

Subcommittee 2/Regulatory & Permitting Process: Recommendations on State Decision-Making Framework for Commercial-Scale Offshore Wind Energy Development¹

Introduction

The regulatory subcommittee has developed the draft recommendations detailed below for consideration by the full Ocean Energy Task Force for inclusion in its final report. This draft is intended to reflect discussion at the regulatory subcommittee's most recent meeting on September 14, 2009. As noted below, recommendations regarding compensation to the State for lease of state submerged lands remain under discussion. The regulatory subcommittee intends to discuss draft recommendations on these issues at its next meeting.

Overall, these recommendations address how the State may use its regulatory and submerged lands leasing authorities, amended as described, to facilitate siting of offshore commercial-scale wind energy development located on state-owned submerged lands in Maine's coastal waters in a manner that addresses as appropriate other natural resources values and human uses.² The recommendations cover projects that propose use of turbines and support structures currently under development and designed for deep water (50 m or greater) as well as those designed for shallow waters using existing, demonstrated technologies. These recommendations are for discussion only and do not necessarily reflect agency or administration policy.

Initial thoughts on the manner in which the proposed public policies would be effected, such as proposed statutory amendments, are indicated in parentheses following each aspect of the recommendations outlined below. Alternative approaches considered by the subcommittee are also noted.

¹ Submerged lands leasing and other provisions as noted would apply to proposed commercial and pilot tidal power facilities subject to permitting under the Maine Waterway Development and Conservation Act (MWDCA) and related authorities. The MWDCA provides a one-stop state permit (submerged lands lease, if required, is separately issued by BPL) for tidal power and other hydropower projects.

² There are some small areas of submerged lands that are privately owned. These are close in shore immediately adjacent to the shore and not relevant to this discussion.

Recommendations

I. Public Trust Doctrine

Subcommittee Recommendation

- As foundation for submerged lands leasing and related permitting provisions below, make legislative findings, tied to offshore wind energy generation goals³, that:
 - 1) Maine's coastal waters and submerged lands provide unique and valuable opportunities for development of wind, tidal, potentially other indigenous, renewable ocean energy resources;
 - 2) concerns regarding climate change and related degradation or loss of marine resources and related human uses make development of and transition to use of renewable ocean energy resources consistent with sound stewardship of trust resources; and
 - 3) with provision for avoidance, minimization, and mitigation of harms to existing public trust-related uses and resources, such as fishing, navigation and wildlife habitat; restoration of lands affected upon completion of authorized uses pursuant to permitting criteria; and adequate compensation to the public for use of its trust resources pursuant to state submerged lands leasing criteria, development of these renewable ocean energy resources promises significant trust-related benefits to Maine people for whom the State holds and manages submerged lands and their resources. (amend 35-A M.R.S. §3402, with cross reference in and to other pertinent provision in leasing and permitting laws; and/or amend 12 M.R.S. §571, *et seq.*, Public Trust in Intertidal Lands Act, to specify Public Trust Doctrine's applicability on submerged lands and make related changes)
- Address the water dependent use issue by amending BPL's leasing statute (12 M.R.S. §1862) to specify that, as per Public Trust Doctrine-related legislative findings outlined above, BPL may lease state submerged lands to facilitate development of offshore ocean wind energy resources and direct BPL to amend its rules accordingly.⁴

³ The subcommittee notes that the OETF may revisit and recommend amendment of the Wind Energy Act's goal for offshore wind capacity. See 35-A M.R.S. § 3404.

⁴ If the Attorney General's office so advised to address Public Trust Doctrine-related concerns, this amendment would clarify that wind power development on state submerged lands is a "water dependent use."

II. State Environmental Permitting

A. Subcommittee Recommendations

- Maintain current bifurcated approach, permitting by DEP (or LURC, see below) and submerged lands leasing by the Bureau of Parks and Lands (BPL) while clarifying that BPL:
 - 1) shall adopt (or may condition its leasing decision on) pertinent findings and conclusions in DEP's Site Law and/or NRPA permit (or LURC land use permit), as applicable; and
 - 2) retains authority to require rent and compensation as discussed below. (amend 12 M.R.S. §1862). Note: BPL lease application would be filed at same time as DEP or LURC application to further coordinate state review and decision making.
- Except as otherwise provided below, DEP designated lead permitting agency (no LURC permitting or rezoning required for an "offshore commercial wind energy development" (see below re: proposed Site Law definition) or other wind energy development located in a "coastal wetland" as defined by the NRPA.⁵ (amend LURC authorizing legislation, Site Law and other pertinent DEP authorities, and potentially 35-A M.R.S. §3451(framework for regulation of grid-scale wind projects) (Note: DEP would consult with and consider comments of LURC and neighboring municipalities in exercising its decision-making authority.)
- Provide for LURC land use permitting jurisdiction over a "community-based offshore wind energy development" that is "locally owned" (as defined by 35-A M.R.S. §3602 ("community-based renewable energy project")); is used primarily to offset part or all of the electricity requirements of the local owners or community in or adjacent to which the project is located; employs generating facilities of a size commensurate with the pertinent community's need; and is located no more than one nautical mile from a coastal island in LURC jurisdiction. Such a "community-based offshore wind energy development" may also be connected to the ISONE grid. Direct LURC to amend its rules to clarify that a "community-based offshore wind energy development" is an allowable use in areas, described above, where LURC has permitting jurisdiction. Current law authorizing DEP to assume jurisdiction over projects located in both the organized and unorganized area would apply.
- Use same administrative and judicial review process for "offshore commercial wind energy development" as for land-based "grid-scale wind energy development" in DEP jurisdiction: DEP makes initial permitting decision (no

⁵ "Coastal wetlands" means all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes." 38 M.R.S. §480-B(2).

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original BEP jurisdiction); BEP may hear appeal on the record (no *de novo* review); 185 day DEP review period; DEP able to contract, at applicant's expense, for expertise needed for timely review; and appeal direct to the Law Court (amend pertinent sections in Title 38) (Note: These same administrative procedures would be made applicable to tidal power development under the Maine Waterway Conservation and Development Act.)

- Amend Site Law (38 M.R.S. §481, *et seq.*), Natural Resources Protection Act (38 M.R.S. §480-A, *et seq.*):

1) Clarify Site Law permit required for an "offshore commercial wind energy development", meaning a "wind energy development" as defined by 35-A M.R.S. §3451(11), that has an aggregate generating capacity of 3 MW or more, is proposed to be located in whole or in part in a "coastal wetland", and includes transmission lines and other associated facilities as defined by 35-A M.R.S. §3451(1)⁶. (Note: In some cases, project-related transmission lines may include upland as well as submerged power lines.) Include provision allowing DEP discretion to address development of "associated facilities", including transmission lines, separately as provided for "grid-scale wind energy development." *See* 38 M.R.S. §344(2-A)(A);

2) Require DEP determination regarding noise, safety-related setbacks, and shadow flicker for "wind energy development" located in a coastal wetland that is less than 3 MW, as per DEP certification for small wind facilities on land.⁷ (Amend 35-A M.R.S §3456 or NRPA, clarifying that noise, setback, and shadow flicker issues concern potential effects on persons as opposed to the "protected resource(s)");

3) Clarify that scenic impact standard and analysis for "grid-scale wind energy development" under NRPA and Site Law also applies to wind energy development proposed for location in a "coastal wetland" and use distance limitations in 35-A M.R.S. §3452 (scenic assessment based on proximity to a "scenic resource of state or national significance", required within 3 miles, at DEP's discretion 3-8 miles, and not required beyond 8 miles);

4) Require, as a Site Law approval criterion, demonstration that the proposed development would provide tangible benefits to communities in the project area in the manner that such benefits are required for land-based "grid-scale wind energy development" and direct DEP develop guidance on this issue; and

⁶ ""Associated facilities" means elements of a wind energy development other than its generating facilities that are necessary to the proper operation and maintenance of the wind energy development, including but not limited to buildings, access roads, generator lead lines and substations. 35-A M.R.S. § 3451(1).

⁷ NRPA may be applicable regardless of generation capacity due to location within "coastal wetlands", which include submerged land areas.

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- 5) Require project decommissioning and provision of related financial assurances for all wind energy development located in a "coastal wetland" in accordance with current the Site Law's current guidance for land-based "grid-scale wind energy development." (amend Site Law and NRPA).
- Amend Site Law and NRPA to include approval criteria that address issues presented by offshore wind energy regarding potential noise, avian (bird and bat), marine resources and other impacts; authorize DEP to adopt rules under Site Law and NRPA necessary to incorporate the above-noted statutory approval criteria (unallocated section, including direction to consult in natural resources agencies in developing proposed rules)
 - Direct SPO to review coastal scenic inventories specified in the definition of "scenic resource of state or national significance" (35-A M.R.S. §3451(9) using methodology adopted by rule pursuant to PL 2007 c. 661 and update them as appropriate by a date certain (2 years, to provide funding flexibility) (unallocated section)

B. Alternatives considered re: state environmental permitting

- Consolidation of permitting at DEP (no LURC rezoning or permitting authority)
- Status quo - permitting under existing agency authorities
- DEP rulemaking under Site Law and NRPA to develop permitting criteria tailored to ocean-based wind energy development pursuant to general legislative direction
- Scenic impact assessment for all wind energy development proposed in a coastal wetland (no distance-based limitation)

III. Submerged Lands Leasing

A. Subcommittee Recommendations

- Compensation for use of state submerged lands (under discussion)
- Disbursement and use of submerged lands leasing revenues (under discussion)
- No competitive bidding process; as under current law, lease applications addressed as received in coordination with DEP process; submerged lands leasing statute amended to clarify lease to be filed at same time as DEP application
- For "offshore commercial wind energy development", allow for 30-year, renewable lease (dating from completion of project construction, with provision

for phased development);⁸ and for tidal power authorize BPL to issue a longer lease (up to 50 years) equivalent with FERC license term

- Allow the developer of an "offshore commercial wind energy development", in lieu of cash payment of rent and/or royalties for use of state submerged lands (see first bullet above) to enter into a contract for sale or use of project-generated power, negotiated with BPL and PUC, that through reduced rates or otherwise provides commensurate dollar value to the State or Maine electric consumers
- Establish a non-lapsing, dedicated fund, the Ocean Renewable Energy Trust Fund ("Trust Fund"), into which the following funds would be deposited: 1) rental payments (less portion to cover administrative costs); and 2) state share of OCS revenues from alternative energy leasing on the OCS

B. Alternatives considered re: submerged lands leasing

- Application; competitive bid process: For "offshore commercial wind energy development" or tidal power development of 3MW or greater, require (except as otherwise noted below) BPL to publish a 30-day notice on receipt of an application for a submerged lands lease for a wind energy development (to be filed contemporaneously with DEP permit application) and to initiate a competitive bidding process if another developer with demonstrated technical and financial capacity expresses a competing interest in the lease area for offshore wind or tidal power energy development. Create exemption from competitive bidding process for lands covered by lease issued pursuant to a DEP-issued general permit for wind energy demonstration project or tidal power pilot project.
- Lease term: 1) Provide for a 50-year lease (based on maximum term of a renewable federal hydropower license) for an "offshore commercial wind energy development" or tidal power development greater than 3MW to facilitate project financing; and 2) status quo (30 year renewable lease)

IV. Local Role

A. Subcommittee Recommendations

- Municipality may not enact or enforce any standard or requirement that is stricter than DEP standards under Site Law or NRPA, as applicable (modeled after provision in wind energy demonstration project legislation, P.L. 2009 c. 270) and must act within date certain of state permitting decision (amend Wind Energy Act) (Note: This provision would apply to tidal power development as well);
- The regulatory subcommittee suggests that the following recommendation be considered by the economic development subcommittee in the context of its

⁸ Maine law current allows a 30-year submerged lands lease.

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discussion of potential incentives: Exempt wind energy development located on state-owned submerged lands from state or local personal property tax and make such development subject instead to an excise tax, based on generation capacity, adequate to reimburse municipalities, where appropriate, for at least 50% of tax lost as per Maine constitution.

B. Alternatives considered re: local role

- State preemption of local permitting authority
- Status quo - no state provision regarding potential municipal authority
- Status quo - potential local taxation

V. Federal-State Coordination - Siting-related Planning

Note: The following coordination efforts would be undertaken concurrently with implementation of proposed changes in state permitting and leasing laws and rules and not as precursors to such changes.

A. Subcommittee Recommendation

- Direct SPO, in conjunction with DOC/BPL, DMR, and the University of Maine System, to develop and publish on the WWW, as detailed, non-regulatory guidance: 1) a user-friendly, map-based information resource (Coastal Atlas) to facilitate public (leasing and permitting) and private (site selection and investment) decision makers' use of the best available information regarding siting of "offshore commercial wind energy development" and other matters; and 2) guidance, developed in consultation with DEP, ACOE and state and federal natural resources agencies, on characteristics, such as presence of endangered species or shipping lanes, that may present difficult regulatory issues under applicable state and federal wind energy laws. In designing this resource, focused on Maine's coastal waters, the agencies would build on pertinent current efforts (including those of the UMaine System and the OETF) and consider options to address the information needs identified in the "Data and Information Needs Assessment" found in Appendix P of the December 2006 "Bay Management Study." Funding to support this effort would come from the following state sources: project-specific federal funding (see next bullet); and (over time) a portion of submerged lands leasing fee for offshore wind or other development utilizing state submerged lands for energy transmission or generation; a portion of state share of OCS alternative energy development related revenue; and a portion of state-assessed personal property tax on wind equipment. See above. (unallocated section; amendment of pertinent funding statutes)
- Recommend that the State seek congressional appropriation needed to undertake the above-described Coastal Atlas-related work in coordination with related

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regional and national marine spatial planning efforts (recommended action; legislation not required)

- Recommend that SPO work with MMS, ACOE, USFWS, NMFS and other federal partners to develop an MOU (using the MOU with FERC on tidal power development as a model) regarding leasing and permitting of wind energy development in state waters and on the OCS. (recommended action; legislation not required)

B. Alternatives considered re: siting related planning

- Use map-based tools and best available information to identify and map "focus areas" within which the streamlined administrative and judicial review process described above⁹ would apply and state financial or other incentives (if any), such as above noted tax exemption, would be provided;
- Use map-based tool and best available information to identify and map resource and use protection areas where commercial offshore wind energy development would not be allowed due to anticipated significant conflicts with existing uses, such as shipping, or natural resources, such as major bird migration corridors or marine mammal feeding areas
- Differentiate between a "community wind energy development" (one by or for and of a size to meet the needs of a discrete coastal community or communities) and an "offshore commercial wind energy development" and require the latter to be sited at least 1 mile from the nearest land mass, including any inhabited island, to mitigate potential noise and visual effects

VI. Federal-State Coordination - CZMA Consistency

Subcommittee Recommendation

- Recommend that SPO submit for NOAA's review and approval amendments to the Maine Coastal Program needed to ensure that, in accordance with and to the extent provided by the federal consistency provision of the Coastal Zone Management Act, offshore wind energy development proposed on the OCS is subject to Site Law and NRPA (amended as proposed) and other pertinent state enforceable policies that are applicable to such projects in Maine's state waters. (recommend agency action under current authority; legislation not required)

⁹ See 4th bullet in Section II., State Environmental Permitting