. The sound level study submitted by the applicant failed to use line source calculations;

- C. The applicant's sound level study failed to adequately consider short duration repetitive sounds (SDRS) and apply a 5 dBA penalty;
- D. The Stetson Wind compliance report which the applicant submitted as additional evidence of the effectiveness of their noise modeling was flawed;
- E. The Department failed to consider the health effects of nighttime noise; and,
- F. The Department should not have allowed the applicant to rely on noise easements without requiring proof of disclosure of potential health effects.

To assess whether a proposed project has made adequate provision to control excessive environmental noise, the Department has adopted regulations which provide acceptable noise level limits in various settings. Chapter 375 §10 sets forth hourly sound pressure level limits ( $L_{Aeq-Hr}$ ) at facility property boundaries and at nearby protected locations. Chapter 375 §10 (G) (16) defines protected locations as "any location accessible by foot, on a parcel of land containing a residence or approved subdivision...." In addition to residential parcels, protected locations include but are not limited to schools, state parks, and designated wilderness areas.

The hourly equivalent sound level resulting from routine operation of a development is limited to 75 dBA at any development property boundary as outlined in Chapter 375 § 10 C (1) (a) (i). The hourly equivalent sound level limits at any protected location varies depending on local zoning or surrounding land uses and existing (pre-development) ambient sound levels. At protected locations within commercially or industrially zoned areas, or where the predominant surrounding land use is non-residential, the hourly sound level limits for routine operation are 70 dBA daytime (7:00 a.m. to 7:00 p.m.) and 60 dBA nighttime (7:00 p.m. to 7:00 a.m.). At protected locations within residentially zoned areas or where the predominant surrounding land use is residential, the hourly sound level limits for routine operation are lower, 60 dBA daytime and 50 dBA nighttime. However, where the daytime pre-development ambient hourly sound level is equal to or less than 45 dBA and/or nighttime ambient hourly sound level is equal to or less than 35 dBA, lower limits known as "Quiet Location" limits apply. For such Quiet Locations, the hourly sound level limits for routine operation are 55 dBA daytime and 45 dBA nighttime. In all cases, nighttime limits at a protected location apply at the property line of a protected location or up to 500 feet from sleeping quarters when the property line is greater than 500 feet from a dwelling.

The applicant submitted a sound level study entitled "Sound Level Assessment", completed by its noise expert, Resource Systems Engineering (RSE), dated April 2, 2009. The sound level study was conducted to model expected sound levels from the proposed Oakfield Wind Project and to compare the model results to operational standards pursuant Chapter 375 (10), the Site Law Rules. In recognition of the rural nature of the site, the applicant opted to forgo pre-development monitoring and apply the quiet limits of 55 dBA daytime and 45 dBA nighttime at all nearby protected locations pursuant to Chapter 375 §10 (H) (3) (1).

The applicant's acoustic model was developed using the CADNA/A software program performing calculations in accordance with the generally recognized standard for estimating the propagation of sound in the environment promulgated by the International Standards Organization (ISO) as Chapter 9613-2, *Attenuation of Sound During Propagation Outdoors*. CADNA/A uses three dimensional terrain, proposed wind turbine characteristics, locations, and environmental factors to calculate outdoor sound propagation from the wind turbines. RSE calculated sound levels for simultaneous operation of the General Electric 1.5 wind turbines at 36 potential turbine locations. (While the applicant proposes to erect 34 turbines the plans include two alternate turbine locations.) Calculations were based on the apparent sound power spectrum produced at full sound power provided by the manufacturer. The wind turbines were treated as point sources at the hub height of 80 meters above base/grade. The sound level modeling that was conducted by RSE included the following assumptions: all wind turbines operating at full sound power output, downwind conditions in all directions simultaneously, moderate ground absorption, no attenuation of sound by foliage, and the addition of a 5 dBA uncertainty factor applied to the turbine manufacturer's specifications (uncertainty factor of 2 dBA based on GE Energy specifications and measurement by RSE of similar turbines during full operation, and an additional 3 dBA to allow for the accuracy of the sound level modeling calculations and measurements). The results of the acoustic model were plotted on a plan that shows residential parcels in the vicinity of the project where the most restrictive sound level limits apply in relation to the predicted sound output expected to be generated by the facility.

The results of the applicant's sound level study indicate that sound levels at full sound power production of the Oakfield Wind Project will be in compliance with the 45 dBA hourly equivalent nighttime limit at the closest protected locations, and since the predictions are for less than or equal to 45 dBA at all protected locations at all times, those same results indicate that sound levels will be in compliance with the 55 dBA hourly equivalent daytime limit.

The Department retained the services of a third party noise expert, EnRad Consulting (EnRad), to review the sound level study that was submitted by the applicant and the evidence and arguments submitted by others. In comments dated December 18, 2009, EnRad stated that the Oakfield Wind Project noise assessment is reasonable and technically correct according to standard engineering practices and the Department Regulations pertaining to control of noise, Chapter 375 (10).

The appellants contend that the applicant should have used a line source analysis instead of a point source analysis in its noise assessment. A line source is defined as a source of noise that emanates from a linear geometry and is comprised of multiple point sources. Roadway noise is an example of a linear source of noise. A point source is a single localized source. During the Department's review process, interested parties contracted E-Coustic Solutions, a noise assessment firm, to review the applicant's sound level study. The appellants point to this review in support of their argument. Appellants assert that if

the applicant's sound level study had used line source calculations rather than point source calculations, then the Department's noise limit would be exceeded.

Enrad has reviewed the appellants' arguments and commented that point source analysis is appropriate for a wind energy project such as this. Enrad commented in part that point source models appropriately represent sound pressure levels, tonal, and short duration repetitive sound for the proposed wind turbine project for the purpose of MDEP compliance. The Board has reviewed this argument in the recent Record Hill Wind Project appeal and found that the use of a point source analysis was acceptable in that licensing decision. The Board finds that the applicant's point source analysis is an acceptable method of analyzing potential noise impacts for this project.

The appellants argue that the applicant's sound level study did not account for potential short duration repetitive sounds (SDRS). In a review of the applicant's sound level study by E-Cooustic Solutions opines that many current studies of SDRS from wind turbines show that SDRS are commonly in the range of 5-6 dBA and can frequently exceed 10-15 dBA.

Chapter 375 (10) requires a penalty of +5 dBA to be incorporated into a sound level prediction model if SDRS are predicted to occur. SDRS are a sequence of sound events, each clearly discernible, that cause an increase of 6 dBA or more in the sound level observed before and after an event. SDRS events are typically less than 10 seconds in duration and occur more than once within an hour. SDRS is commonly associated with the thumping noise associated with operation of turbine blades. The applicant's analysis of the sound to be generated by the Oakfield Wind Project concluded that operations of the proposed project are not expected to result in the 6 dBA increase required to be SDRS as defined in Chapter 375 §10(G)(19). In its review EnRad concurred with this analysis. The Department is also requiring the applicant to conduct compliance monitoring to ensure that this analysis is accurate.

In the Department's decision, the Department requires the applicant to conduct sound compliance monitoring and requires the applicant to submit a revised operations plan for review and approval if the applicant's post-construction compliance data indicates that the proposed project is not in compliance with Department noise standards. The applicant would be required to consider various mitigation measures capable of achieving compliance with Department noise standards. Among other strategies, the applicant must consider and analyze potential turbine shutdown scenarios to achieve compliance with the terms of the Department permit. The Board finds that the condition in the permit, together with the normal legal requirement that a permit holder comply with the permit issued, will provide an adequate safeguard that the noise level limits are not exceeded.

The appellants argue that the Department failed to consider the health effects of nighttime noise. The appellants point to a Technical Assistance Bulletin published by the Maine State Planning Office in 2000 which states that prolonged noise exposure is a serious threat to human health, especially when resulting in sleep interruption and especially

during the nighttime hours. That Bulletin includes a recommended nighttime residential review standard of 45 dBA, consistent with Chapter 375.

During the Department's review of the applications, interested parties stated concerns that low frequency sound emitted from wind turbines is linked to annoyance, sleep disturbance and other secondary adverse health effects. Low frequency noise is sound that is generally considered to be less than 20 Hz, the normal limit of human hearing. Low frequency noise vibrations are common in our background, particularly in neighborhoods near airports and trains, and they are emitted from many household appliances and vehicles.

The Department requested that the Maine Center for Disease Control (MCDC) review and comment on the evidence submitted by the interested parties concerning potential health effects of the noise generated by the project. In a report titled "Wind Turbine Neuro-Acoustical Issues" dated June, 2009, MCDC reviewed a variety of materials relating to the sound impacts of wind turbines and found no evidence in peer-reviewed medical and public health literature of adverse health effects from the kinds of noise and vibrations produced by wind turbines other than occasional reports of annoyances, and these are mitigated or disappear with proper placement of the turbines in relation to nearby residences. MCDC considered the interested parties' concerns and the evidence submitted and found that these submissions did not alter its opinion on this issue. EnRad also commented that infrasound has been widely accepted to be of no concern below the common human perception threshold for tonal sounds. Enrad noted that numerous national infrasound standards establish acceptable limits for industrial facilities, impact equipment and jet engines, but wind turbine infrasound levels fall below these limits.

Appellants also contend that the Department should not have allowed the applicant to rely on noise easements to exempt certain protected locations from meeting the standards without requiring a disclosure of potential health effects to the property owners granting such easements. Chapter 375(10)(C)(5)(s) exempts from regulation by the Department: sounds "received at a protected location when the generator of the sound has been conveyed a noise easement for that location." The exemption does not require a warning of potential health effects in the applicant's negotiation of noise easements. The easements explicitly state that they are for the purpose of allowing noise from wind turbines to be received on the subject properties. The Board finds that the Department Order appropriately allowed protected locations subject to these noise easements to be exempt from the regulatory noise standards.

And finally, the appellants contend that the Board should declare that Chapter 375, Section 10 is inadequate for permitting wind power projects and that this project should be reviewed without regard to those regulations.

The Board has considered the information contained in the permitting record, evidence admitted during the administrative appeal, the arguments of the appellants, and the licensee's response to the appeal. The Board finds MCDC's and EnRad's analyses to be

credible evidence on the prediction of whether the project will meet the Department's noise standards and on the general issue of whether the project will result in an unreasonable adverse effect on existing uses in the area. The applicant submitted a detailed sound level assessment model which uses the Department's most restrictive sound level limits and which meets standard industrial sound modeling protocols. Results of the applicant's sound level study indicates that the proposed development can be constructed such that it is in compliance with the 45 dBA sound level limit required pursuant to Chapter 375 (10) provided that they measure for potential SDRS that may be present due to excessive amplitude modulation in accordance with the conditions of the Department Order. After weighing evidence submitted by the appellants against the analysis of MCDC and EnRad regarding potential adverse health effects, the Board recognizes that noise emitted from the proposed project has a potential to be heard at an audible level from protected locations and the noise generated by the Oakfield Wind Project may be deemed as an annoyance depending on a person's level of sensitivity. However, after consideration of the evidence submitted by the applicant and appellants on noise and potential health effects, and the analyses of MCDC and EnRad, the Board finds that the applicant has made adequate provisions to ensure that noise standards pursuant to the Site Law Rules, Chapter 375 (10) will be met, that the proposed project will not have an unreasonable adverse health effect in the surrounding environment and protected locations, and that the project will not have an unreasonable adverse effect on the natural environment and existing uses.

C. SCENIC CHARACTER:

Appellants Powers Trust and Brian Raynes contend that the visual impact assessment submitted by the applicant relating to Pleasant Lake, which lies to the south of the southern end of the project, is inaccurate, inconsistent, does not fairly depict the extent of the visual impact of the project on Pleasant Lake, and does not provide adequate information to properly evaluate the visual impact. Appellants have emphasized the scenic characteristics of Pleasant Lake and the importance of protecting that scenic character. The appellants have criticized the applicant's visual simulations and offered their own visual simulation.

Subsequent to the submission of the application, it was discovered by the applicant that the portion of Pleasant Lake which lies within T4R3 WELS is listed in the "Maine Wildlands Lakes Assessment" as having significant scenic resources. "Significant" is the second potential scenic rating in the Wildland Lakes Assessment, below "outstanding" and above those lakes that are unrated for scenic resources. The applicant did not address this listing in the original application due to the fact that the copy of this list which was posted on the State's Wind Power Task Force website, and on which the applicant relied, was missing three pages. Pleasant Lake was listed on one of these missing pages. The applicant submitted an Addendum, Visual Assessment of the Proposed Oakfield Wind Project, prepared by LandWorks and dated June 30, 2009, to address this oversight. The western portion of Pleasant Lake is in the organized town of Island Falls and is not listed on the "Maine's Finest Lakes" report.

Title 35-A § 3452 (1) in pertinent part provides 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 primary siting authority 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).

Title 35-A § 3452 (3) provides that:

In making its determination pursuant to subsection 1, and in determining whether an applicant for an expedited wind energy development must provide a visual impact assessment in accordance with subsection 4, the Department shall consider:

- (A) The significance of the potentially affected scenic resource of state or national significance;
- (B) The existing character of the surrounding area;
- (C) The expectations of the typical viewer;
- (D) The expedited wind energy development's purpose and the context of the proposed activity;
- (E) The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and
- (F) The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.

A finding by the Department that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance. In making its determination under subsection 1, the primary siting authority shall consider insignificant the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a scenic resource of state or national significance.

The proposed Oakfield Wind Project is a "grid scale wind energy development" as defined by 35-A M.R.S.A. § 3451 (6) and it is proposed for an expedited permitting area as defined by 35-A M.R.S.A. § 3451 (3). Therefore, the proposed Oakfield Wind Project

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and its associated facilities must be reviewed pursuant to the expedited wind energy development standards outlined above and, to the extent applicable, 38 M.R.S.A. § 484 (3).

The applicant's June 30 Addendum to its Visual Impact Assessment characterized Pleasant Lake as follows:

"Pleasant Lake is developed at the westerly end of the lake and primarily undeveloped in that portion of the lake which falls within T4R3 WELS. Low hills and ridges surround the lake, and the shoreline is wooded and has a landscape character typical of many similar lakes in this region of Maine. There are no identified state lands, parks or publicly conserved properties on Pleasant Lake and there is one public boat launch on the most westerly cove of the Lake, in Island Falls. Camps line the north and south shores in Island Falls, the portion of the lake in T4R3 WELS has one camp area on the north shore. There are a number of jeep trails, wood roads and logging areas around the perimeter of the lake."

The June 30 Addendum described views from the western end of the lake, in the vicinity of the public boat launch, as follows:

"Limited views of 4 turbines may be possible above the treeline from the boat launch on the western edge of the lake, with the closest turbine, S17, being about 3.1 miles from the boat launch. The views of turbines S16 and S17 will be primarily of a portion of the turbines from the nacelles and above, and the views of turbines S13 and S14 will include a portion of the towers below the nacelles. It is possible that the very tip of a rotor of a fifth turbine, S15, may also be visible, but will be hard to discern given the distance and foreground vegetation. None of the associated project facilities are visible from any portion of the lake."

The June 30 Addendum goes on to assess the impacts of the project on views from the lake as follows:

"Boaters will be able to see portions of the Oakfield Wind Project as it has been proposed, and the visibility will most likely be of 5 of the closest turbines, 1-1/2 to 2 miles distant depending on the vantage point. The turbines appear in a compact group and will only be visible over one small section of the shoreline (see Exhibit 1: Visual Simulation from Pleasant Lake). Thus, this will de-emphasize their presence and the turbines will not appear dominant nor will they compromise the experience of the lake to a substantial degree. There will remain many areas on the lake where those who wish to fish or boat out of sight of the turbines, or with a different orientation, may do so. Boaters and those fishing from boats can choose locations where, if they do not want to experience the turbines, they will not be visible, particularly along most of the north shore. They can anchor in particular locations where the orientation is away from the project.

In fact, given the east-west orientation of the lake, the eye is drawn in these two directions, and from the eastern end there appears to be a long distance view of Mt. Chase, which draws the eye and the viewer's attention. The large cove in the far northeastern portion of the lake will remain secluded and without any visibility of the project. As with Mattawamkeag Lake, the visibility of the turbines will be subject to atmospheric conditions."

The applicant's assessment also addresses project aesthetics and viewer expectations and concludes that the proposed project will not significantly compromise the views from Pleasant Lake.

The Board has considered the information contained in the permitting record, the arguments of the appellants, and the licensee's response to the appeal. The appellants have not disputed the fact that camps line the shores of the western end of Pleasant Lake, nor have they disputed the fact that views of the project from Pleasant Lake will be at a distance of from 1.5 to 2 miles. Moreover, the appellants have not disputed the fact that Pleasant Lake is classified as "significant" for scenic character in the Maine Wildlands Lakes Assessment and is not classified as "outstanding." In reviewing the criteria of 35-A § 3452 (3) as quoted above, the Board finds that these facts are important in determining if the proposed project significantly compromises views from a scenic resource of state or national significance. Specifically:

- (A) Significance of the scenic resource: The Board finds that the fact that the eastern portion of Pleasant Lake did not achieve the highest rating of "Outstanding" and the western portion is not listed on the "Maine's Finest Lakes" reflects a lower significance than if it had achieved "Outstanding" or been placed on the Finest Lakes list.
- (B) Character of the surrounding area: The Board finds that the developed nature of the western end of the lake is an important factor in the consideration of the character of the surrounding area.
- (C) Expectations of the typical viewer: The Board finds that the developed nature of the western end of the lake also reduces the reasonable expectations of the typical viewer from the lake as a whole.
- (D) The development's purpose and context: The Board finds that the turbines are central to the purpose of the project and the context has been adequately addressed by the applicant.
- (E) The use and enjoyment of the scenic resource: The Board finds that the factors discussed above, as well as the directive of the law that the fact the wind turbines may become a "highly visible feature in the landscape" is not a solely sufficient basis for rejecting a project, argue against finding the potential impacts of this project unreasonable. The Board finds the applicant has adequately addressed this issue.
- (F) The scope and scale of the potential effect: Again, considering the factors above and the evidence before it, the Board finds that the scope and scale of the potential effects are not unreasonable.

After weighing the evidence and reviewing the photo simulations provided by the applicant and the appellants, the Board finds that the applicant's visual assessments provide an adequate basis on which to determine compliance with the relevant standards

under the Wind Energy Act and finds that the project will not significantly compromise views from a scenic resource of state or national significance. The Board further finds the views of the Oakfield Wind Project from Pleasant Lake will not have an unreasonable adverse effect on the scenic character or existing uses related to scenic character of Pleasant Lake or other scenic resources of state or national significance.

D. DECOMMISSIONING:

Appellants Powers Trust and Brian Raynes contend that the Department Order should be reversed because it fails to require the decommissioning fund for the project to be fully funded prior to the operation of the wind energy facility. The appellants also object to the deduction for scrap value in estimated decommissioning costs. Further, the appellants contend that the applicant's financial condition is precarious raising the possibility that the applicant might fail financially before the first reassessment of salvage value.

Pursuant to 2007 Public Law, Chapter 661, Part B § Section B-13 (6), an applicant for a wind energy development is required to submit a decommissioning plan that includes a demonstration of current and future financial capacity that would be unaffected by the applicant's future financial condition to fully fund any necessary decommissioning costs commensurate with the project's scale, location and other relevant considerations, including, but not limited to, those associated with site restoration and turbine removal.

The Site Law permit application form requests that applicants provide a demonstration that, upon the end of the useful life of the facility, the applicant will have financial assurance in place for 100% of the total cost of decommissioning, less salvage value. At the time of the filing of this application, the Site Law permit application form stated that an applicant could propose securing financial assurance in phases, provided that complete financial assurance is in place a minimum of 5 years prior to the expected end of the useful life of the equipment.

The applicant submitted documentation that states that the General Electric 1.5 turbines proposed for the Oakfield Wind Project are certified as having at least 20 years of expected operating life.

The applicant submitted a decommissioning plan which proposed that, on or prior to December 31 of each calendar year for years 1-7 commencing with project construction activities, an amount equal to \$50,000 would be reserved in the form of a performance bond, surety bond, letter of credit, parental guaranty or other acceptable form of financial assurance, to a Decommissioning Fund. On or prior to December 31 of year 15 of the project's operation, the estimated cost of decommissioning, minus salvage value, would be reassessed and an amount equal to the balance of such updated estimated cost of decommissioning, less salvage value and less the amounts reserved in years 1-7, would be reserved for decommissioning and site restoration. The applicant's plan provided that financial assurance would be kept in place until such time as the decommissioning work

has been completed, but that to the extent available as liquid funds, the financial assurance could be used to offset the costs of the decommissioning.

The Department Order partially adopted the applicant's proposal, however it went beyond that proposal and required that the applicant reassess salvage value and overall decommissioning costs in year 7 as well as in year 15, and continue to make annual contributions to the decommissioning reserve in years 8-15 of operation in an amount commensurate with fully funding the decommissioning reserve by the end of year 15. If the decommissioning reserve shows a shortfall at the end of year 15 of operation based on revised estimates of salvage value and overall decommissioning costs, the applicant is required to make a lump sum payment in the amount of the shortfall to fully fund the decommissioning reserve by December 31 of year 15. These requirements were imposed as special condition 19 of the Department Order.

After considering the appellants arguments in this appeal, and the language the Legislature used in its direction to the Department on this issue in the Wind Power Act, the Board finds that the requirements for decommissioning funding contained in the Department Order are sufficient to provide financial assurance for decommissioning in accordance with the law. The Board has discussed the financial capacity of the applicant in section 7.A. above and found it sufficient to undertake this project subject to the condition in the Department Order as discussed. The Board further finds that the condition imposed by the Department Order provide a reasonable mechanism for reassessing salvage values as the end of the life of the project approaches and adjusting the reserve fund should salvage value expectations change.

#### 8. OTHER CONSIDERATIONS:

All three appellants contend that the proposed wind energy development will have an unreasonable adverse impact on the value of their property. None of the applicable laws require that an applicant make a demonstration with regard to potential impacts of a proposed project on property values. The Board finds that the applicant is not required to demonstrate that its proposed project will have no impact on property values in order to receive approval.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.
2. The Board denies the request for a public hearing for this appeal.
3. The applicant's proposal to construct a 51 MW wind energy development, known as the Oakfield Wind Project, in the Town of Oakfield meets the criteria for a permit pursuant to the Site Location of Development Act, 38 M.R.S.A. § 484, the Natural Resources Protection Act, 38 M.R.S.A §480-D, and the Wind Energy Act, 35-A M.R.S.A. §§ 3452-3455.

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THEREFORE, the Board AFFIRMS the Department's approval of the permit applications filed by EVERGREEN WIND POWER II, LLC to construct a 51 MW wind energy development, known as the Oakfield Wind Project, in the Town of Oakfield, Maine, pursuant to Department Order #L-24572-24-A-N/L-24572-TF-B-N and incorporates the findings of that Department order by reference, including but not limited to Section 5. NOISE.

The Board DENIES the appeals of the Martha A Powers Trust, Brian Raynes, and Daniel Koerschner.

DONE AND DATED AT AUGUSTA, MAINE, THIS 11<sup>th</sup> DAY OF June, 2010.

BOARD OF ENVIRONMENTAL PROTECTION

By:

  
Susan M. Lessard, Chair





STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
State House Station 17                      AUGUSTA, MAINE 04333

**BOARD ORDER**

IN THE MATTER OF

EVERGREEN WIND POWER II	) SITE LOCATION OF DEVELOPMENT ACT
MAINE GENLEAD LLC	) NATURAL RESOURCES PROTECTION ACT
Aroostook and Penobscot Counties	)
OAKFIELD WIND POWER	)
L-24572-24-C-N (denial of appeal)	) APPEAL
L-24572-TF-D-N (denial of appeal)	)
L-24572-IW-E-N (denial of appeal)	)
L-24572-24-F-N (denial of appeal)	)
L-24572-TF-G-N (denial of appeal)	) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. §§ 344 (2-A) and 341-D (4) and Chapter 2, § 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal and request for a public hearing of Protect our Lakes and Donna Davidge (collectively "appellants"), the material filed in support of the appeal, the response of the licensees, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

In Department Order #L-24572-24-A-N and L-24572-TF-B-N, dated January 12, 2010, the Department approved Site Location of Development Act (Site Law) and Natural Resources Protection Act (NRPA) permit applications 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 approved 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, for a total of 45.1 acres of new impervious area and approximately 50 acres of new developed area. The NRPA permit approved impacts to wetlands and one significant vernal pool (SVP). These impacts included 2,440 square feet of fill in forested, scrub shrub, and emergent freshwater wetlands, and the clearing of 8,790 square feet of wetland vegetation for construction of the transmission lines. The project as originally proposed would have resulted in the alteration of upland habitat of one SVP, where the project crane road would be located within 200 feet of the SVP, leaving 82% of the critical terrestrial habitat undisturbed. The applicant also received a Permit by Rule (PBR #47798) for a stream crossing. 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

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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 held a public meeting on August 3, 2011 in the Town of Oakfield. Prior to the start of the general public meeting, the Department met with individuals who had specific concerns.

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.

## 2. AGGREIVED PERSONS:

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. It 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.

In its response to the appeal, the Town of Oakfield submitted argument and supplemental information to the record that questioned whether POL or Donna Davidge is an aggrieved person with standing. The Town claims that POL does not have any members (according to the articles of incorporation submitted by the Town as its Exhibit #3). The Town asserts that an organization only has standing when the "members would otherwise have standing to sue in their own right," and that therefore with no members the organization can have no standing. The Town further argues that even if the organization did have members it has not identified a member with aggrieved person status. The Town argues that Donna Davidge is not an aggrieved person because she has not demonstrated how she will suffer a particularized injury (harm that is traceable to the governmental action and also, in fact, a harm distinct to an individual as opposed to a harm posed to the general public).

POL and Ms. Davidge filed a response to the Town of Oakfield's standing challenge. POL asserts that, while its articles of incorporation correctly reflect that it has no voting members, it does indeed have members. POL states that, while its members have no decision-making power, as reflected in the articles of incorporation, it has individual members who support the goals of POL and who may or may not also make financial contributions to the non-profit. POL further states that it has supporting members who are aggrieved because they own

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property with views of the proposed turbines and thus their use and enjoyment of those properties will be negatively impacted. Ms. Davidge asserts that she owns and operates a business that will be negatively impacted by the views of the proposed turbines from Mattawamkeag Lake.

The Board finds and concludes 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 Board determines 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.

### 3. BASIS FOR APPEAL:

The appellants assert that the Department erred in making the following findings:

- A. Scenic Character: The proposed project will not have an unreasonable adverse effect on the scenic character of scenic resources of state or national significance or related existing uses;
- B. Wildlife: The proposed project will not adversely impact birds and bats;
- C. Wetland Impacts: The applicants have avoided and minimized wetland and waterbody impacts to the greatest extent practicable, and the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project; and
- D. Financial Capacity: The applicants have demonstrated adequate financial capacity to comply with Department standards.

### 4. REMEDY REQUESTED:

The appellants request that the Board hold a public hearing and reverse the January 17, 2012 Department decision approving a permit for the construction of the Oakfield Wind Project 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.

### 5. REQUEST FOR A PUBLIC HEARING:

The appellants request that the Board conduct a public hearing on this appeal on the issues of wildlife and visual impacts. The appellants raise concerns regarding the procedural provisions of the Wind Energy Act (WEA), for example, noting that under the WEA the Board may not take original jurisdiction and hold public hearings, and therefore the Board, unlike the Land Use Regulatory Commission, has not held public hearings on wind power projects. The appellants also argue that there is "credible conflicting technical information regarding licensing criteria" in this case, and therefore a public hearing is warranted. At a hearing, the appellants propose to present direct and rebuttal testimony from ornithologist

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Michael Good on wildlife issues and present rebuttal testimony from an unnamed independent visual impact specialist. Appellants did not, however, submit a summary of Michael Good's proposed testimony or the name and qualifications of the independent visual impact specialist as required by Chapter 2 § 24(B)(5) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

The permit applications were filed on June 10, 2011. The Department did not receive a request for a public hearing during the 20-day period specified for such requests in the Department's Chapter 2 rules governing the processing of applications.

In consideration of the level of public interest in wind power projects, the Department held a public meeting pursuant to 38 M.R.S.A. § 345-A (5). The purpose of this meeting was to provide interested persons and the general public with an opportunity to comment on the application and submit information into the Department's record. The Department held the public meeting on August 3, 2011 at the Oakfield Town Hall in the Town of Oakfield, Maine. Members of the public offered comments and asked questions at the meeting. The Department also received numerous letters and documents regarding specific aspects of the proposed project during the application review period.

The record reflects that during the 7-month period of the review of the applications, the appellants had the opportunity to present information and argument to the Department and availed themselves of that opportunity both at the public meeting and through the submission of information during the review process. The appellants' submissions included an email from United States Fish and Wildlife (USFWS) dated January 19, 2012 which is discussed in section 7 below. The appellants could have submitted evidence from an independent visual expert and from Michael Good on wildlife during the period of review of the applications by the Department.

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 licensees, the appellants and other members of the public submitted comments on the draft order.

The Board has considered the information contained in the permitting record, the arguments of the appellants, and the licensees' response. Pursuant to 38 M.R.S.A. § 341-D (4) and the Department's regulations, holding a public hearing is discretionary. In this appeal the Board finds that the evidentiary record is well developed with regard to the statutory criteria. The appellants had the opportunity to submit evidence in response to the licensees' submittals with regard to visual impacts, wildlife impacts, wetland impacts, and financial capacity, and in response to the analysis by the Department's visual expert. The Board finds that a public hearing in this case is not warranted or necessary to assist the Board in understanding the presented evidence.

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6. DISCUSSION AND FINDINGS PERTAINING TO VISUAL IMPACTS CLAIMS RAISED ON 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 or existing uses related to scenic character 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 *Wildlife Lake Assessment* and *Maine's Finest Lakes Survey*.

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.]

Title 35-A § 3452 (3) provides in pertinent part that:

In making its determination pursuant to subsection 1, and in determining whether an applicant for an expedited wind energy development must provide a visual impact assessment in accordance with subsection 4, the [Department] shall consider:

- (A) The significance of the potentially affected scenic resource of state or national significance;
- (B) The existing character of the surrounding area;
- (C) The expectations of the typical viewer;
- (D) The expedited wind energy development's purpose and the context of the proposed activity;
- (E) The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and
- (F) The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.

A finding by the [Department] that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national

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significance. In making its determination under subsection 1, the [Department] shall consider insignificant the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a scenic resource of state or national significance.

Title 35-A § 3452 (4) provides in pertinent part that:

An applicant for an expedited wind energy development shall provide the [Department] with a visual impact assessment of the development that addresses the evaluation criteria in subsection 3 if the [Department] determines such an assessment is necessary in accordance with subsection 3. There is a rebuttable presumption that a visual impact assessment is not required for those portions of the development's generating facilities that are located more than 3 miles, measured horizontally, from a scenic resource of state or national significance. The [Department] may require a visual impact assessment for portions of the development's generating facilities located more than 3 miles and up to 8 miles from a scenic resource of state or national significance if it finds there is substantial evidence that a visual impact assessment is needed to determine if there is the potential for significant adverse effects on the scenic resource of state or national significance...

The proposed project contains "generating facilities" including wind turbines and towers as defined by 35-A M.R.S.A. § 3451 (5) and "associated facilities" such as buildings, access roads, substations as defined by 35-A M.R.S.A. § 3451 (1). Therefore, the proposed project and its associated facilities must be reviewed pursuant to the expedited wind energy development standards outlined above and, to the extent applicable, 38 M.R.S.A. § 484 (3) and § 480-D (1). The Department elected under section 3452 (2) to review the generator lead line pursuant to the visual impact criteria of the Site Location of Development Act 38 M.R.S.A. § 484 (3).

The licensees submitted two visual impact assessments (VIA) for the proposed project prepared by Terrence J. DeWan and Associates (TJD&A). The first, entitled *Section 30: Visual Impacts of a Generation Facility*, focused on the potential impact of the generating facilities and associated facilities on scenic resources of state or national significance (SRSNS) within eight miles of the proposed project using the evaluation criteria presented in the Wind Energy Act. The second, entitled *Section 6: Visual Quality and Scenic Character*, evaluated the generator lead line, using the Department's traditional scenic assessment procedures. The licensees also submitted a user intercept survey addressing recreational users of Pleasant Lake and Mattawamkeag Lake, authored by Market Decisions and dated October 2011. In the application materials the licensees referenced and cited the results from a recreational user survey that had been conducted for the Bull Hill wind project in Hancock County and that surveyed users of Black Mountain and Donnell Pond.

In accordance with 35-A M.R.S.A. §§ 3452 (3) & (4), the Department required that the licensees conduct a visual impact assessment within a three-mile radius of the proposed project. Although not specifically required by the Department, the licensees extended the assessment to an eight mile radius. The licensees' visual impact assessment (VIA) identifies scenic resources of state or national significance (SRSNS) as defined pursuant to 35-A

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M.R.S.A. § 3451(9), it analyzes the potential impacts the project will have on scenic resources of state or national significance, and it provides visual simulations of the views from those resources. The only SRSNSs with potential for views of the project were Pleasant Lake and Mattawamkeag Lake.

The Department hired an independent expert, James F. Palmer of Scenic Quality Consultants (SQC), to review the Scenic Character section of the application; to attend the Department's public meeting; to visit the site; to review information submitted by the interested persons and supplemental evidence submitted by the licensees; and to provide the Department with review comments.

A. User surveys submitted by the licensees

In the application materials, the licensees referred to and cited statistics from a recreational user survey that had been conducted for the Bull Hill Wind Project in Hancock County and had surveyed users of Black Mountain and Donnell Pond. The reference was to substantiate the statement that "[t]he project should have no unreasonable adverse effect on its scenic character or the uses related to scenic character of Pleasant Lake." The licensees subsequently submitted a recreational user survey of the users of Pleasant and Mattawamkeag Lakes, dated October 2011. The appellants argue that the recreational user survey completed for the Bull Hill project is not relevant to the Oakfield wind power project because the users surveyed engage in different recreational uses than users of Pleasant and Mattawamkeag Lakes. The appellants further argue that both the Black Mountain and Donnell Pond and Pleasant Lake and Mattawamkeag Lake recreational user surveys lacked reliability and validity, and failed to meet the standards of a scientifically designed survey instrument.

While not directly related to the present project the Board finds that it was appropriate for the Department to consider the reference to and findings from the Black Mountain and Donnell Pond recreational user survey as evidence of the opinions of recreational users of Maine's scenic natural areas in general. The Board recognizes that the Department did not make its finding regarding scenic character and existing uses related to scenic character based solely on this survey and that the licensees did conduct a recreational user survey of users in the project area to be reviewed with the other relevant visual impact materials submitted by the licensees.

The survey methods for both recreational user surveys were reviewed and approved by the Department's independent expert, SQC, which found the survey methods followed standard practice for recreational user surveys. The appellants raised concerns over reliability and validity of the recreational user surveys during review of the project, but SQC found that there was no evidence to support the assertion that the intercept surveys were invalid or unreliable. SQC found the initial Bull Hill survey had a group reliability of .987 for the Black Mountain responses and .952 for the Donnell Pond responses, which are very high, as noted in Finding 6 of the Department Order. The October 2011 Pleasant Lake and Mattawamkeag Lake recreational user survey interviewed people near the boat launches on Pleasant and Mattawamkeag Lakes. In the initial review of the October 2011 recreational user survey, SQC commented that the survey was "well constructed to address the Wind

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Energy Act's scenic criteria relating to the users of SRSNSs," as noted in Finding 6 of Department Order. SQC found the procedures used by this survey to be normal for an intercept study. For example, the interviewers acted independently from the licensees, intercepted users near the public boat launches on both lakes, and interviewed only adults. Appellants have submitted no expert testimony to contradict the SQC comments. The Board finds that the Department properly relied on the comments of SQC.

The Board finds that the licensees' recreational user surveys submitted with the applications are relevant, valid, and reliable based on the evidence in the record. The Board further finds these surveys were used properly as one tool of many submissions used by the Department to determine the visual impacts of the proposed project. The Board finds that the Department properly relied on these surveys while reviewing potential visual impacts.

#### B. *The Wildlands Lake Assessment and Maine's Finest Lakes Survey*

The 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 *Wildlands Lake Assessment* is a report presenting the findings of a study initiated by the Maine Land Use Regulation Commission (LURC) in order to make informed decisions regarding the protection and use of Maine's lake resources. In the *Wildlands Lake Assessment* both lakes are classified as having significant but not outstanding scenic resources. These ratings were based on LURC's *Scenic Lakes Character Evaluation in Maine's Unorganized Towns*. This evaluation rated lakes within the unorganized towns for their scenic quality using map analysis and field evaluation. Relevant to this appeal, the evaluation rated Mattawamkeag Lake as 30 out of 100 for Scenic Attributes, and Pleasant Lake was rated 20 out of 100. These ratings were based mostly on physical features (presence of cliffs or beaches), shore configuration, or special features. Both lakes had their ratings reduced for inharmonious development. The rating system rated lakes 1-A if they had two or more outstanding values and 1-B if the lakes had one single outstanding value. The ratings of 1-A for Mattawamkeag Lake and 1-B for Pleasant Lake are not based on a scenic value. Mattawamkeag Lake's Resource Class is due to outstanding ratings for fisheries and shoreline character. Pleasant Lake's Resource Class is due to an outstanding rating for fisheries. These resource characteristics should not be affected by the presence of turbines.

The appellants argue, however, that the Department has underestimated the value of the lakes' remoteness and the project's impact on that characteristic. Further, the appellants argue that the Department has underestimated the value of Mattawamkeag Lake in view of recent land acquisitions in the area by the Bureau of Parks and Lands (BPL). In its review of the project SQC commented that neither Pleasant nor Mattawamkeag Lakes would be

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considered remote because the lakes have road access, boat launches, and residential development, as noted in Finding 6 of Department Order. LURC designates lakes as "remote" in its *Comprehensive Land Use Plan*, and neither lake is so designated. Moreover, remoteness is not an independent Wind Energy Act (WEA) evaluation criterion. As to the BPL purchases, none of the lands is defined under the WEA as a SRSNS, see 35-A M.R.S.A. § 3451(9). The BPL can choose to designate land as scenic viewpoints as defined under 35-A § 3491 (9)(F), and did not do so in this case. Pursuant to the criteria in the WEA the Board cannot consider scenic impacts to areas that are not designated SRSNS.

The appellants point out that the Department Order states that the scenic impacts from the "worst case" photo simulations could be controversial. The appellants argue that the turbines will be visible from approximately two-thirds of Mattawamkeag Lake and 90% of Pleasant Lake and that the visibility of the project from these lakes and the impact on recreational use of the lakes should have been found to be unreasonable. However, as also described in the Department Order, the "worst case" photo simulation is not the case for the majority of locations in both lakes but is restricted to a much smaller area. On Pleasant Lake the "worst case" simulations show locations with a view of +/- 25 turbine hubs plus a half a dozen blade tips; on Mattawamkeag Lake the "worst case" is a location with a view of +/- 30 turbine hubs plus five blade tips. While turbines will be visible from most of Pleasant Lake, a typical location would have about 10 turbine hubs visible. On Mattawamkeag Lake, there will be no visibility from almost all of the upper lake, and almost half of the lower lake. There are areas from which 25 to 30 turbines will be visible, but the closest of these turbines are 3.5 to 5 miles distant, and some will be more than 8 miles away. According to both the licensees' VIA and SQC's review, the scenic impact to Pleasant Lake was determined to be low tending toward medium and will not be an unreasonable adverse impact, the scenic impact to Upper Mattawamkeag Lake will be minimal to low, and the scenic impact on Lower Mattawamkeag Lake will be medium to high. In no case, did any scenic expert determine that the scenic impact would be unreasonably adverse.

As noted above, the WEA provides that, "A finding by the primary siting authority that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance." Thus, while the proposed project may be clearly visible and such scenic impacts controversial, it does not necessarily follow that the impacts are unreasonable under the WEA. The Department's finding that the scenic impacts to these two lakes is not unreasonable was based on its 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 Board finds the licensees' submissions and analysis of potential visual impacts to the use of the pertinent resources to be an adequate assessment and a demonstration that the development will not significantly compromise the views from the pertinent resources. The Board also finds the review of the evidence and comments submitted on this issue by Scenic Quality Consultants to be credible. Therefore, based upon the evidence in the record, the Board finds that the licensees have adequately assessed the proposed project's potential visual

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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. The Board finds the Oakfield Wind Power 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.

#### 7. DISCUSSION AND FINDINGS PERTAINING TO WILDLIFE ISSUES:

The appellants argue that the Department failed to address numerous defects in the licensees' submissions pertaining to wildlife issues.

##### A. Post-Construction Monitoring of Bat Mortality

The appellants argue that the Department failed to require the licensees to develop a bat mortality study in consultation with Maine Department of Inland Fisheries and Wildlife (MDIFW) Bat Conservation International, and the Bat and Energy Cooperative, and that this will result in the project having an adverse effect on bats.

In Comments on the applications dated November 15, 2011, MDIFW recommended that the Department require operational control measures, in the form of seasonal curtailment of the turbines, be established to minimize risk of mortality to bats. The MDIF&W commented to the Department that if the applicant did not agree to the recommended seasonal curtailment MDIFW recommended that the licensees develop a bat mortality study in consultation with MDIFW, BCI and the Bat and Energy Cooperative. The actual detailed study design would be reviewed by the Department prior to commencing turbine operation. The licensees and the Department came to an agreement to utilize operational control measures, as discussed in Finding 7 of the Department Order. The curtailment agreed to by the licensees and MDIFW is required from May 1 to September 30 when the wind speed is less than 5.0 meter/second (m/s); and only when the ambient temperature is above 50 degrees F from June 1 to August 31; and when above 32 degrees F in May and September. If at any point during this time period the wind speed increases to greater than 5.0 m/s the turbine blades will be free to rotate. The licensees are the first wind power project in Maine to agree to the seasonal curtailment to protect bats. This was the preferred method of protecting bats recommended to the Department by MDIFW. Based on the licensees' agreement to implement seasonal curtailment measures, and MDIFW's opinion that these measures would be adequate to protect bat populations, the Department did not require the specific bat mortality study referred to by the appellant. The licensees are, however, required to submit to the Department for its review and approval a post-construction monitoring plan for bat and bird mortality in Condition 26 of the Order.

The Board finds that the Department's approval of an operational curtailment plan in lieu of the referenced post-construction bat mortality study was reasonable, that the Department addressed potential impacts to bats in an appropriate manner, and that the project will not result in an adverse effect on bats.

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## B. Eagle Impacts

The appellants argue that the licensees did not adequately address the potential impacts the proposed project could have on bald eagles. The appellants point to a January 19, 2012 email in which United States Fish & Wildlife Service (USFWS) stated that there is an eagle nest within a mile of the closest turbine and argue that the Department should have considered this in its analysis and addressed it in the Department Order.

The licensees submitted surveys assessing the potential impacts of the project on bird populations. These surveys included aerial surveys for bald eagle nests, raptor migration surveys and eagle activity surveys. These surveys were prepared in consultation with MDIFW and the USFWS. The results were reviewed by both agencies.

Between 2009 and 2010 the licensees conducted aerial assessments of all lakes within three to four miles of proposed turbines to determine if there was eagle nesting activity. Of the area lakes searched, one bald eagle nest, three quarters of a mile north of the project area, was found to have some activity, as documented in Appendix 7-8 of the Eagle Summary Report submitted by the licensees and reviewed by the Department. This particular nest was active in 2009 and inactive in 2010. The licensees surveyed the proposed transmission line and found no nests in the project area. As discussed in the Department's order, the licensees did find one active nest within a mile of the generator lead line Penobscot River crossing, as documented in Appendix 7-4 of the 2010 Bald Eagle Aerial Flight Survey Memo submitted by the licensees.

It is true that the Department did not discuss the nest near the turbines in its Order but in consideration of the evidence in the record this cannot be read to infer that the Department's review of potential project impacts to eagles was inadequate. The nest was documented in the application and MDIFW reviewed all the surveys and information submitted by the licensees and did not note any concerns regarding eagles in their review comments. As explained by MDIFW, the existence of one nest over ¼ mile away from the turbines cannot be construed as presenting a significant adverse impact to bald eagles. The Department found that there were no adverse effects to bald eagles based on the MDIFW review comments and the information submitted in the applications.

The Board finds that the Department adequately addressed the issue of bald eagle impacts and properly concluded that the proposed project would not result in an adverse effect to Wildlife.

## 8. DISCUSSION AND FINDINGS PERTAINING TO WETLAND IMPACTS:

The appellants point out that the licensees noted "four known potential vernal pools" in the compensation area but failed to determine the status and level of biological significance as requested by MDIFW in comments. The appellants argue that the mitigation parcel may not be considered compensation for lost vernal pool values when the application did not address the status and level of biological significance of the pools in the compensation area.

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The Department did not require the licensees to verify if the vernal pools were considered Significant Vernal Pools (SVPs), as defined by NRPA Chapter 335, because the licensees were not required to compensate for any vernal pool impacts. The proposed project will not impact any vernal pool depressions. The impacts to vernal pool habitat will be minor in nature and all qualify for consideration under Permit-By-Rule (PBR) and would not require compensation. The licensees applied for and the Department approved three PBRs for impacts to vernal pool habitat which included activities that impacted less than 25% of the critical terrestrial habitat. These PBRs included one that will impact 3% of the habitat of a potentially SVP critical terrestrial habitat for the collector line right of way, one that will impact approximately 4% of a SVP critical terrestrial habitat for turbine pad clearing, and one for an access road that will impact 18% of a SVP critical terrestrial habitat.

The Board finds that the Department did not err in allowing the compensation parcel without requiring evidence of the level of significance of its vernal pools.

9. DISCUSSION AND FINDINGS PERTAINING TO FINANCIAL CAPACITY:

The appellants argue that the documents submitted by the licensees were not an adequate basis for a finding of financial capacity. These documents included Condensed Consolidated Balance Sheets (unaudited) for First Wind Holdings, LLC (the parent company of the licensees) and a letter from Michael Alvarez, the President and Chief Financial Officer of First Wind Holdings, LLC indicating First Wind Holdings, LLC's intent to develop and finance the project. The appellants additionally argued that the licensees have four pending wind projects in Maine and the Board should determine whether the licensees have financial capacity for all of these projects. The appellants contend that the licensees should submit an "intent to fund" statement from an appropriate funding institution.

The licensees submitted a letter of support to provide initial funding for the project from First Wind. The Department determined that the evidence submitted by the licensees in the applications was sufficient to find that the licensees had the financial capacity to develop "the project in a manner consistent with state environmental standards and the provisions of [the Site Law], 38 M.R.S.A. §484 (1)" provided that, as set forth in the Department's order, licensees submit evidence of final financing to the Department prior to the start of construction. In conjunction with that finding, the Department conditioned the permit such that, "[p]rior to the start of construction, the applicants shall submit evidence that they have secured final financing for the project in accordance with 38 MRSA §484(1) and Chapter 375(1), to the Department for review and approval."

The Board finds that the licensees have demonstrated adequate financial capacity to comply with Department standards provided that, as set forth in the Department's order, licensees submit evidence of final financing to the Department prior to the start of construction.

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10. CONCLUSIONS:

Based on the above findings, the Board concludes that:

- A. The appellants filed a timely appeal.
- B. The Board denies the request for a public hearing on this appeal.
- C. The licensees' proposal to construct a 150 MW wind energy development, known as the Oakfield Wind Project, 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 meets the criteria for a permit pursuant to the Site Location of Development Act, 38 M.R.S.A. § 484, the Natural Resources Protection Act, 38 M.R.S.A §480-D, and the Wind Energy Act, 35-A M.R.S.A. §§ 3452-3455.

THEREFORE, the Board AFFIRMS the Department's approval of the permit applications filed by EVERGREEN WIND POWER II LLC AND MAINE GENLEAD LLC to construct a 150 MW wind energy development, known as the Oakfield Wind Project, 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, Maine, as described in Department Order L-24572-24-C-N through L-24572-TF-G-N. The Board DENIES the appeal of Protect Our Lakes and Donna Davidge.

DONE AND DATED AT AUGUSTA, MAINE, THIS 11<sup>th</sup> DAY OF April, 2012.

BOARD OF ENVIRONMENTAL PROTECTION

By:

  
Susan M. Lessard, Chair





STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

HANCOCK WIND, LLC	) SITE LOCATION OF DEVELOPMENT ACT
T16 MD/T22 MD/Aurora	) NATURAL RESOURCES PROTECTION ACT
Osborn, Hancock County	) WATER QUALITY CERTIFICATION
WIND POWER FACILITY	)
L-25875-24-C-Z (Denial of appeal)	) FINDINGS OF FACT AND ORDER
L-25875-TF-D-Z (Denial of appeal)	) ON APPEAL

Pursuant to the provisions of 38 M.R.S. §§ 341-D (4); 480-A et seq; 481 et seq; 35-A M.R.S. §§ 3401-3457; and Section 401 of the Federal Water Pollution Control Act, the Board of Environmental Protection (Board) considered the appeals of DARREN W. LORD and OSCAR E. WEIGANG, their supportive data, the responses to the appeals, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On January 14, 2013, Hancock Wind, LLC filed a Site Location of Development Act (Site Law) and a Natural Resources Protection Act (NRPA) application with the Department for a permit for the construction of a wind energy development with 18 turbines. The project site is located in T16 MD, T22 MD, Aurora, and Osborn. The Department held the first of two public meetings in Aurora on March 28, 2013, to receive comments on the proposed project. A second public meeting, chaired by the Department's Commissioner, was held on June 6, 2013. A draft Department order was issued on July 11, 2013, for public comment. The Department approved the applications in Department Order #L-25875-24-A-N/L-25875-TF-B-N, dated July 22, 2013.

On July 31, 2013, Darren Lord filed a timely appeal of the Department's decision to the Board. Mr. Lord requested that the Board reverse the Department approval and deny the Site Law and NRPA permit applications. Mr. Lord also requested an investigation into meetings with Osborn Plantation officials concerning a potential Weaver Wind project, the decommissioning of the existing Bull Hill Wind Project (Bull Hill), and a financial audit of First Wind and its subsidiaries.

On August 12, 2013, Oscar Weigang filed a timely appeal of the Department's decision to the Board. Mr. Weigang requested that the Board obtain a formal written opinion from the Attorney General's Office (AG) concerning the community benefits package. Mr. Weigang also requested that the Board vacate the Department approval and remand the project to the

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Commissioner for further action consistent with any AG opinion issued in response to his request.

2. STANDING:

In his appeal, Mr. Lord states that he owns property on Spectacle Pond in Osborn and he has been negatively impacted by the wind project at Bull Hill.

Mr. Weigang provided comments during the licensing process about the issue of Hancock County receiving a community benefit package and he spoke at the second public meeting. He states he is a resident of Hancock County.

The Board finds that both appellants, Mr. Lord and Mr. Weigang, have demonstrated they are aggrieved persons as defined in Chapter 2 § 1(B) and may bring these appeals before the Board.

3. PROJECT DESCRIPTION:

The applicant proposes to construct a wind energy development consisting of 18 turbines. This project qualifies as an expedited wind energy development as defined in the Wind Energy Act (WEA) (35-A M.R.S. §3451(4)) because of its size and its location within an expedited wind zone. The area of land proposed to be used for the generating facility portion of the project is located on property currently used for commercial forestry operations. The site contains logging roads, some of which will be upgraded and used for project access. The proposed project overall includes 30.04 acres of impervious and developed area. The development of the O&M building will result in approximately 0.6 acre of impervious area. The proposed project will use roads constructed for the nearby Bull Hill and will lease a portion of the Bull Hill substation. The project consists of the following:

- 1) Wind Turbines. The applicant proposes to construct 18 turbines, either Vestas V112 or Siemens 3.0-113. Either would be 3.0-megawatt (MW) turbines, for a total of 54 MW of generation capacity. Each Vesta turbine would have a 94-meter tall (approximately 308 feet) tower with a total height of 150 meters (492 feet) to the tip of a fully extended blade. Each Siemens turbine would have a 99.5-meter tall (approximately 326 feet) tower with a total height of 156 meters (approximately 512 feet) to the tip of a fully extended blade. The turbines will be located on Schoppe Ridge in T22 MD and an unnamed ridge in T16 MD.
- 2) Turbine Pads. The turbines will be constructed on 18 pads. The total impervious area associated with the turbine pads is 8.52 acres.
- 3) Access Roads and Crane Path. The applicant proposes 24-foot wide access roads and a 39.5-foot wide crane path. Some existing logging roads will be utilized to

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minimize environmental impacts. The total impervious area associated with the linear portion of the project is 20.79 acres.

- 4) Electrical Collector Substation and O&M Building. The applicant proposes to direct all power generated by the Hancock Wind project to the existing electrical substation located at the Bull Hill project. A substation addition will be constructed as part of the Hancock Wind project on an existing pad within the Bull Hill project to accommodate the new flow. Also proposed for the Hancock Wind project is an O&M building in the town of Aurora. The total new impervious area associated with the electrical substation and the O&M building is 0.73 acre.
- 5) Meteorological Towers. The applicant is proposing to construct two permanent meteorological towers on the site to monitor turbine performance. Up to a total of five temporary meteorological towers are proposed for the project. Up to three temporary met towers, not to exceed 105 meters tall, will be placed on turbine pads and removed prior to commercial operation. Two additional 60-meter temporary meteorological towers on metal base plates are also proposed.

#### 4. BASIS FOR APPEALS:

Mr. Lord objects to the Department's treatment of the Hancock Wind facility as a single and complete project; he argues that the proposed Hancock Wind facility, the existing Bull Hill facility and a potential third project, Weaver Wind, should have been reviewed as one project. The second basis for Mr. Lord's appeal is his assertion that the applicant failed to demonstrate adequate financial capacity to comply with Department standards. His third argument is that the escrow amount for decommissioning is underfunded and the Department should not have found that the applicant's proposal will adequately provide for decommissioning.

Mr. Weigang's appeal is based on his argument that because Hancock County did not receive a community benefit package the Department erred in concluding that the proposed project will provide significant tangible benefits to the State, host communities and surrounding area pursuant to 35-A M.R.S. §3454.

#### 5. REMEDY REQUESTED:

Mr. Lord requests that the Board reverse the Department approval and deny the Site Law and NRPA permit applications. Mr. Lord also requests an investigation into meetings between the applicant and the selectmen of Osborn Plantation concerning the potential Weaver Wind project, a financial audit of First Wind and its subsidiaries and that the Bull Hill project be decommissioned.

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Mr. Weigang requests that the Board solicit a formal written opinion from the Attorney General's Office concerning the issue he raises with regard to the Wind Energy Act's requirement for a community benefits package. Mr. Weigang requests that the Board vacate the Department approval and remand the project to the Commissioner for further action in accord with such an opinion from the Attorney General's Office.

6. DISCUSSION AND FINDINGS:

A. PHASED DEVELOPMENT:

In his appeal, Mr. Lord contends that the Hancock Wind project is not a stand-alone project, instead it is Phase 2 of the Bull Hill wind project, another wind project developed by the parent company of the Hancock Wind project. Mr. Lord further contends that a potential future project, Weaver Wind, should also be considered a phase of the Bull Hill project. Mr. Lord states that the environmental impacts of all three "phases" should have been considered by the Department at the same time.

The Bull Hill wind project was approved on October 5, 2011 by the Land Use Regulation Commission (LURC) (now the Land Use Planning Commission, or the LUPC). Subsequently, Public Law 2011, Chapter 682, effective September 1, 2012, transferred permitting authority for grid-scale wind energy developments under the Site Law in unorganized and deorganized areas of the State from the LUPC to the DEP.

Chapter 682 specifically reserves to the LUPC the permitting authority for amendments or revisions to a development approved by the LUPC prior to September 1, 2012 unless the proposed revision by itself triggers the Site Law. Because Hancock Wind is large enough on its own to trigger the Site Law (by virtue of creating more than three acres of impervious area), under Chapter 682 it was not considered an amendment to the approved Bull Hill project and was not be considered a second phase. The Department conferred with the LUPC on the permitting jurisdiction of the Hancock Wind project before the application was received and the two agencies agreed the Department would be the appropriate permitting authority for the Hancock Wind project. Given the size of the Hancock project, that this is a different legal entity proposing the Hancock development, and the language of the statute regarding jurisdiction, the Board finds that a new permit application and a decision licensing the Hancock project independently is appropriate.

During the application review process the Department reviewed the cumulative visual impacts of both the Hancock Wind project in light of the existence of impacts from the Bull Hill project. On May 14, 2013, Department staff conducted a site visit to several of the Scenic Resources of State or National Significance including the summit of Tunk Mountain. At this time, the Bull Hill project construction had been completed. It was possible to compare the existing view with what those same views would look like following the construction of the Hancock Wind project through the use of photosimulations. Thus, while the Hancock Wind project was not considered as an

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addition to the Bull Hill project, the total impacts of the two projects were in fact considered in the analysis of whether the Hancock Wind project met the statutory criteria.

During the application review period for Hancock Wind, Mr. Lord contacted the Department and advised staff that First Wind had approached the selectmen of Osborn Plantation concerning a new wind energy project. The Department visited the Osborn office and requested to view any plans concerning the future wind energy project; however, none were present in the office at the time of the visit. The Department contacted First Wind and inquired about the full extent of the Hancock Wind project. The applicant responded that future wind energy projects were being considered in the area, however, no transmission options or wind data had been studied to determine viability of any specific site. Based on this information, the Department determined that nearby possible future expansions or projects were too preliminary to require the applicant obtain Department approval of a potential future expansion or project together with the Hancock project at that point in time.

Selectmen from the Town of Osborn filed a response to the appeal on August 28, 2013. In the response, the Selectmen deny private meetings were held with the applicant concerning the Weaver Wind project. The Selectmen also refute Mr. Lord's account of a conversation between Mr. Lord and Selectman Waterman.

The Hancock Wind project is of sufficient size by itself to meet the threshold for review under the Site Law and Wind Energy Act. The Board finds that the Department exercised reasonable diligence when requesting information on the applicant's plans for a future nearby wind energy development, to determine if the Hancock Wind project should be considered as part of a phased development. The question of whether the applicant has met with any officials of the Town of Osborn, and the circumstances of such a meeting, is not a matter for the Board to determine. The Board finds that the Department was not legally required to postpone review of the Hancock Project until First Wind had gathered information, analyzed it, and made a determination whether to proceed with a nearby expansion or other project.

Based on the facts present in this case concerning the sequence of development, the legal entities conducting the development, the timing of the information available, and the other evidence in the record, the Board finds that the Department properly reviewed the Hancock Wind project as a single project under the applicable Site Law, NRPA and Wind Energy Act standards.

**B. FINANCIAL CAPACITY:**

Mr. Lord contends that First Wind did not meet the Department's financial capacity requirement. Mr. Lord states that "First Wind Holdings received a \$117 million loan guarantee in March of 2010. First Wind withdrew its initial public offering in October of 2010, due to a lack of investor demand." He alleges, citing a newspaper article, that

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investors have shied away from the company because of significant debt and negative cash flow. He further asserts that First Wind sold 49% of its company to Emera “to stave off bankruptcy.”

Under 38 M.R.S. § 484(1) of the Site Law, the Department requires applicants demonstrate financial capacity to develop the project in a manner consistent with State environmental standards and with the provisions of Site Law. However, 38 M.R.S. § 484(1) gives discretion to the Commissioner to issue a permit with a condition which allows an applicant to provide evidence of final financial assurance that is suitable to the Department after the issuance of a permit, but prior to the commencement of construction.

As part of the application materials, the applicant submitted its plan detailing financing for the project. The financing is proposed to include First Wind Holdings equity funded from cash balances, bank construction and long-term debt sourced on market terms, tax equity sourced on market terms, and cash contributions from Emera pursuant to its joint venture with First Wind. As part of the application, the applicant included an estimate of project costs, a letter of financing commitment, a consolidated balance sheet, and a certificate of good standing from the Maine Secretary of State.

In its response to the appeal, the applicant states that First Wind owns and operates five wind power facilities in Maine. The applicant also notes that the Department Order requires they submit final financial capacity information prior to the commencement of construction. The applicant argues that the Department properly concluded it has financial capacity to develop the project.

While the Department found that the evidence submitted on financial assurance met the financial capacity standards of 38 M.R.S. § 484(1) and Chapter 373 of the Department Rules, as a safeguard, the Department required that with the exception of the construction of two temporary meteorological towers, prior to the start of construction the applicant must submit up-to-date and final evidence of financial capacity. The Board finds that the evidence submitted by the applicant demonstrated adequate financial capacity to construct and operate the development consistent with State environmental standards and the provisions of the Site Law.

C. DECOMMISSIONING:

Mr. Lord contends that the Department-approved escrow amount of \$506,000 to decommission the Hancock Wind project would result in a decommissioning that would be “grossly underfunded.” Mr. Lord states that the amount equals \$28,000 per turbine and that the cost would be closer to \$100,000 per turbine so the escrow amount for decommissioning should be \$1.8 million in order to cover the cleanup and disposal of the turbines. During the Department’s consideration of the application, Mr. Lord did not provide any evidence with regard to the applicant’s estimate for decommissioning costs.

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In his appeal, Mr. Lord requests that the Board initiate a study of the expected cost to decommission the Bull Hill project.

The applicant provided an estimated cost of decommissioning, details on financial assurance and site restoration funds, and narratives on the decommissioning and site restoration process. The estimated decommissioning costs were prepared by the James Sewall Company.

Aside from the statements made in Mr. Lord's appeal, which do not have an underpinning in evidence in the record, the applicant's submitted evidence on decommissioning costs are the only estimates of those costs in the record. Given the detail of those estimates and the applicant's experience in the field, the Board finds the applicant's estimates to be credible. The Board finds that it is reasonable to include salvage value of the towers and turbine components to partially offset the cost of decommissioning the project, as allowed in the Department's submission requirements for decommissioning. The Department Order's requirement that the applicant reevaluate decommissioning costs at the end of years ten and fifteen to ensure that there are sufficient funds available when the project is dismantled provides a safeguard if such costs or salvage value were to change. On this basis, the Board finds that the applicant provided adequate information on decommissioning and the escrow required in the Department's Order sufficiently provides for the applicant's funding of decommissioning.

**D. TANGIBLE BENEFITS:**

As part of a demonstration of tangible benefits, an applicant must establish a community benefit package which includes community benefit agreement payments. In his appeal, Mr. Weigang argues that the Department erred in its finding that the applicant demonstrated that the proposed project will provide significant tangible benefits to the State, host communities, and surrounding area pursuant to 35-A M.R.S. §3454, provided that annual payments are made to the towns of Osborn, Waltham, and Eastbrook. Mr. Weigang contends that Hancock County should be designated a host community by law.

During the Department's processing of the application and in his appeal, Mr. Weigang argues that Hancock County is legally required to be included in the applicant's community benefits package. In consultation with the Attorney General's office, the Department determined that the applicant is not required to provide benefits to every host community.

Pursuant to the Wind Energy Act a county in which the generating facilities (the turbines) are located is a host community when the turbines are located in a township. However, the Act also expressly allows an applicant to choose, for the purpose of providing specific tangible benefits, a municipality proximate to the location of when, as

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in this case, those facilities are located within the State's unorganized or deorganized areas. The Act requires that the total community benefit package be valued at no less than \$4,000 per turbine per year, averaged over 20 years. The applicant in this case selected three nearby municipalities, Osborn, Waltham and Eastbrook, all in Hancock County, which thereby qualified them as host communities. The applicant established a package that divided payments among those three host communities. The statute does not state that all entities that qualify as a host community must be included in the community benefit package.

As a customary part of the Department's analysis, the applicant's proposed tangible benefits plan was also reviewed by the State Economist. The State Economist provided her assessment that the tangible benefits meet the criteria established in 35-A M.R.S. §3454 and the community benefits package exceeds the minimum statutory requirements.

Based on the location of the proposed development in T16 MD, T22 MD, Osborn, and Aurora, and the provisions of the Wind Energy Act as discussed above, the Board concludes that the applicant has met the requirements with regard to the provision of community benefits. The Board finds that the proposed project will provide significant tangible benefits in accordance with 38 M.R.S. §484(10) and 35-A M.R.S. §3454.

E. OTHER REQUESTED ACTIONS:

Mr. Lord's request that the Board order the decommissioning of the Bull Hill development is not within the Board's authority in the context of this appeal. With respect to Mr. Lord's request that the Board conduct or order a financial audit of First Wind the Board is without jurisdiction to take such an action.

7. CONCLUSIONS:

Based on the above findings, the Board concludes that:

1. The appellants filed timely appeals.
2. The licensee's proposal to construct an 18 turbine wind energy development, known as the Hancock Wind Project, in T16 MD, T22 MD, Osborn, and Aurora, meets the criteria for a permit pursuant to the Natural Resources Protection Act, 38 M.R.S.A § 480-A et seq; the Site Location of Development Act, 38 M.R.S. § 481 et seq; the Wind Energy Act, 35-A M.R.S. §§ 3401-3457, and Section 401 of the Federal Water Pollution Control Act.

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THEREFORE, the Board AFFIRMS Department Order #L-25875-24-A-N/L-25875-TF-B-N approving the application of HANCOCK WIND, LLC to construct a wind energy development in T16 MD, T22 MD, Aurora, and Osborn, Maine and DENIES the appeals of DARREN W. LORD and OSCAR E. WEIGANG.

DONE AND DATED AT AUGUSTA, MAINE, THIS 6<sup>th</sup> DAY OF December, 2013.

BOARD OF ENVIRONMENTAL PROTECTION

By: Robert A. Foley  
Robert A. Foley, Chair



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

Dated: March 2012

Contact: (207) 287-2811

### SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's ("DEP") Commissioner: (1) in an administrative process before the Board of Environmental Protection ("Board"); or (2) in a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S.A. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S.A. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S.A. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This INFORMATION SHEET, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

### I. ADMINISTRATIVE APPEALS TO THE BOARD

#### LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S.A. §§ 341-D(4) & 346, the *Maine Administrative Procedure Act*, 5 M.R.S.A. § 11001, and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 CMR 2 (April 1, 2003).

#### HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days of the date on which the Commissioner's decision was filed with the Board will be rejected.

#### HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by the Board's receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner a copy of the appeal documents and if the person appealing is not the applicant in the license proceeding at issue the applicant must also be sent a copy of the appeal documents. All of the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

#### WHAT YOUR APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time submitted:

1. *Aggrieved Status.* The appeal must explain how the person filing the appeal has standing to maintain an appeal. This requires an explanation of how the person filing the appeal may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.
6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing on the appeal is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.
7. *New or additional evidence to be offered.* The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered by the Board in an appeal only when the evidence is relevant and material and that the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2.

#### OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed the license normally remains in effect pending the processing of the appeal. A license holder may proceed with a project pending the outcome of an appeal but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

#### WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge receipt of an appeal, including the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, and any materials submitted in response to the appeal will be sent to Board members with a recommendation from DEP staff. Persons filing appeals and interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, a license holder, and interested persons of its decision.

## **II. JUDICIAL APPEALS**

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2; 5 M.R.S.A. § 11001; & M.R. Civ. P 80C. A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. Failure to file a timely appeal will result in the Board's or the Commissioner's decision becoming final.

An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S.A. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

### **ADDITIONAL INFORMATION**

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452 or for judicial appeals contact the court clerk's office in which your appeal will be filed.

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**Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.**

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