



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

PAUL RICHARD LEPAGE  
GOVERNOR

WILLIAM H. BEARDSLEY  
COMMISSIONER

**TO:** Commission Members  
**FROM:** Frederick W. Todd, Project Planner  
**DATE:** November 18, 2011  
**SUBJECT:** Request to withdraw application  
Champlain Wind, LLC 'Bowers Wind Project'  
Development Permit DP 4889; Carroll Plt (Penobscot) and Kossuth Twp (Washington)

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### Project Proposal

On March 14, 2011 staff accepted as complete for processing an application for Development Permit DP 4889, submitted by Champlain Wind, LLC (a subsidiary of First Wind Energy, LLC) for a 69.1 megawatt (MW) wind energy facility to be located on Bowers Mountain, an unnamed ridge to the south (referred to as "South Peak" throughout the application) in Carroll Plantation and Dill Hill in Kossuth Township. The entire proposed project is located within the area designated for expedited permitting.

The proposed \$136 million development project consists of up to 10 Siemens 3.0 MW turbines and up to 17 Siemens 2.3 MW turbines. The project would also include: access to the turbines utilizing new and existing roads; 34.5 kilovolt (kV) collector lines connecting the turbines; an "express collector" line for 5.2 miles to connect to a new substation adjacent to Line 56 -- an existing 115kV transmission line; an operations and maintenance building; and up to four permanent meteorological towers.

### Background

The Commission held a public hearing on this proposal on June 27 and 28, 2011, in Lincoln, Maine, and it was continued on July 6, 2011, in Bangor, Maine. The hearing record closed on July 18, 2011, for public comment.

The Commission deliberated on this project proposal on September 7, October 5 and October 19, 2011. At the conclusion of the October 19<sup>th</sup> deliberations, staff was directed to prepare a draft denial of this proposal and bring that draft decision for the Commission's consideration at the December 5, 2011, Commission meeting.

According to § 685-B(2-C) of the Commission's statute, the Commission is directed to return a decision within 270 days from the date the application is accepted as complete for processing – in this instance, by December 9, 2011. On November 8, 2011, the applicant, Champlain Wind, LLC, filed a request to withdraw its application, and it agreed to an extension of the Commission's deadline for issuing a final decision through January 2012. For the Commission's convenience, a copy of the Applicant's request is attached to this memo.

CATHERINE M. CARROLL, DIRECTOR

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The Chair issued a procedural order on November 15, 2011 regarding the Applicant's request. The Order delayed the decision on the project until January to give the Commission an opportunity to respond to this request. For the Commission's convenience, a copy of the Chair's order is attached to this memo.

The Commission has received responses to the Applicant's request to withdraw from Intervenors, interested persons, and members of the public, and copies of those are also attached for the Commission's convenience.

### **Decision on Applicant's request**

The Commission will be asked to make a decision on this request at its December 7, 2011, Commission meeting. As discussed in the Chair's procedural order, the Commission may, based upon due process and policy considerations, grant or deny the request to withdraw.

Staff recommends that, if the Commission decides to deny the request, it state the reasons for doing so at the December 7<sup>th</sup> meeting, and by motion and vote direct staff to finalize the requested denial decision document for the Commission's consideration and vote at the January 2012 meeting. After receipt of the denial decision, Commission Rule 4.07(c) would require that, in order to "reapply . . . for a permit for the same proposed use for the property in question," the Applicant "demonstrate that there is a significant change in circumstances or substantial new information to be presented to the Commission."

Staff recommends that, if the Commission decides to grant the request, it state the reasons for doing so and any conditions associated with the grant, and by motion and vote direct the Chair to work with staff to issue a procedural order reflecting the Commission's decision.

FWT

Attachments: Applicant's November 8, 2011, Cover Letter and Request to Withdraw Its Application  
Commission Chair's 14<sup>th</sup> Procedural Order Regarding Request to Withdraw  
Intervenors, Interested Persons and Public Responses to Request to Withdraw

# Verrill Dana<sub>LLP</sub>

Attorneys at Law

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November 8, 2011

**By E-mail**

Frederick W. Todd  
Project Planner  
Land Use Regulation Commission  
18 Elkins Lane  
Augusta, ME 04333

Re: Champlain Wind, LLC/Bowers Wind Project DP 4889

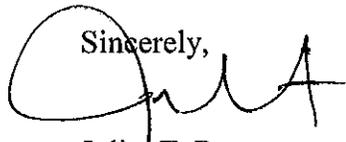
Dear Fred:

Enclosed please find the Applicant's request to withdraw its application for the purpose of allowing it an opportunity to reconfigure the Project to address the concerns identified by the Commission during deliberations and the guidance on the visual impact standard that has developed during the pendency of this proceeding. We also request an opportunity to address the Commission orally on this request at the December meeting.

The Applicant agrees to extend the deadline for the Commission to issue a final decision on DP 4889 through January, 2012, to allow the Commission the opportunity to consider and rule on this request at its December meeting in advance of taking final action on a decision document.

Thank you for consideration of this request.

Sincerely,



Juliet T. Browne

JTB/prf

Enclosure

cc: Amy Mills, Asst. Attorney General (via e-mail)  
Catherine Carroll (via e-mail)  
Samantha Horn Olsen (via e-mail)  
Sean Mahoney (via e-mail)  
Kevin Gurall (via e-mail)  
David Corrigan (via e-mail)  
D. Gordon Mott (via e-mail)  
Neil Kiely (via e-mail)  
Joy Prescott (via e-mail)

STATE OF MAINE  
LAND USE REGULATION COMMISSION

IN THE MATTER OF DEVELOPMENT	)	
APPLICATION DP 4889	)	APPLICANT'S REQUEST TO
CHAMPLAIN WIND, LLC	)	WITHDRAW ITS APPLICATION
BOWERS WIND PROJECT	)	

Champlain Wind, LLC ("Champlain") respectfully requests that it be allowed to withdraw its application for the purpose of reconfiguring the Project to address the concerns expressed by the Commission during deliberations and the guidance that has been developed during the pendency of this proceeding.

Champlain began the permitting process in May, 2010, when it filed a petition to expand the expedited permitting area to include portions of Kossuth Township, where 8 of the 27 proposed turbines are located. Following a public hearing on that proposal, the Commission voted unanimously to include the entirety of the project area within the expedited permitting area. In January, 2011, Champlain then filed DP 4889.

We believe allowing withdrawal here is justified for two compelling reasons:

- First, there has been an evolution in how the Commission interprets and applies the visual impact standard - - an inherently subjective standard - - as well as imposition of de-facto new regulatory requirements related to remote ponds and intercept surveys for assessing level of use and the effect of a project on the public's continued use and enjoyment of a resource, which has occurred during the pendency of this proceeding.
- Second, because of the recent significant shift in Commission make-up, the Commission is placed in the awkward position of needing unanimity to take any action on DP 4889.

These facts are not likely to reoccur and therefore allowing withdrawal here would have limited if any impact on future proceedings. More importantly, these constitute equitable

considerations that support allowing Champlain to withdraw and re-file an application that reduces visual impacts and is otherwise responsive to the Commission's concerns.

The Visual Impact Standard. The Commission and its outside expert have expressed uncertainty regarding the application of the visual impact standard set forth in the Wind Energy Act and, as a result, have developed guidance and application requirements over time, including during the pendency of this proceeding. The Commission, by its own admission, has struggled with the visual impact standard. Likewise, the Commission's outside reviewer, Dr. James Palmer, has struggled with the standard and commented on the difficulty of its application. For example, in his project reviews, Dr. Palmer states that the Act's criteria are "so succinct as to be somewhat ambiguous" and has called upon LURC and DEP to "further refine the Evaluation Criteria so they are unambiguously understood, accurately applied and usefully interpreted." E.g., Review of Bowers Wind Project Visual Impact Assessment, June 3, 2011 at 63; see also Kibby Expansion Transcript at 296-300 (discussing concerns with interpretation of the Wind Energy Act); Bowers Public Hearing Transcript, Day Session June 28, 2011 (discussing request for assistance from developers and other consultants to help "clearly define" the Wind Energy Act criteria). Additionally, Dr. Palmer has, through his review comments, established a de-facto requirement that applicants conduct intercept surveys to evaluate level of use of the resource and impact on use and enjoyment, two factors under the Wind Energy Act. Intercept surveys were not required in prior applications approved by both LURC and DEP,<sup>1</sup> and there is no agreed

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<sup>1</sup> Intercept surveys were not required for the Stetson II or the Kibby Expansion projects, both reviewed by LURC, or the Rollins or Oakfield projects, which were reviewed by the DEP. Dr. Palmer was not involved in either of the DEP projects and neither project included intercept surveys. For the Kibby Expansion project, Dr. Palmer noted the absence of studies or surveys of viewer expectations or how the project would impact use and enjoyment. April 16, 2010 Review of the Kibby Expansion Wind Project Aesthetic Impact Assessment, James F. Palmer (filed in DP 4860). Dr. Palmer noted that without documented information on users, his ratings were "little more than guesstimates." October 2, 2010 Summary Review of the Amended Kibby Expansion Project Aesthetic Impact Assessment at 5 and 8

upon methodology or protocols that govern such surveys.<sup>2</sup> Nonetheless, because they have become a de-facto requirement, the Applicant undertook two formal surveys specific to the scenic resources within the study area (the telephone and snowmobiler surveys). The Applicant also provided substantial other more general surveys that were nonetheless directly responsive to the criteria in the Act. To the extent that surveys are a required element of the visual impact assessment, there should be clear direction to applicants on the methodology and protocols for such surveys.

In recognition of the challenges associated with application of the visual impact standard, during the pendency of this proceeding the Commission held several work-sessions to develop relevant guidance. In September, following the public hearing on DP 4889, the Commission had staff present information on how to harmonize the Wind Energy Act standard with the Commission's CLUP and Chapter 10 regulations. Staff provided guidance on and the Commission discussed lake remoteness and low levels of public use and how they should be evaluated under the Wind Energy Act. From that discussion, the Commission developed an analysis that provided additional guidance to the Applicant in this matter, but at the same time appears to be at odds with Dr. Palmer's application of the Wind Energy Act criteria. The Commission also addressed how to evaluate visual impacts associated with traveling through the

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(filed in DP 4860). The Commission approved the project, notwithstanding the absence of surveys on use of Chain of Ponds and impact of the project on use and enjoyment of that and other scenic resources. See Findings of Fact and Decision (DP 4860) Conclusion 11. While the Commission acted appropriately in doing so, since then user surveys appear to have been elevated to a de-facto requirement.

<sup>2</sup> This is in stark contrast to the agreed upon protocols for conducting pre-construction surveys to evaluate risks to birds and bats and agreed upon methodology for conducting sound modeling to determine compliance with the applicable sound limits. There has been no consensus or even a rule making or stakeholder process for developing protocols for intercept or other surveys related to assessment of visual impacts. Indeed, although Dr. Palmer characterized the results of the Baskahegan survey as "powerful," and has cited to it in his review of a DEP project, it is not clear how the Commission (or even Dr. Palmer) views such surveys and their role in demonstrating compliance with the Wind Energy Act standards.

landscape. See August 30, 2011 Memo from Staff to Commission regarding Evaluating Scenic Impacts Under the Wind Energy Act (discussed at the September meeting). Both issues are directly relevant to DP 4889. Likewise, in July, also following the public hearing on DP 4889, staff presented information “designed to facilitate interpretation of statutory language and set Commission policy.” See June 29, 2011 Memo from Staff to Commission re Discussion about Cumulative Visual Impacts related to Wind Power Development within LURC Jurisdiction at 13 (discussed at the July meeting).

While we commend the Commission for its diligence in developing guidance for applying the Wind Energy Act’s visual impact standard, the fact remains that much of the Commission’s work in clarifying its application of the visual impact standard has occurred after DP 4889 was filed and after the public hearing on the Project. This is an important factor in this proceeding as the constitutionality of scenic and aesthetic standards has been the subject of recent judicial scrutiny, and the Maine Law Court has repeatedly stated that with regard to scenic impact standards, “[d]evelopers are entitled to know with reasonable clarity what they must do...to obtain the permits or approvals they seek.” Uliano v. Board of Environmental Protection, 977 A.2d 400, 419 (Me. 2009) (citing Kosalka v. Town of Georgetown, 752 A.2d 183, 186 (Me. 2000)). Standards that fail to “furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights” may be found to be unconstitutionally vague. Kosalka, 752 A.2d at 186.

Champlain is not arguing that the Wind Energy Act visual impact standard is unconstitutionally vague. To the contrary, it includes specific factors that are not present in more typical visual impact standards. To the extent, however, an agency is going to provide additional guidance and specificity on interpretation and application of a standard, which the Commission

has done here, it is only fair that an applicant be afforded advance notice of those requirements. Much of the clarification and interpretation of the Commission's standard has occurred recently and, as a result, at the time Champlain filed its application it was not afforded "an intelligible principle to which [it was] directed to conform." *Id.* at 413. Champlain is simply requesting an opportunity to refine its project in response to the guidance that has been developed since it filed its application in December, 2010, and to address the concerns expressed by the Commission during deliberations.

Champlain does not raise any of these points as a criticism of either the Commission or its outside expert, but as evidence of the unique challenges it faced in understanding how the Commission would apply the visual impact standard. As acknowledged by all the commissioners who deliberated on the Project, there are not any natural resource or siting issues except for Project visibility. And with respect to Project visibility, the Commission's independent visual expert concluded that there was no undue adverse impact on any of the scenic resources within eight miles of the Project. Additionally, in response to a concern raised by one of the commissioners during the public hearing, the Applicant voluntarily agreed to retrofit the Project to incorporate new lighting technology that will effectively eliminate nighttime lighting impacts, which was one of the principal visibility concerns expressed during the public hearing. This is an example of the Applicant's ability and willingness to modify the Project in response to refinements of the standard and concerns that arise during the permitting process, which is what the Applicant is seeking to do again by this request.

Procedural Posture of DP 4889. There is a provision unique to LURC that requires a minimum of four votes for the Commission to take action on an application. See 12 M.R.S.A. § 684. Through no fault of the applicant, only four commissioners are able to participate in a final

decision on DP 4889.<sup>3</sup> As a result, for the Commission to either approve or deny the pending application, all participating commissioners must agree. During deliberations, however, at least one of the four commissioners indicated that he supported approval, but would defer to his colleagues in the interest of allowing the Commission to act.<sup>4</sup> If he were not to change his position to vote with the majority, the effect would be the same as what Champlain is requesting here: no decision on the pending application. Thus, allowing withdrawal is consistent with the substantive positions expressed during deliberations and, importantly, avoids a commissioner having to change his vote simply to allow the Commission to act.

Alternatives to Withdrawal. Champlain is requesting withdrawal as opposed to a reopening of the record for purposes of filing an amendment to its application for the following reasons. First, reconfiguring the project to address visual concerns will require evaluation of several variables, including not only those impacting project visibility, such as eliminating or relocating particular turbines, but the engineering and economic implications of doing so. Simply put, there is not a simple amendment that could be filed in a relatively short timeframe, as occurred in the Kibby Expansion project in which the Commission reopened the record to allow the applicant to modify its project in response to concerns expressed during deliberations. Second, although the Commission allowed project amendments following a public hearing in both the Plum Creek and Kibby Expansion proceedings, the process followed by the Commission in doing so is currently being challenged in court. See First Ecology Network, et al. v. Land Use Regulation Commission, Supreme Judicial Court Sitting as the Law Court, Docket No. BCD-11-210; Friends of the Boundary Mountains v. Land Use Regulation Commission,

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<sup>3</sup> There are two new commissioners who did not participate in the public hearing and as a result did not participate in deliberations, as well as a vacancy.

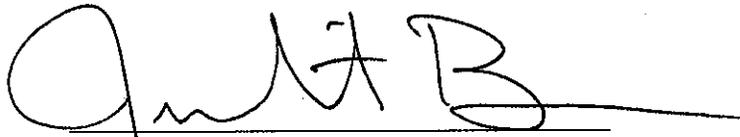
<sup>4</sup> A second commissioner indicated ambivalence with respect to her position but ultimately voted to direct staff to draft a denial document.

Supreme Judicial Court Sitting as the Law Court, Docket LURC-11-61. A re-filed application will be subject to the full public participation and due process requirements of the Commission's rules governing new applications, thereby avoiding the procedural claims at issue in those appeals.

Finally, allowing a withdrawal will not prejudice the parties. The pending application, to which some of the intervenors object, will not go forward and they, along with any other interested parties, will have a full and complete opportunity to comment on a reconfigured project.

For the foregoing reasons, Champlain respectfully requests withdrawal of its application and an opportunity to address the Commission at its December meeting on this request.

Dated: November 8, 2011

A handwritten signature in black ink, appearing to read 'Juliet T. Browne', with a long horizontal line extending to the right.

Juliet T. Browne, Esq.  
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PAUL RICHARD LEPAGE  
GOVERNOR

WILLIAM H. BEARDSLEY  
COMMISSIONER

**Fourteenth Procedural Order**

**In the Matter of  
Development Permit DP 4889  
Champlain Wind, LLC.  
Bowers Wind Project  
November 15, 2011**

**To:** Parties  
Neil Kiely (Applicant)  
Juliet Brown, Esq. (Counsel for Applicant)  
Sean Mahoney, Conservation Law Foundation  
Kevin Gurall, PPDLW  
David Corrigan  
Gordon Mott

**cc:** LURC Commissioners  
Amy Mills, Maine Assistant AG  
Catherine Carroll, LURC Director  
Samantha Horn Olsen, LURC  
Frederick Todd, LURC

**From:** Gwen Hilton, Presiding Officer

**Subject:** Applicant's request to withdraw its application

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**I. Background**

The application for the Bowers Wind Project (Project) by Champlain Wind, LLC (Applicant), was accepted as complete for processing on March 14, 2011. According to 12 M.R.S.A § 685-B(2-C), the Commission must, with respect to wind energy development permit applications that are set for public hearing, return a decision within 270 days from the date the application is accepted as complete for processing – in this instance, by December 9, 2011. At the request of an applicant, however, the Commission may stop the processing time for a period of time agreeable to the Commission and an applicant – thus delaying the deadline for returning a decision for an agreeable period of time.

Pursuant to the Third and Eighth Procedural Orders, the Public Hearing for the Project was held on June 27 and 28, 2011 at the Ella P. Burr Elementary School in Lincoln, Maine, and on July 6, 2011 at the Spectacular Events Center in Bangor, Maine.

CATHERINE M. CARROLL, DIRECTOR

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The Eighth Procedural Order established Monday, July 18, 2011 as the close of the public comment period and Monday, July 25, 2011 as the deadline for accepting rebuttal comments. The Third Procedural Order established that after the close of the record "no additional evidence or argument will be allowed into the record except by leave of the Presiding Officer."

After deliberating on the merits of the visual impact aspects of the Project at its September 7, 2011 and October 5 & 19, 2011 meetings, the Commission directed its staff to prepare a decision document denying the application, and it indicated it would consider and adopt the document by vote at its December 7, 2011 meeting.

On November 8, 2011, the Applicant filed a request to withdraw its application "for the purpose of reconfiguring the Project to address the concerns expressed by the Commission during deliberations and the guidance that has been developed during the pendency of this proceeding." The Applicant stated two reasons to justify this request. First, it asserts that the Commission's application of the visual impact standard has evolved over the course of this proceeding, specifically with respect to how the Commission evaluates impacts to certain ponds that receive a low level of public use, and how it considers intercept surveys regarding the expectations of the typical viewer. Second, it states that recent changes in the makeup of the Commission, in conjunction with voting requirements of 12 M.R.S.A. § 684, required the Commission to reach a unanimous 4-0 decision in order to take any action with respect to this application.

In addition to the request to withdraw, the Applicant agreed to stop the processing time for the application as set by 12 M.R.S.A § 685-B(2-C), thereby extending the deadline for the Commission to issue a final decision on this Project through January 2012, thus allowing the Commission the opportunity to consider and rule on this request at its December meeting in advance of taking final action on a decision document.

Furthermore, the Applicant requests an opportunity to address the Commission orally on this matter at its December 7, 2011 meeting.

On November 9, 2011, Intervenor David Corrigan filed a response to the Applicant's request, arguing that allowing the Applicant to withdraw would be unfair because the parties in opposition to this project have "expended considerable time, effort, and resources on this case." He asserts that, if the Applicant wants to submit a modified application at a later date and go "through this process again," then it is more appropriate at this point in time to deny the project. Mr. Corrigan contends that allowing this withdrawal would undermine the integrity of the public process, and requests that the Commission adopt the requested denial decision at its December 2011 meeting.

On November 11, 2011, Intervenor PPDW filed a response to the Applicant's request, arguing the request to withdraw is more in the nature of legal argument as to why the Commission should approve the proposed project, and that therefore the filing should be stricken as the record is closed. PPDW further asserts that the reasons why the Applicant wants to withdraw its application are irrelevant, and that the Commission ought to take up the denial decision document in December 2011 as scheduled.

Finally, PPDLW indicates that it has further argument to make with respect to why the Commission should not grant the Applicant's request.

## **II. Order.**

The Chair acknowledges that the Commission has received requests to proceed with adoption of the denial document at its December 2011 meeting. Under the facts and circumstances of this matter, however, the Applicant's pending request to withdraw is more appropriately addressed by the Commission as a whole, not the Chair and Presiding Officer. To allow time for the Commission as a whole to consider the Applicant's request to withdraw, the request will be considered and decided upon by the Commission at its December 7, 2011 meeting. The Applicant has agreed to extend the decision deadline, and therefore the deadline for issuing a decision on this application is extended through January 2012. The Commission will take up the previously requested denial decision document in January 2012, as necessary.

The Commission has authority, based upon its Title 12 enabling legislation and in keeping with considerations of administrative fair play, to manage and control its adjudicatory proceedings. This authority includes the Commission's ability to control and condition unilateral requests to withdraw applications that have already undergone significant review. While the Chair appreciates, as argued by PPDLW, that the arguments now made by the Applicant with respect to withdrawal may have some bearing as to the Applicant's position that the Project should be approved, in order to decide where the equities fall in this matter with respect to a withdrawal, it is incumbent on the Commission to consider the facts and circumstances of this proceeding. Therefore, PPDLW's request to strike the Applicant's request to withdraw is denied.

PPDLW, or any other Intervenor in this proceeding who wishes to, may submit further argument in writing with respect to the Applicant's request to withdraw no later than Tuesday, November 22, 2011. The Applicant may file argument in response no later than Tuesday, November 29, 2011. The Chair requests that, to the extent reasonably possible, staff bring to the Commission's attention any public comment received in advance of the December 7<sup>th</sup> meeting regarding the Applicant's request to withdraw.

The Chair grants the Applicant's request to address the Commission orally on this matter at the December 7<sup>th</sup> meeting for a time period not to exceed 10 minutes. The Applicant may, within the allocated 10 minutes, reserve time for rebuttal. Any other Intervenor in this proceeding may also request, no later than Friday, December 2, 2011, time at the December 7<sup>th</sup> meeting to address the Commission orally on the Applicant's request to withdraw. The Chair will allocate at her discretion up to 10 minutes to each requesting party.

## **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 this Order or 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 15th DAY OF NOVEMBER, 2011

A handwritten signature in cursive script that reads "Gwen Hilton".

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