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STATE OF MAINE
DEPARTMENT OF CONSERVATION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

WILLIAM H. BEARDSLEY
COMMISSIONER

Second Procedural Order

**In the Matter of
Development Permit DP 4889
Champlain Wind, LLC
Bowers Wind Project
April 21, 2011**

To: Parties
Neil Kiely (Applicant)
Juliet Brown, Esq. (Counsel for Applicant)
Sean Mahoney, Conservation Law Foundation (Intervenor)
Dylan Voorhees, Natural Resources Council of Maine (Intervenor)
Interested Persons
David Corrigan, Fletcher Mountain Outfitters
Steve Norris, The Pines Lodge
Kevin Gurall, PPDW
David R. Darrow
Pete Borden
Leonard J. Murphy
Barbara Moore
Gordon Mott
Andrew Buckman
Gary and Kay Campbell
Timothy Dalton
Paul Rudershausen
Tracy Allen
Phillip Daw
Daniel Remian

cc: Commissioners of the Land Use Regulation Commission (LURC)
Amy B. Mills, AAG
Catherine Carroll, LURC Director
Samantha Horn-Olsen, LURC Planning Division Manager
Fred Todd, LURC Project Planner
Jim Palmer, LURC Scenic Quality Consultant

From: Gwen Hilton, Land Use Regulation Commission Chair and Presiding Officer

Subject: Scenic standard applicable to associated facilities, 35-A M.R.S. § 3452(2)

I. Background.

LURC staff determined the Bowers Wind Project application was complete on March 14, 2011. Following the staff's determination, no interested person raised a concern regarding the scenic impact standard applicable to this project's associated facilities. On April 6, 2011, the Commission voted to set this matter for a public hearing, but no date has yet been set. In view of 35-A M.R.S. § 3452(2), this issue may arise at the public hearing, and fairness to all parties in this proceeding requires that a determination on the applicable scenic standard be made in advance of the pre-filing of testimony and the public hearing.¹ Therefore, on March 29, 2011 the Presiding Officer issued the First Procedural Order in this matter. That order sought filings regarding the scenic standard applicable to the associated facilities, and provided an opportunity to submit argument in advance of the Presiding Officer's determination on this scenic standard issue.

On April 6, 2011, two interested persons, David Corrigan and Kevin Gurall, submitted information regarding this scenic standard issue.² Mr. Corrigan of Fletcher Mountain Outfitters submitted a filing, arguing that this project stands at the head of the Downeast lakes region watershed – an area he states that the Legislature intentionally excluded from the area designated as appropriate for wind energy development. He states the economy of this region depends, in large part, on its wild character, and that in part is why the Downeast lakes region is home to perhaps the largest concentration of working Registered Maine Guides in the state. He further asserts that part of the Commission's duty is to ensure that existing, traditional uses will not be adversely impacted. By applying the higher scenic standard to the associated facilities, he states the Commission can ensure that that duty is fulfilled. Mr. Gurall, President of the Partnership for the Preservation of the Downeast Lakes Watershed, submitted a filing, generally arguing that the associated facilities of this project should be held to the higher scenic standard.

On April 12, 2011, the Applicant responded, arguing that the exception set forth in section 3452(2) regarding associated facilities is not applicable to this project's associated facilities, which are the access roads including the crane-path roads, the express collector line³, the substation, the operations and maintenance building, the permanent met towers, and the turbine pads or cleared areas around individual turbine locations.

The Applicant states the substation, the operations and maintenance building, and the express collector line are all located on the north side of the project ridge and, as such, would not be visible from any

¹ 35-A M.R.S. § 3453(2) states that the Commission "shall make a determination [regarding the scenic standard applicable to associated facilities] within 30 days of its acceptance of the application as complete for processing." The Applicant states that a determination after the 30-day period is untimely. The 30-day time period set by the Legislature for the Commission is directory, not mandatory. As stated above, a hearing date has not yet been set and testimony has not yet been pre-filed. There has been no showing that making the scenic standard determination now would be unfairly prejudicial to any party to this proceeding. Rather, deciding this issue before the pre-filing of testimony and before the hearing will lend itself to fairness as all parties will know the scenic standard applicable in this administrative proceeding before the matter is adjudicated before the Commission.

² The First Procedural Order required that any interested person file pleadings on this scenic standard issue no later than April 5, 2011. The two interested person filings on April 6, 2011 were, therefore, untimely. No party has objected or identified any unfair prejudice arising out of the filings being late, and therefore they have been accepted.

³ The Applicant assumes for the sake of discussion that the express collector line is an associated facility. This issue is discussed in more detail in the text below.

scenic resources of state or national significance (jurisdictional resources) because those resources are located to the south of the project. Further, the associated facilities would not be visible from the Springfield Congregational Church (which is on the National Register of Historic Places). The express collector line would only be visible from local viewing points where it crosses an existing road, Route 6. The potential visual impacts of the turbine pads, access roads, and all associated clearing is consistent with similar facilities (roads, buildings and substations) located throughout the rural Maine landscape. Finally, the Applicant asserts the potential visual impact of the permanent met towers will be minimal to both jurisdictional and local resources due to their narrow profile (18" wide) and their light color.

II. Order.

A. Definition of associated facilities

As a preliminary matter, to determine which scenic standard applies to the associated facilities in this project, the definition of associated facilities, as compared to generating facilities, must be clear. In accordance with 35-A M.R.S. §3451(1) and (5):

Generating facilities means wind turbines, including their blades, towers, and concrete foundations, and transmission lines (except the generator lead line) immediately associated with the wind turbines.

Associated facilities means all other facilities that are not generating facilities, and that includes the turbine pads, which are the cleared, leveled areas around each turbine, all roads used to access the turbines, the generator lead line, the meteorological towers, as well as the operations and maintenance building and the substation.

The transmission lines in this project require clarification with respect to whether certain lines are generating facilities or associated facilities. In this project, there are transmission lines that run between the turbines, collecting the power. Those transmission lines are immediately associated with the wind turbines and are generating facilities. In this project there is also, however, a so-called express collector line that runs for 5.2 miles from the summit of the project to the substation. The express collector line is not immediately associated with the wind turbines, is more like a generator lead line, and therefore is an associated facility. This project proposes no new generator lead line leaving the substation as power is transported from the substation to the power grid on an existing line.

B. Applicable scenic standard

Regarding the scenic standard applicable to associated facilities, the Wind Energy Act provides, in relevant part:

The [Commission] shall evaluate the effect of associated facilities of a wind energy development in terms of potential effects on scenic character and existing uses related to scenic character in accordance with Title 12, section 685-B, subsection 4, paragraph C . . . in the manner provided for development other than wind energy development, if the [Commission] determines that application of the [Wind Energy Act scenic] standard . . . to the development may result in unreasonable adverse effects due to the scope, scale, location or other characteristics of the associated facilities. An interested party may submit information regarding this determination to the primary siting authority for its consideration. The primary siting authority shall make a determination pursuant to this subsection within 30 days of its acceptance of the application as complete for processing.

35-A M.R.S. § 3452(2) (emphasis added). Thus, this section provides the Commission with an analytical framework as follows.

To determine which scenic standard to apply, § 3452(2) first directs the Commission to apply the scenic standard provided by the Wind Energy Act to the associated facilities. That scenic standard and its associated criteria are found at 35-A M.R.S. §§ 3452(1) & (3). In applying that standard, the Commission would consider views of the associated facilities only from scenic resources determined under the Wind Energy Act to be of state or national significance, and based upon the criteria set forth in the Act, it would consider whether the associated facilities significantly compromised those views such that there was an unreasonable adverse effect on scenic character or existing uses related to scenic character.⁴ 35-A M.R.S. §§ 3451(9), 3452(1) & (3). Upon this review, that is—the scenic impacts of the associated facilities under the Wind Energy Act standard—section 3452(2) then directs the Commission to consider whether the application of that standard, as opposed to application of the scenic standard set forth in Title 12, “may result in unreasonable adverse effects due to scope, scale, location or other characteristics of the associated facilities.” 35-A M.R.S. § 3452(2). Thus, the Commission must next consider what it would consider with regard to the scenic impacts of associated facilities under the Title 12 standard that it would not consider under the Wind Energy Act standard.

Under the Commission’s traditional scenic standard, 12 M.R.S. § 685-B(4)(C) and Commission Standards § 10.25(E)(1), the Commission would consider whether “adequate provision has been made for fitting the [project] harmoniously into the existing natural environment in order to ensure there will be no undue adverse effect on [among other things] existing uses [and] scenic character . . . in the area likely to be affected by the project.” Thus, under Title 12, the standard is the so-called harmonious fit/no undue adverse effect standard, and the Commission’s review of the scenic impacts of associated facilities would not be not limited to those views that have been identified by the Legislature as significant under the Wind Energy Act. *See* 35-A M.R.S. § 3451(9) & § 3452(1). Under Title 12 the Commission would consider the impacts the associated facilities would have on views from scenic resources of state or national significance as well as locally significant scenic resources in the area likely to be affected by the project.

Accordingly, if the Commission were to apply the Wind Energy Act standard to associated facilities, two factors are relevant for the Commission’s consideration. First, the Commission would not consider the scenic impacts of the associated facilities on locally significant scenic resources. Second, with respect to views of the associated facilities from scenic resources of state or national significance, the Commission would not consider whether the associated facilities fit harmoniously into the natural environment. Thus under the analytical framework provided by 35-A M.R.S. § 3452(2), the Commission must ultimately consider: whether (because of their scope, scale, location or other characteristics) the associated facilities may result in (because the above two factors would not be taken into consideration) unreasonable adverse effects.

C. Bowers Wind Project associated facilities

A review of the filings regarding the scenic standard applicable to the associated facilities of this project and the information contained in the administrative record to date, including the Applicant’s complete

⁴ The Wind Energy Act provides that the Commission “shall consider insignificant the [scenic] effects of portions of the development’s *generating facilities* located more than 8 miles . . . from a scenic resource of state or national significance.” 35-A M.R.S. § 3452(3) (emphasis added). Therefore, under the Wind Energy Act, there is no distance limitation on the Commission’s consideration of associated facilities’ scenic impact on scenic resources of state or national significance. It may be that parties have not addressed this issue as associated facilities may not typically be visible beyond 8 miles.

application, indicates the following with respect to the scope, scale, location and other characteristics of the associated facilities:

- Lakes located to the south of the project area in the Downeast lakes region (other than the lakes in this region that have been designated scenic resources of state or national significance under the Wind Energy Act) have been identified as locally significant scenic resources, but the views of associated facilities from these resources will be limited for the reasons stated below;
- There is no new generator lead line leaving the substation;
- The operations and maintenance building, substation, and express collector line will be located on the north side of the project area, and while the access road to the operations and maintenance building will be visible from an existing road, and the express collector line will be visible where it crosses an existing road, none of those associated facilities will be visible from any identified scenic resources;
- This project proposes 9.8 miles of new access roads in a project area that contains existing logging roads, the roads will be located at relatively low elevations, the topography will not require extensive cut and fill, and therefore the visual impact from the roads will primarily be limited to notches in the vegetation canopy;
- Elevations proximate to the project area are relatively low-lying and elevations that will provide views of the associated facilities will be at a distance that reduces the scenic impact; and
- This project's associated facilities may be visible to varying degrees from scenic resources that have been identified as significant under the Wind Energy Act, but they will not be visible from any national natural landmark, federally designated wilderness area, nationally-listed historic property, or national park.


In view of the scope, scale, and location of the associated facilities, as identified above, the Presiding Officer does not conclude that the application of the Wind Energy Act scenic standard to this project's associated facilities may result in an unreasonable adverse effect. With respect to other mountainous regions in the State of Maine under the Commission's jurisdiction, this project area and areas proximate to it are relatively low-lying, and the project area is located in a region with only moderate changes in elevation. Further, many of this project's associated facilities are located to the north of the project area, and thus the ability to view associated facilities from the southerly lakes of local and state significance is limited. Therefore, not considering the associated facilities' impacts to scenic resources that the Legislature has already determined as a matter of law to be insignificant with respect to the scenic impacts of the generating facilities, and not requiring a harmonious fit with respect to how the associated facilities will be viewed from scenic resources of state or national significance, will not result in an unreasonable adverse effect. For all of these reasons, the Wind Energy Act scenic standard, not the Title 12 standard, is applicable to the associated facilities of the Bowers Wind Project.

III. Authority and Reservations.

This Procedural Order is issued by the Presiding Officer pursuant to LURC Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission but are not to be further argued except by leave of the Presiding Officer. All rulings and objections will be noted in the record. The Presiding Officer may amend this Order at any time.

Questions regarding these rulings of the Presiding Officer should be directed to Catherine Carroll, the Commission's Director, or Fred Todd at the Commission's office in Augusta. No *ex parte* communication may occur with the Presiding Officer or any other Commission member.

DATED AT AUGUSTA, MAINE THIS 21st DAY OF April 2011

By: 

Gwen Hilton, Chair and Presiding Officer