



PAUL RICHARD LEPAGE

GOVERNOR

STATE OF MAINE  
DEPARTMENT OF CONSERVATION  
MAINE LAND USE REGULATION COMMISSION  
22 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0022

WILLIAM H. BEARDSLEY

COMMISSIONER

## **Fifth Procedural Order**

### **In the Matter of Development Permit DP 4889 Champlain Wind, LLC Bowers Wind Project**

**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/Pending Intervenor Consolidated Parties

David Corrigan, Fletcher Mountain Outfitters  
Steve Norris, The Pines Lodge  
Kevin Gurall, PPDW  
Gordon Mott

**cc:** Commissioners of the Maine Land Use Regulation Commission (LURC)

Amy B. Mills, AAG  
Catherine M. Carroll, LURC Director  
Samantha Horn-Olsen, LURC Planning Division Manager  
Frederick W. Todd, LURC Project Planner

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

**Subject:** Scenic standard applicable to turbine lighting

### **I. Background.**

On April 29, 2011, the Presiding Officer issued the Third Procedural Order regarding the pre-hearing conference held on April 20, 2011. At that pre-hearing conference, clarification was sought as to what scenic standard applies to turbine lighting. This scenic issue had been raised but not resolved in an unrelated wind energy development project then pending before the Commission. The Presiding Officer noted in the Third Procedural Order that this legal issue would be resolved by a subsequent procedural order in advance of the June 6<sup>th</sup> deadline for the pre-filing of direct testimony.

More precisely, the issue is whether consideration of the effect of turbine lighting on scenic character and existing uses related to scenic character is governed by the scenic standard of the Wind Energy Act, 35-A M.R.S. § 3452, or of LURC's statute, 12 M.R.S. § 685-B(4)(C), and LURC Rules § 10.25(F)(2).

## II. Applicable law

Pursuant to its general authority under Title 12, the Commission may not approve a development permit unless, among other things, an applicant has made adequate provision for fitting a proposed project harmoniously into the existing natural environment, ensuring there will be no undue adverse effect on existing uses, scenic character, and natural and historic resources. 12 M.R.S. § 685-B(4). The Commission has adopted regulatory development standards, including lighting standards, which are applicable to structures and uses that require a permit. LURC Rules § 10.25(F).

The Wind Energy Act, P.L. 2007, ch. 661, however, amended the Commission's permitting authority with respect to wind energy development proposed in the expedited permitting area. Section 685-B now provides that "[i]n making a [permitting] determination . . . regarding an expedited wind energy development . . . the commission shall consider the development's or project's effects on scenic character and existing uses related to scenic character in accordance with" the Wind Energy Act scenic standard, which is found at 35-A M.R.S. § 3452. Thus, while the Commission continues to apply its harmonious fit/no undue adverse effect standard to the impacts of expedited wind energy development on any existing uses not related to scenic character and on natural and historic resources, neither § 685-B(4) nor its related regulatory development standards are applicable to impacts to scenic character and uses related to scenic character.<sup>1</sup>

## IV. Order

The Commission is mindful of its statutory charge to soundly plan with respect to, among other things, the scenic resources of its jurisdiction, 12 M.R.S. § 681, and this charge is reflected in the Commission's Comprehensive Land Use Plan (CLUP) (2010) (see, e.g., pages 272-78). Further, the Commission is mindful of its statutory charge to ensure that applicants demonstrate by substantial evidence "that the public's health, safety and general welfare will be adequately protected." 12 M.R.S. § 685-B(4). The Wind Energy Act, however, amended the Commission's permitting authority with respect to expedited wind energy development, and the standard set forth at 35-A M.R.S. § 3453 governs the Commission's findings on the impacts of turbine lighting on scenic character and existing uses related to scenic character.

## V. Authority and Reservations

This 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 this Memorandum and Order or rulings of the Presiding Officer should be directed to Catherine Carroll, Director: 207-287-4930, [Catherine.M.Carroll@maine.gov](mailto:Catherine.M.Carroll@maine.gov) or Fred Todd, Project Planner: 207-287-8786 [fred.todd@maine.gov](mailto:fred.todd@maine.gov) at the Commission's office in Augusta.

No *ex parte* communication may occur with the Presiding Officer or any other Commission member.

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<sup>1</sup> Unless, however, it is determined that the exception set forth at 35-A M.R.S. § 3452(2) is applicable, and then, if so, the Title 12 and related regulatory standards would apply to the associated facilities of a wind energy development. As concluded in the Third Procedural Order (4/14/11), wind turbines, and thus the safety-related lighting required by the Federal Aviation Administration, are generating facilities, and therefore the Wind Energy Act scenic standard would be applicable to them regardless of the applicability of the exception set forth at 35-A M.R.S. § 3452(2).

DATED AT AUGUSTA, MAINE THIS 23<sup>rd</sup> DAY OF MAY 2011

A handwritten signature in cursive script that reads "Gwen Hilton". The signature is written in black ink on a white background.

By: \_\_\_\_\_  
Gwen Hilton, Presiding Officer