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June 8, 2010

Via E-mail and Federal Express

Marcia Spencer Famous
Maine Land Use Regulation Commission
22 State House Station
Augusta, ME 04333

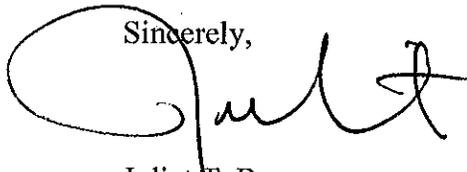
Re: TransCanada Maine Wind Development, Inc.
Kibby Expansion Project - DP 4860

Dear Marcia:

Enclosed please find TransCanada's post-hearing brief.

As always, if you have any questions, please do not hesitate to contact me. Thank you for consideration of this information.

Sincerely,



Juliet T. Browne

JTB/prf

Enclosure

cc: Samantha Horn-Olsen (By e-mail)
Catherine M. Carroll (By e-mail)
Amy Mills (By e-mail)
Bob Weingarten (By e-mail and Federal Express)
Nancy O'Toole (By e-mail and Federal Express)
Jenn Burns Gray (By e-mail and Federal Express)
Nick Di domenico (By e-mail)
Christine Cinnamon (By e-mail)
Dana Valleau (By e-mail)

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APPENDIX A

TRANSCANADA'S PROPOSED KEY FINDINGS OF FACT

1. Bicknell's Thrush

Finding. Bicknell's thrush is not listed as threatened or endangered under state or federal law. (Pre-Filed Testimony of Susan Gallo [hereinafter Gallo Testimony] at 7; MDIFW Endangered Species Program/State List, at www.maine.gov/ifw/wildlife/species/endangered_species/state_list.htm).

Finding. The Bicknell's thrush population is approximately 40,000 individuals and the population is not declining in Maine. (Pre-filed Testimony of Peter Vickery [hereinafter Vickery Testimony] at 4; Hearing Transcript at 196; TransCanada Post-Hearing Submission, Dana Valleau Testimony [hereinafter Valleau Post-Hearing testimony], Tab C, Exhibit C [Tom Hodgman Comment #3]).

Finding. At least 83,000 acres of Bicknell's thrush habitat exist in Maine, spread over 60 mountain peaks. (Vickery Testimony at 4; Pre-filed Testimony of Dr. Jeffrey Wells in ZP 702 [hereinafter Wells ZP 702 testimony] at 3 [contained in TransCanada Hearing Exhibit 13]).

Finding. In 2007, when Maine IF&W evaluated whether to add Bicknell's thrush to this state list of threatened or endangered species, it did not add the species to the list "largely because of its population size and the large number of sites where it occurs in Maine." (Valleau Post-Hearing Testimony at Tab C, Exhibit C [Tom Hodgman Comment #3]).

Finding. Within a one mile radius of Sisk Mountain, there is approximately 882 acres of potential Bicknell's thrush habitat and within a five mile radius there is approximately 14,811 acres of potential habitat. (BRI Breeding Bird Survey Report for the Sisk Mountain Wind Power Project, Appendix F at 104-05, attached to e-mail from Juliet Browne to Marcia-Spencer Famous (May 6, 2010)).

Finding. Regenerating timber harvest clear cuts, ski trails, and other areas impacted by human activity provide potential breeding habitat for Bicknell's thrush. (National Audubon Society Bicknell's thrush Watchlist, cited in Pre-filed Testimony of Susan Gallo and contained in TransCanada Hearing Exhibit 12 at 1; Valleau Post-Hearing Testimony at Tab C, Exhibit C [Tom Hodgman Comment #3]; Wells ZP 702 Testimony at 7-8; Partners in Flight NA Landbird Conservation Plan at 43 [contained in TransCanada Post-Hearing Submission at Tab E, Exhibit 9]).

Finding. If regenerating clear cut areas are added as potential breeding habitat, this increases Bicknell's thrush habitat in Maine by approximately 98,000 additional acres. (Wells in ZP 702 Testimony at 8).

Finding. TransCanada has identified actual breeding Bicknell's thrush in regenerating clear cuts, below 2,700 feet, on Kibby. (Valleau Post-Hearing Testimony at 1-2 and Exhibit B).

Finding. Bicknell's thrush survey protocols were approved in advance by Maine IF&W, and are consistent with the protocols approved by Maine Audubon in the Kibby Project. (Pre-filed Direct Testimony of Christine Cinnamon and Dana Valleau [hereinafter Cinnamon/Valleau Testimony] at 22).

Finding. In response to comments from Maine IF&W, TransCanada moved turbine #11 out of the Bicknell's thrush habitat, reducing the clearing impacts from 12.4 to 8 acres. (Vickery Testimony at 9).

Finding. In this proceeding, Dr. Vickery has concluded that the loss of 8 acres due to direct clearing of habitat is "of no significance biologically" to Bicknell's thrush. (Vickery Testimony at 8).

Finding. In the Black Nubble proceeding, NRCM concluded that the loss of 64 acres due to direct clearing of habitat was "inconsequential" to Bicknell's thrush. (Wells ZP 702 Testimony at 3).

Finding. In the Redington proceeding, Maine IF&W concluded that the loss of 300 acres due to direct clearing of habitat was "very slight" when compared to available habitat in the region. (Valleau Post-Hearing Testimony at Exhibit C [Tom Hodgman Comment #3]).

Finding. Most of the available northern breeding habitat, in Maine and in the region, is "reasonably extensive and well-protected overall" (Letter from Chris Rimmer to Christine Cinnamon (Apr. 21, 2010) [hereinafter Rimmer Letter], contained in TransCanada Post-Hearing Submission at Tab G, Exhibit 1; see also Wells ZP 702 Testimony at 9 ["much of the [Bicknell's] breeding range in North America is within existing protected areas. . . ."]).

Finding. Loss of Bicknell's thrush wintering habitat is the "greatest threat to the species' long-term viability," according to Audubon New York, the Nature Conservancy, Cornell Lab of Ornithology, Chris Rimmer's organization (VCE), and the Wildlife Conservation Society. (Wells ZP 702 Testimony at 3).

Finding. TransCanada intends to make a contribution of \$100,000 to the BITH Fund for preservation of the wintering habitat in the Caribbean. (Rimmer Letter).

Finding. Mr. Rimmer has concluded that the TransCanada donation will "provide a very important boost, enabling a first-ever disbursement of monies to local conservation partners on Hispaniola by the end of 2010." (Rimmer Letter).

Finding. The Consolidated Intervenors agree "absolutely" that Chris Rimmer is "widely considered" an expert on Bicknell's thrush. (Transcript at 212).

2. Subalpine Forest

Finding. The subalpine forest community on the Sisk ridgeline is ranked "S3" by the Maine Natural Areas Program (MNAP). (MNAP Comments p. 1).

Finding. An S3 ranking is in contrast to an MNAP S2 ranking (imperiled because of rarity) or an S1 ranking (critically impaired because of extreme rarity). (<http://www.maine.gov/doc/nrimc/mnap/features/rank.htm>).

Finding. According to MNAP, approximately 40,000 acres of mapped subalpine forest exists in Maine. (Hudson Pre-Filed Direct Testimony p. 2).

Finding. There are approximately 358 acres of mapped subalpine forest on the Sisk ridgeline. (Hudson Test., Ex. B; MNAP Comments p. 1).

Finding. The Project will result in the clearing of 39 acres of this mapped area, or approximately 10%. (Hudson Test., Ex. B).

Finding. Including direct and indirect impacts (“edge effects” and fragmentation), the total impact from the Project is 102 acres. (Hudson Test., Ex. B).

Finding. The calculation of edge effects and fragmentation was done in consultation with MNAP. (Feb. 24, 2010 MNAP Comments pp. 1-2).

Finding. The total impacts of the Project constitute 0.25% of the mapped subalpine forest in Maine. (Tr. p. 223 [testimony of David Publicover]).

Finding. There is approximately 3,000 acres of additional unmapped subalpine forest in the “immediate area” of Sisk Mountain. (Tr. p. 92 [testimony of Don Hudson]).

Finding. As there exists unmapped subalpine forest in Maine, the actual percentage of impact due to the Project is less than one quarter of one percent. (Tr. p. 223 [testimony of David Publicover]).

Finding. Moving turbine #11 out of the mapped subalpine forest “considerably reduces fragmentation.” (MNAP Comments p. 2).

Finding. This subalpine forest community in Maine is “relatively stable in overall extent and are extensive on Maine’s higher mountains,” “major occurrences are well protected within public lands or private conservation lands,” and “recreation and windpower generation could locally degrade other minor sites, but these uses are unlikely to present a significant threat to the integrity of these forests.” (Maine’s Comprehensive Wildlife Conservation Strategy p. 7 [TransCanada Hearing Exhibit 5]).

Finding. Some amount of clearing impacts to subalpine forest community are acceptable. (Tr. at 224-25 [testimony of David Publicover]).

Finding. The Appalachian Mountain Club has supported a wind energy project (the “Granite Reliable” project in New Hampshire) with impacts to mapped subalpine forest that AMC characterized by AMC as a “higher value forest community” than the community on Sisk. (Tr. p. 225 [testimony of David Publicover]). AMC concluded that the impacts in the Granite Reliable project (direct impacts of 37 acres out of a 226 acre community) “would not constitute an unreasonable adverse effect on the natural environment.” (Tr. p. 227 [testimony of David Publicover]).

Finding. The Commission has issued permits for timber harvesting above 2,700 feet in areas with subalpine forest, including a recent permit for BPL that included mapped S3 subalpine forest. (Dana Valleau Post-Hearing Submission, Ex. C, D, E; Didisheim ZP 702 Testimony at 2).

3. Vernal Pools

Finding. TransCanada conducted vernal pool surveys in accordance with IF&W guidance, which expressly allows surveys to occur outside of the spring amphibian identification period and these surveys have been affirmatively approved by IF&W. (e-mails from Mr. Cordes, IF&W to Ms. Spencer-Famous dated May 24, 2010 and June 1, 2010).

Finding. TransCanada identified 14 man-made, non-state regulated, vernal pools in the Project area. (Application Section b.15.6.10, Cinnamon et al. Direct Pre-Filed Testimony at 10 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated May 24, 2010).

Finding. TransCanada will treat all man-made and, therefore, non-state regulated vernal pools as though they were significant by applying the habitat management standards required under the Natural Resources Protection Act to all identified vernal pools. (Cinnamon et al. Direct Pre-Filed Testimony at 10 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated May 24, 2010).

4. Bog Lemming

Finding. TransCanada identified three wetlands that are suitable for and potentially occupied by northern bog lemmings on Sisk Mountain and has located all project elements to completely avoid the watersheds that contain these wetlands. As a result, IF&W concluded that no adverse impacts to the bog lemming are anticipated from the Project (Pre-Filed Direct Testimony of Cinnamon et al. at 24 and e-mail from Mr. Cordes, IF&W, dated March 3, 2010).

5. Roaring Brook Mayfly/Spring Salamander

Finding. TransCanada, in consultation with IF&W, conducted surveys for the Roaring Brook Mayfly and the Spring Salamander within the Kibby Stream watershed where both species are known to occur. Although the surveys did not document either species, TransCanada has committed to implement IF&W management guidelines to protect the habitat of both species. (Cinnamon et al. Pre-Filed Direct Testimony at 24 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated March 3, 2010).

6. Erosion/Capacity of the Land to Absorb and Hold Water

Finding. TransCanada will implement the construction techniques and use the Best Management Practices developed in connection with and successfully implemented

during construction of the Kibby Project. (Goulet et al. Pre-Filed Direct Testimony at 15 and memorandum from Mr. Rocque, State Soil Scientist, dated May 24, 2010).

Finding. TransCanada's implementation of the "toolbox approach" developed and endorsed by the State Soil Scientist, will be used during construction of the Kibby Expansion Project to minimize soil erosion and maximize the ability of the mountainous soil to absorb and hold water. (Goulet et al. Pre-Filed Direct Testimony at 15 and memorandum from Mr. Rocque, State Soil Scientist, dated May 24, 2010).

7. Historic Resources

Finding. The Arnold Trail shares much of the route in the study area with Chain of Ponds and, for this reason, the visual impacts are similar. The Project will be visible only from a 1.6 mile developed section of a 194 mile trail, resulting in 0.8% visibility. (Vissering Pre-Filed Direct Testimony at 37, [Testimony of Jean Vissering at 298]).

Finding. As part of a parallel federal permitting process, the Maine Historic Preservation Commission ("MHPC") made a determination that the Project will have an adverse effect on an approximately 1.6 mile section of the Arnold Trail. (Letter from Kirk Mohney, MHPC, to TRC dated May 6, 2010). MHPC's determination of adversity is not a finding of undue or unreasonable adverse impact under LURC's (or any other State review) criteria.

8. Tangible Benefits:

Finding. TransCanada will provide extensive tangible benefits in connection with the Kibby Expansion Project, which include:

- a. displacement of air pollution associated with fossil-fuel based generation and contribution towards the State's greenhouse gas reduction objectives;
- b. energy benefits related to increased diversification of energy sources; direct and indirect ;
- c. direct and indirect economic benefits related to construction;
- d. creation of at least one additional permanent employment position;
- e. property tax contributions in excess of \$500,000 per year of operation;
- f. state income taxes on the income generated from operation of the project;
- g. a host community benefit payment of \$45,000 per year or \$900,000 over a 20-year period;
- h. \$150,000 contribution to the Department of Labor to support green jobs education and training in Franklin County;
- i. \$150,000 contribution to the High Peaks Alliance for land conservation and trail corridor acquisition in Franklin County;
- j. \$100,000 contribution to the Arnold Expedition Historical Society for use in land protection surrounding the Arnold Trail north of the Chain of Ponds or other

- projects that will enhance the mission of the Society to interpret and share with the public the history of the Arnold Trail; and
- k. \$100,000 contribution to the Bicknell's Thrush Habitat Protection Fund for conservation of wintering habitat in the Caribbean.

(Pre-Filed Direct Testimony of Bennett et al. at 10-15).

Finding. TransCanada, although not required to do so, will meet the requirements of a recent amendment to the Wind Energy Act requiring applicants to establish a community benefits package of no less than \$4,000 per turbine per year averaged over a 20-year period. Specifically, through an annual payment of \$45,000 per year to the Town of Eustis, a one-time contribution of \$150,000 for renewable jobs in Franklin County and \$150,000 for trail corridor acquisition in Franklin County, totaling \$1,200,000 over a 20-period, TransCanada will exceed this requirement. (Pre-Filed Direct Testimony of Bennett et al. at 14 and P.L. 2009, Ch. 642).

9. Visual

Finding. There are nine scenic resources of state or national significance located within the 8-mile visual impact study area for the Project. There will be no Project visibility from four of these resources: the Dead River, Spencer Stream, the Natanis Pond overlook and the Sarampus Falls overlook. (Application Attachment A.1, Aesthetic Impact Assessment (AIA), TransCanada Hearing Ex. 6).

Finding. There are five scenic resources of state or national significance with some Project visibility: Arnold Pond, Crosby Pond, Kibby Stream, Chain of Ponds and the Arnold Trail. (TransCanada Hearing Ex. 6).

Finding. Views from Arnold Pond and Crosby Pond would be very limited, seen at a distance of 6.5 miles away and diminished by the prominent landform of Mount Pisgah. (Vissering Pre-Filed Direct Testimony at 37).

Finding. Minimal views of the Project are possible from two viewpoints on Kibby Stream. The first is a location where Gold Brook Road crosses over the stream approximately three miles from the Project area and the second an open wetland area approximately eight miles away. (Vissering Pre-Filed Direct Testimony at 37, 38).

Finding. The Project will not be visible from more than two-thirds of Chain of Ponds. (Vissering Pre-Filed Direct Testimony at 5,6).

Finding. Chain of Ponds is designated as having outstanding scenic values primarily due to its scenic foreground features, including very dramatic relief, cliffs, ledges, beaches, boulders, diverse shoreline, and excellent water quality, rather than for views of distant mountains or other scenery. (Maine State Planning Office Critical Areas Program, Maine's Finest Lakes, The Results of the Maine Lake Study (Oct. 1989) at 86.).

Finding. Other natural foreground features contribute to and enhance the overall scenic quality of Chain of Ponds, including Mount Pisgah, Sisk Mountain, and the Bigelow Mountains, which provide strong focal points and reduce the visual impact of the turbines. (Vissering Pre-Filed Direct Testimony at 9; Palmer Comments p. 18.).

Finding. The existing viewer experience along Chain of Ponds already includes human development, including the constant presence of Route 27 and its heavy traffic, several privately-owned camps, the developed campground at Natanis Point, and motorized recreational use of the water and adjacent land. (Vissering Pre-Filed Direct Testimony at 9-10, John Titus Pre-Filed Direct Testimony p. 7, Palmer comments, pp. 18-19).

Finding. Of the five ponds that constitute Chain of Ponds, visibility of the Project is limited only to portions of Bag, Natanis, and Long Ponds. (Application Attachment A.1 (AIA) at 7).

Finding. The Project will not be visible from roughly two thirds of Bag Pond and visibility is minimized the prominent landforms of Mount Pisgah and the southern peak of Sisk Mountain dominate views toward the Project, making the turbines appear much less prominent and lower in elevation. (Vissering Pre-Filed Direct Testimony at 14).

Finding. The Project will not be visible from the vast majority of Natanis Pond, including the commercial campground and all of the State's primitive campsites. There also will be no visibility of the Project when looking south toward the very distant peaks of the Bigelow range. Where there is visibility, only the tops of four turbines (behind Mount Pisgah) will be visible from a very small area along the southeastern-most shore of Natanis Pond. (Vissering Pre-Filed Direct Testimony at 25).

Finding. The majority of views of the Project occur from Long Pond, where there will be visibility from approximately half of Long Pond. Long Pond also is the only area from where the entire Project can be viewed. (Vissering Pre-Filed Direct Testimony at 17).

Finding. From Bag, Natanis and Long Ponds, views will include the more dominant landforms of Mount Pisgah and/or Sisk Mountain, making the Project turbines appear more distant, lower in elevation, and less prominent (Vissering Pre-Filed Direct Testimony at 14, 17, 25).

Finding. In total, there will be no views of the Project from more than two-thirds of Chain of Ponds. Where there are views, they are primarily of only portions of the Project and often include only the tops of turbines or tips of blades. (Vissering Pre-Filed Direct Testimony at 5,6, Palmer Comments pp. 18-19).

Finding. With regard to "cumulative impacts," as noted by Mr. Palmer and Ms. Vissering, because the Kibby Project will be visible from Long Pond, locating additional turbines in this area (even when visible) is appropriate as the incremental impacts will not be significant, and locating the projects in proximity will reduce the overall impact of wind energy projects in the state. (Vissering Pre-Filed Direct Testimony p. 39, 40, Tr. [testimony of Jean Vissering pp. 315-316]).

Finding. It is possible to travel the entire length of Chain of Ponds without seeing a single turbine. Where there is visibility, turbines will enter and recede from view across

a changing landscape, and will not have an unreasonable adverse effect on the scenic character. (Testimony of Jean Vissering p. 303).

Finding. The Arnold Trail shares much of the route in the study area with Chain of Ponds and, for this reason, the visual impacts are similar. The Project will be visible only from a 1.6 mile developed section of a 194 mile trail, resulting in 0.8% visibility. (Vissering Pre-Filed Direct Testimony at 37, [Testimony of Jean Vissering at 298]).

Finding. As noted by both Ms. Vissering and Mr. Palmer, distant views were likely of little concern to Arnold's company, and the presence of turbines in portions of the Arnold Trail viewshed is unlikely to materially diminish the historic experience along the Arnold Trail. (Vissering Pre-Filed Direct Testimony at 37, (Tr. p. 298 [testimony of Jean Vissering]).

Finding. The Wind Energy Act states “[a] finding by [the Commission] that the development’s generating facilities are a highly visible feature in the landscape,” is not by itself a “sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character.” (35-A M.R.S.A. § 3452 (3)).

STATE OF MAINE
LAND USE REGULATION COMMISSION

IN THE MATTER OF DEVELOPMENT)	
APPLICATION DP 4860)	Post-Hearing Brief
TRANSCANADA MAINE WIND)	TransCanada Maine Wind
DEVELOPMENT, INC.)	Development, Inc.

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STATE OF MAINE
LAND USE REGULATION COMMISSION

IN THE MATTER OF DEVELOPMENT)	
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INTRODUCTION

The Kibby Expansion Project is located within the expedited permitting area and is immediately adjacent to the existing Kibby Wind Power Project (“Kibby Project”). In the Kibby Project rezoning order, the Commission recognized that the Kibby Project site was one of the “best reasonably available sites” for wind power due to its outstanding wind resource, proximity to transmission, compatibility with existing land uses, and given that it was not located in the more remote areas of the jurisdiction.¹ The determination by the Commission in ZP 709 is evidence that from a broad planning perspective, the Wind Power Task Force and the Legislature correctly determined that this area is appropriate for wind power.

Locating additional wind generating capacity adjacent to an existing project makes economic, environmental, visual and common sense. The Kibby Project takes advantage of one of the premier wind resource in all of New England. The Kibby Expansion Project will share that same resource, making for a strong, economically viable project. The Kibby Expansion Project will share a portion of the road and transmission line infrastructure upgrades associated with the Kibby Project (thereby eliminating the need for greater impacts that would result from building new infrastructure). From a visual perspective, it is also desirable to concentrate wind generation. As the Commission’s visual expert testified: “Rather than distribute projects throughout the state, it seems to me that it would be from a scenic point of view a whole lot

¹ ZP 709 at 63.

better if we concentrated those projects in places where we're going to have the least impact."²

Moreover, the Project is not in an area widely used for remote recreation and other, more remote recreation areas are readily available nearby; and it is adjacent to a major state highway and close to two service centers yet distant from populated areas so as to avoid conflicts with residential uses such as the noise and shadow flicker concerns that have plagued other projects.

The Comprehensive Land Use Plan's (the "CLUP"'s) energy resources goal is to "provide for the environmentally sound and socially beneficial utilization of indigenous energy resources when there are no overriding public values that require protection."³ As demonstrated in the application materials and other filings, and at the public hearing, while there are resource and scenic impacts—as there always will be—there are no overriding public values that outweigh the determination that this is an appropriate location for wind power. In short, if the State of Maine is to meet its goal of 2,000 megawatts of installed capacity by 2015 and 3,000 megawatts of installed capacity by 2020,⁴ the Boundary Mountain area offers one of the best and most logical locations in the State to locate grid scale wind projects.

ARGUMENT

I. FROM A LANDSCAPE AND PLANNING LEVEL THE PROJECT AREA IS APPROPRIATE FOR WIND ENERGY

The Task Force on Wind Power Development in Maine (the "Task Force"), the Maine Legislature, Maine Audubon, NRCM, and AMC, have each concluded that from a landscape and planning perspective, the Sisk Mountain area is appropriate for wind energy development.⁵ The Task Force (which included representation by each of the Consolidated Intervenors) unanimously recommended, and the Legislature unanimously approved, identification of areas

² Transcript of May 12, 2010 Commission Public Hearing Day Session [hereinafter "Tr. at ___"] at 298-99.

³ CLUP at 13.

⁴ 35-A M.R.S.A. § 3404(2).

⁵ Report of the Governor's Task force Report on Wind Power Development (Feb. 14, 2008) at 18-89; Tr. at 223-24.

within the LURC's jurisdiction that were appropriate for wind power development and where, as a result, wind power should be an allowed use pursuant to LURC regulations (the so-called expedited permitting area).⁶ This was an effort to guide grid-scale wind power development away from the locations with the highest competing public values. Accordingly, the expedited permitting area does not include the vast majority of the "core" for LURC's jurisdiction – the remote interior areas where there is very little existing development, where the sense of remoteness and absence of man-made intrusion is most profound, and where LURC's policies have long held intensive development at bay. The expedited permitting area also does not include many of the important recreational areas of the state, including the famed Bigelow and Nahmakanta Preserves, long stretches of the Appalachian Trail, the Moose and Allagash River Waterways, the Baxter Park area, and many other important scenic and recreational resources throughout the state.

The process of establishing where in the jurisdiction wind power would be an allowed use was not a hollow exercise, and it was intended to have an impact on permitting. The Act to Implement Recommendations of the Governor's Task Force on Wind Power Development (the "Wind Energy Act") noted that one of the reasons for establishing areas within the jurisdiction where wind energy projects would be a permitted use was to address the fact that,

The Legislature finds that it is in the public interest to reduce the potential for controversy regarding siting of grid-scale wind energy development by expediting development in places where it is most compatible with existing patterns of development and resource values when considered broadly at the landscape level.⁷

⁶ 12 M.R.S.A. § 685-B (2-C).

⁷ 35-A M.R.S.A. § 3402 (2).

The expedited area, where the Project is proposed, is in just such an area—placed there due to the fact that there were not significant overarching natural resource considerations and where there is compatibility with existing patterns of development.

II. APPLICABLE REGULATORY CRITERIA

Because wind power is an allowed use along the Sisk ridgeline, the Project does not require a rezoning and instead is reviewed under the general criteria for approval set forth in 12 M.R.S.A. § 685-B (4),⁸ the wind energy-specific requirements established under the Wind Energy Act and set forth in 12 M.R.S.A § 685-B (4-B),⁹ and the development standards contained in Commission Rules § 10.25.

The criteria that received heightened attention during the permitting process are addressed below. It is important to note that as it did with the siting of the Kibby Project, TransCanada has chosen a location that avoids many of the challenges that have arisen elsewhere, including concerns relating to shadow flicker and noise, which occur in more developed areas. While it is impossible to avoid all impacts, TransCanada has avoided and minimized natural resource and visual impacts to the greatest extent practicable. And as demonstrated below, the impacts that remain are not “undue” or “unreasonable.”

III. TRANSCANADA HAS EXCEEDED THE REQUIREMENTS RELATED TO DEMONSTRATION OF SIGNIFICANT TANGIBLE BENEFITS

The evidence is uncontroverted that the Kibby Expansion Project will provide significant tangible benefits that not only meet but exceed the statutory requirements, as well as the precedent set by the Commission and the Department of Environmental Protection (DEP) in other wind power projects. Under the Wind Energy Act, an applicant must demonstrate that the

⁸ The general approval criteria are restated in Commission Rules at Chapter 10.24, attached as Exhibit A.

⁹ The Wind Energy Act requires a demonstration that expedited wind energy developments satisfy the following wind-specific requirements: compliance with the Board of Environmental Protection’s noise control rules; avoidance of undue shadow flicker effects; setbacks adequate to protect public safety; and, significant tangible benefits. 12 M.R.S.A § 685-B (4-B).

wind energy development will provide significant tangible benefits.¹⁰ Here, it is undisputed that the Kibby Expansion Project will provide the following tangible benefits:

- displacement of air pollution associated with fossil-fuel based generation and contribution toward the State’s greenhouse gas reduction objectives;¹¹
- energy benefits related to increased diversification of energy sources;
- direct and indirect economic benefits related to construction;
- at least one additional permanent employment position;
- property taxes in excess of \$500,000 per year;
- state income taxes on the income generated from operation of the project;
- a host community benefit payment of \$45,000 per year or \$900,000 over a 20-year period;
- \$150,000 contribution to the Department of Labor to support green jobs education and training in Franklin County;
- \$150,000 contribution to the High Peaks Alliance for land conservation and trail corridor acquisition in Franklin County;
- \$100,000 contribution to the Arnold Expedition Historical Society (AEHS) for use in land protection surrounding the Arnold Trail north of the Chain of Ponds or other projects that will enhance the mission of AEHS to interpret and share with the public the history of Arnold Trail; and,
- \$100,000 contribution to the Bicknell’s Thrush Habitat Protection Fund for conservation of wintering habitat in the Caribbean.

While the Wind Energy Act does not quantify the tangible benefits that must be provided by an applicant, the benefits provided as part of this application are consistent with or exceed those associated with other expedited wind energy development approved to date, including the tangible benefits approved by LURC in the Stetson II project, which is the only other wind power project reviewed by the Commission under the Wind Energy Act.¹²

¹⁰ 12 M.R.S.A. § 685-B (4-B). Tangible benefits are broadly defined to include environmental and economic improvements attributable to the construction, operation and maintenance of an expedited wind energy development. 35-A M.R.S.A. § 3451 (10).

¹¹ Although the environmental and more general energy benefits have not been quantified, as a matter of law, the Commission shall presume that a wind energy development offsets pollution from other fossil-fuel based generation and will make a “significant contribution to the State’s renewable energy and greenhouse gas reduction objectives.” 35-A M.R.S.A. §§ 3402 (1), 3453.

¹² The Stetson II project included proportionate general energy and environmental, construction, employment, and tax benefits. The Stetson II project also included a one-time donation of \$25,000 to the Stetson Mountain Fund to advance recreational opportunities in the area. DP 4818 at 23-24 (describing tangible benefits).

Finally, the Legislature recently amended the Wind Energy Act in an effort to provide greater predictability to communities that host wind developments.¹³ The new law requires an applicant to establish a community benefits package of qualifying payments that total \$4,000 per turbine per year, averaged over a 20-year period.¹⁴ Although not required to do so because the new law has not yet taken effect, TransCanada has voluntarily met this requirement here. Specifically, the annual payment of \$45,000 per year to the Town of Eustis and the one-time contributions of \$150,000 for renewable energy jobs in Franklin County and \$150,000 for trail corridor acquisition in Franklin County, total \$1.2 million over a 20-year period.¹⁵

IV. RESIDENTS AND BUSINESS LEADERS IN THE STRATTON AREA STRONGLY SUPPORT THE KIBBY EXPANSION PROJECT

The Wind Energy Act directed that tangible benefits be provided with particular focus on the community or communities that host the project. The majority of people who live near the Project area and who provided comments or testimony to the Commission during the public session¹⁶ testified in support of the Project. Many of the proponents are local business owners who testified to the Project's economic and community benefits. For example, the Commission heard from Sharon Thomas, who owns the campground at Natanis Point on Chain of Ponds; Lloyd Cutler, a resident, small business owner and selectman in Carrabassett Valley; Earl Wyman, Jr., a Eustis selectman; Seth Wescott, who lives and owns a small business in Carrabassett Valley; and, Kate Punderson, a resident of Carrabassett Valley and the director of

¹³ P.L. 2009, ch. 642.

¹⁴ Id. § A-7. The community benefits package consists of payments to host communities, excluding property taxes, payments that reduce energy costs in the host community, and donations for land or natural resource conservation. Id. § A-3.

¹⁵ This excludes the donation to the Arnold Expedition Historical Society and the Bicknell's Thrush Habitat Protection Fund, which amount to an additional \$200,000 above and beyond the \$4,000 per turbine per year.

¹⁶ The issues raised by the intervenors are addressed separately.

development and finance at the Carrabassett Valley Academy. They spoke to the economic and other benefits of the Project and their positive experience with TransCanada.¹⁷

In contrast, the majority of public comment in opposition to the Project came from people who live outside the Project area and the testimony was largely ideological and focused on objections to wind power generally, as opposed to concerns with site-specific impacts.

V. THE KIBBY EXPANSION PROJECT WILL NOT RESULT IN AN UNDUE ADVERSE IMPACT TO BICKNELL'S THRUSH OR ITS HABITAT

The Project will result in clearing of approximately 8 acres of suitable breeding habitat for Bicknell's thrush on the Sisk ridgeline. This amount of clearing, and any associated indirect impacts due to construction activity or impacts from operations, will not result in an undue adverse impact to Bicknell's thrush for the following reasons, all of which are supported by substantial record evidence.

A. Bicknell's Thrush is Not Subject to Special Regulatory Protection as its Population in Maine is Stable and There is Sufficient Available Breeding Habitat

While Maine IF&W currently lists 46 species as either threatened or endangered,¹⁸ Bicknell's thrush is not included on that list and is not subject to any special regulatory protection in Maine. Instead, Bicknell's thrush is one of 52 birds included on the State's list of Species of Special Concern, along with the tree swallow, veery, and American redstart. Species of Special Concern are not subject to any specific regulatory protection under Maine law. Moreover, while Maine Audubon testified that inclusion on the list of Species of Special Concern was a "precursor" to inclusion on the threatened or endangered species list,¹⁹ in fact, the Bicknell's thrush population is strong (an estimated 40,000 individuals) and there is extensive

¹⁷ Transcript of May 11, 2010 Public Hearing Evening Session at 17-19, 25, 63-67, 71-73; Transcript of May 12, 2010 Public Hearing Evening Session at 41, 43.

¹⁸ MDIFW Endangered Species List, http://www.maine.gov/ifw/wildlife/species/endangered_species/state_list.htm

¹⁹ Tr. at 196.

breeding area available in Maine (spread over 83,000-181,000 acres in Maine on more than 60 peaks).²⁰ As a result, the State specifically declined to add it to the list in its most recent update in 2007.

When this issue was raised in the Redington proceeding, Maine IF&W noted that Bicknell's thrush, "is not being recommended for listing as Endangered or Threatened in Maine during MDIFW's current review largely because of its population size and the large number of sites where it occurs in Maine."²¹ Maine Audubon testified that it agreed with the decision not to list the species and that the population had not dropped to levels that qualify the species for listing.²²

B. TransCanada Has Minimized Impacts to Bicknell's Habitat

Although Bicknell's is not afforded special protection under Maine law, TransCanada has worked with IF&W to ensure that TransCanada has accurately identified potential habitat and implemented measures to avoid and minimize impacts to such habitat. For example, the survey protocols were approved in advance by Maine IF&W (and are consistent with the protocols approved by Maine Audubon in the Kibby Project).²³ The results of the surveys indicate that there is approximately 88 acres of existing Bicknell's habitat in the immediate vicinity of the Sisk ridgeline where the Project will be located.²⁴ Based on these results, road alignments and turbine locations were moved out of the habitat to the maximum extent practicable and to the

²⁰ Pre-filed Direct Testimony of Peter Vickery [hereinafter "Vickery Testimony"] at 4; Pre-filed Direct Testimony of Dr. Jeffrey Wells in ZP 702 [hereinafter "Wells ZP 702 Testimony"] at 3 (contained in TransCanada Hearing Exhibit 13).

²¹ Responses of MDIFW Wildlife Biologist Thomas Hodgman (Aug. 14, 2006) (contained in TransCanada Post-Hearing Submission, Testimony of Dana Valteau [hereinafter "Valteau Post-Hearing Testimony"] at Tab C, Exhibit C) (emphasis added).

²² Tr. at 196.

²³ Pre-filed Direct Testimony of Christine Cinnamon and Dana Valteau [hereinafter "Cinnamon/Valteau Testimony"] at 22.

²⁴ Vickery Testimony at Figure 2.

fringes of the habitat where impacts could not be entirely avoided.²⁵ This has maintained relatively large, contiguous blocks of unfragmented habitat. Much of the layout optimization was done in response to feedback from consultation with IF&W. Of greatest concern to IF&W was location of turbine 11, and as a result TransCanada moved that turbine to an area acceptable to IF&W.²⁶

C. There is Substantial and Well-Protected Breeding Habitat in the Region

There is no question that construction of the Project will impact some amount of Bicknell's thrush habitat. As noted above, however, TransCanada has taken steps, as recommended by IF&W, to minimize those impacts. And while Maine Audubon and TransCanada may disagree on the precise calculation of impacts to Bicknell's habitat, the evidence demonstrates that irrespective of how the impacts are calculated, the impacts are significantly below any threshold that approaches an undue adverse impact.

There can be no meaningful disagreement that there is substantial Bicknell's thrush breeding habitat in Maine and the Sisk Mountain and surrounding area, and that loss of overwintering habitat, not breeding habitat, is the primary threat to the species. There is no dispute that there is, at a minimum, 83,000 acres of breeding habitat for Bicknell's thrush in Maine.²⁷ With regard to the Sisk Mountain area, Chris Rimmer and Kent McFarland from the Vermont Center for Ecostudies conducted habitat modeling for Bicknell's thrush and concluded that within a single mile radius of Sisk Mountain, there is approximately 357 hectares—or 882

²⁵ Cinnamon/Valleau Testimony at 7, 23.

²⁶ Cinnamon/Valleau Testimony at 23.

²⁷ Vickery Testimony at 4; Wells ZP 702 Testimony at 3.

acres—of potential Bicknell’s thrush habitat.²⁸ Within five miles of the Project there is 14,811 acres of potential habitat.²⁹

Moreover, when regenerating clear cuts, ski trails, and other similar areas are considered, the 83,000 acres of Bicknell’s habitat in Maine likely more than doubles to more than 170,000 acres.³⁰ While Maine Audubon did not agree that the species uses regenerating clearcuts,³¹ their skepticism on this point is refuted by all experts who have studied Bicknell’s thrush, including the National Audubon Society, Chris Rimmer, the American Bird Conservancy, and NRCM’s previous Bicknell’s expert, Dr. Jeff Wells, all of whom have concluded that this species breeds both in naturally degraded areas above 2,700 feet AND regenerating clear cuts and other areas disturbed by human activities.³²

Bicknell’s thrush use of regenerating clear cuts for breeding is not just an academic theory. TransCanada has identified actual breeding Bicknell’s thrush in regenerating clear cuts, below 2,700 feet, on Kibby.³³ In its rebuttal to this uncontroverted evidence, Audubon continues to claim, without any facts or cited authority whatsoever, that Bicknell’s are not “breeding

²⁸ BRI Breeding Bird Survey Report for the Sisk Mountain Wind Power Project, Appendix F at 104-05 (“BRI Report”), attached to e-mail from Juliet Browne to Marcia Spencer Famous (May 6, 2010). Maine Audubon testified that Chris Rimmer is “absolutely” a recognized expert on Bicknell’s thrush. Tr. at 212.

²⁹ BRI Report, Appendix F at 104-05.

³⁰ Wells ZP 702 Testimony at 7-8.

³¹ Tr. at 207-08.

³² The National Audubon Society has concluded that “Bicknell’s Thrush has taken advantage of areas disturbed by timber harvesting, ski trail and road construction, and other human activities.” National Audubon Society Bicknell’s Thrush Watchlist at 1 (contained in TransCanada Hearing Exhibit 12). Maine IF&W Wildlife Biologist Tom Hodgman, in the Commission’s proceeding regarding the proposed wind power development on Redington Mountain, noted that “we know this thrush readily uses mountains with intense ski area development.” Valteau Post-Hearing Testimony at Tab C, Exhibit C. Jeff Wells, NRCM’s Bicknell’s expert in the Black Nubble proceeding, stated that “[i]n Maine and adjacent Canadian provinces, Bicknell’s Thrush have been found with increasing frequency in regenerating clear cuts typically dominated by balsam fir.” Wells ZP 702 Testimony at 7-8. The Partners in Flight study, also cited by Ms. Gallo, concluded that Bicknell’s thrush use both “dense and stunted conifers at high elevation” and “regenerating industrial forest.” Partners in Flight NA Landbird Conservation Plan at 43 (contained in TransCanada Post-Hearing Submission at Tab E, Exhibit 9).

³³ Valteau Post Hearing Testimony p. 1-2, Ex. B.

successfully in regenerating clearcuts in Maine.”³⁴ Given the record evidence this assertion is wholly without merit.

Finally, according to the recognized experts, including Chris Rimmer, most of the available northern breeding habitat, in Maine and in the region, is “reasonably extensive and well-protected overall.”³⁵ This is consistent with recent findings by Dr. Jeff Wells, NRCM’s Bicknell’s expert in the Black Nubble proceeding, that “much of the [Bicknell’s] breeding range in North America is within existing protected areas. . . .”³⁶

This is in stark contrast to Bicknell’s thrush wintering habitat, the loss of which is the “greatest threat to the species’ long-term viability,” according to Audubon New York and other experts.³⁷ Mr. Rimmer agrees, and he has concluded that,

Because the species’ winter habitats are more geographically concentrated and limited in extent than its [northern] breeding habitats, and under more immediate threat of loss or degradation, the [International Bicknell’s Thrush Conservation Group] believes that their conservation is of utmost priority.³⁸

As the northern breeding habitat is largely protected, there is no debate among Bicknell’s experts that threats to Bicknell thrush’s wintering habitat is the primary threat to this species.³⁹

In response to this *primary threat to the species*, which as noted above is not loss of breeding habitat but threats to the overwintering grounds, TransCanada intends to make a contribution of \$100,000 to the BITH Fund for preservation of the habitat in the Caribbean. Chris Rimmer notes that prior to TransCanada’s offer, this fund “has been unable to achieve financial resources sufficient to allow implementation of a grant-making process” to protect the

³⁴ Gallo Post Hearing Rebuttal Testimony p. 2.

³⁵ Letter from Chris Rimmer to Christine Cinnamon (Apr. 12, 2010) [hereinafter “Rimmer Letter”] (contained in TransCanada Post-Hearing Submission at Tab G, Exhibit 1).

³⁶ Wells ZP 702 Testimony at 9.

³⁷ *Id.*

³⁸ Rimmer Letter.

³⁹ Wells ZP 702 Testimony at 3, 9.

wintering habitat.⁴⁰ The TransCanada donation, however, will “provide a very important boost, enabling a first-ever disbursement of monies to local conservation partners on Hispaniola by the end of 2010.”⁴¹

While Maine Audubon argues that banning projects in “*all* potential breeding habitat”⁴² is critical to protecting this species, doing so would be of little meaningful benefit. In contrast, TransCanada is taking real steps, in consultation with the experts working to protect this species, to help protect the Bicknell’s thrush population.

D. NRCM and Maine IF&W Have Concluded that Projects With Far Greater Impacts on Bicknell’s Thrush Habitat Did Not Constitute an Undue Adverse Effect

The issue of impacts of wind power projects on Bicknell’s thrush is not new to the Commission, as this issue has arisen in the Redington, Black Nubble, and Kibby Project proceedings. The prior proceedings are relevant to the pending application as all these projects were proposed in the same general area, and all raised concerns about loss of habitat above 2,700 feet. In the Black Nubble proceeding, NRCM argued to this Commission that 64 acres of direct impacts (and whatever indirect or edge effects were associated with those direct impacts) was “inconsequential” to Bicknell’s thrush—inconsequential.⁴³ Similarly, when Maine IF&W reviewed the Redington project, which would have impacted 300 acres of potential habitat above 2,700 feet, it concluded that,

...the amount of habitat that will be lost to construction (i.e., permanently maintained free of trees) will be very slight compared to the amount of habitat available to the birds on the rest of this mountain, in the greater Redington/Sugarloaf/Saddleback region, and certainly among all occupied peaks in Maine.⁴⁴

⁴⁰ Rimmer Letter.

⁴¹ Id.

⁴² Gallo Testimony at 12.

⁴³ TransCanada Hearing Exhibit 13 at 3.

⁴⁴ Valteau Post-Hearing Testimony at Exhibit C.

In this proceeding, Peter Vickery testified that the loss of 8 acres of breeding habitat—equal to approximately one breeding female’s range—is of “no significance biologically.”⁴⁵ Given that NRCM and IF&W have stated to the Commission that 64 acres and 300 acres of impacts are “inconsequential” or “very slight,” Dr. Vickery’s conclusions are entirely reasonable. In summary, Peter Vickery, Jeff Wells, and Maine IF&W all agree that the magnitude of impacts of this project fall well below anything approaching an undue adverse impact.

Finally, while Maine Audubon concedes that some level of impact to Bicknell’s habitat in Maine is acceptable,⁴⁶ they testified that the level of impact of this project is unacceptable. Maine Audubon failed, however, to identify or provide any specific reason why the anticipated loss of 8 acres, or any other specific amount, constitutes an undue adverse effect.⁴⁷ Although Ms. Gallo concedes that she has no expertise with this species and is relying on a review of other professionals’ work,⁴⁸ she has failed to cite any study, research, source, survey data, or any other fact to support her conclusion that the impacts here are undue.

TransCanada appreciates the need to take reasonable measures to avoid and minimize impacts to habitat generally, including habitat for species of special concern. It has done so undertaking comprehensive habitat surveys pursuant to approved protocols, implementing

⁴⁵ Vickery Testimony at 7-8.

⁴⁶ Tr. at 221.

⁴⁷ Ms. Gallo also appears to believe that because the exact location of Bicknell’s habitat changes due to ice, wind and other natural events – according to Ms. Gallo, the habitat “will move around the landscape over time” (Susan Gallo Rebuttal Testimony at 3) – all existing and potential future habitat must be preserved. It is unclear how the Commission would implement Ms. Gallo’s “undue adverse effect” test. Even if TransCanada were prohibited from impacting a single acre of the current 88 acres, such protection might be of little value in the future, should this habitat area “move around” to another location. Even worse, if the Commission permitted any clearing above 2,700 feet, that would be, according to Ms. Gallo, an undue adverse effect to future Bicknell’s thrush habitat. The only way the Commission could implement Ms. Gallo’s test would be to prohibit all human activity above 2,700 feet—which the Commission does not presently do, given the issuance of many timber harvesting permits for work above this altitude. Vallean Post-hearing Testimony at Exhibit D; Pre-filed Direct Testimony of Pete Didisheim in ZP 702 (contained in TransCanada Hearing Exhibit 13) [hereinafter “Didisheim ZP 702 Testimony”] at 2, 12.

⁴⁸ By her own admission, Ms. Gallo has not “actually engaged in any surveying work or specific study or published papers regarding Bicknell’s thrush,” and her testimony is based solely on her review of work done by others. Tr. at 213-14.

measures to minimize impacts to identified Bicknell's habitat, and making a contribution to protect overwintering habitat from being lost, which is the greatest threat to the species. Because there is substantial available habitat in the Project area as well as regionally, the relatively minor impact to the known habitat will not result in an undue adverse impact to the species. This conclusion is supported by recognized experts who have considered impacts to Bicknell's thrush both in the context of this as well as other wind power projects.

VI. THE KIBBY EXPANSION PROJECT WILL NOT RESULT IN AN UNDUE ADVERSE EFFECT TO THE SUBALPINE FOREST IN THE PROJECT VICINITY OR IN MAINE

Construction of the Kibby Expansion Project will not result in undue adverse effects to the subalpine forest community for the following reasons, all of which are supported by substantial record evidence.

A. The Subalpine Forest is Not Subject to Special Protection Under LURC's Regulations

The subalpine forest community on the Sisk ridgeline is ranked "S3" by the Maine Natural Areas Program (MNAP).⁴⁹ Such a ranking means only that this forest community is rare in Maine (20-100 occurrences), and is in contrast to an MNAP S2 ranking (imperiled because of rarity) or an S1 ranking (critically impaired because of extreme rarity).⁵⁰

This distinction is relevant because the Commission does not regulate S3 areas as it does S1/S2 areas, which are subject to protection by LURC. Specifically, Section E(2)(a) of Chapter 10.25 of the Commission's regulations, applicable to the Project, provides as follows:

- a. Natural Features. If any portion of a subdivision or commercial, industrial or other non-residential project site includes critically imperiled (S1) or imperiled (S2) natural communities or plant species, the applicant shall demonstrate that there will be no undue adverse impact on the community

⁴⁹ MNAP Comments (Feb. 24, 2010) at 1.

⁵⁰ Index of MNAP rarity ranks, <http://www.maine.gov/doc/nrimc/mnap/features/rank.htm>.

and species the site supports and indicate appropriate measures for the preservation of the values that qualify the site for such designation.

Although all projects are subject to the general standards in Section 10.24 of the Commission's regulations, the specific regulation that governs assessment of impacts to these state-ranked natural areas expressly omits any mention of S3 communities, which evidences the fact that S3 communities are not subject to the same level of protection. This is because although these areas may be rare, they are not imperiled. Moreover, there is no prohibition against impacts to the S1 and S2 communities that are specifically called out under LURC's regulation. For example, during the permitting for the Kibby Project, the Commission concluded that impacts to boreal bedstraw and lesser wintergreen, both S2 rankings, although limited were permissible.⁵¹

Nor has the Commission restricted timber harvesting that may impact this S3 community. As NRCM noted in the Black Nubble proceeding and AMC has conceded here, over the years the Commission has issued many permits for timber harvesting above 2,700 feet, which results in more significant impacts to subalpine forest natural communities than the clearing associated with this project.⁵² Just recently, the Maine Bureau of Parks and Lands applied for and received a permit for harvesting above 2,700 feet, in an area that includes mapped S3 subalpine forest natural community.⁵³

⁵¹ ZP 709 at 61.

⁵² Valteau Post-Hearing Testimony at Tab C, Exhibit D; Didisheim ZP 702 Testimony at 2.

⁵³ Valteau Post-Hearing Testimony at Tab C, Exhibit E. As BPL intended to conduct a portion of this harvesting above 2,700 feet, in and adjacent to a subalpine forest area, the proposal raised concerns about impacts to Bicknell's thrush. Id. In the Commission's Black Nubble proceeding, NRCM argued that LURC's issuance of permits for cutting above 2,700 was a factor in favor of granting a permit for a wind power project, as these areas are not considered off limits to human activity. Didisheim ZP 702 Testimony at 12. In addition, the record is clear that most of these S3 subalpine forest communities are already protected—in the Bigelow Range, Baxter State Park—and in the region this forest community is neither rare, nor at risk from development. Pre-Filed Direct Testimony of Don Hudson [hereinafter "Hudson Testimony"] at 5.

B. The Project Impacts to Subalpine Forest Are Minor and Do Not Constitute An Undue Adverse Effect

It is undisputed that there are approximately 40,000 acres of mapped subalpine forest in Maine, most of which is protected, and if the Kibby Expansion Project were to proceed more than 39,900 acres would remain.⁵⁴ It is also undisputed that there are many additional examples of unmapped subalpine forest communities in the Project area. At least 15 different peaks and ridges near Sisk Mountain host subalpine forest.⁵⁵ Only 10 percent of the mapped subalpine forest on the Sisk ridgeline will be cleared, and even considering so-called “edge effects,” the Project will only impact 64 acres.⁵⁶ Considering edge effects and fragmentation based on criteria established by MNAP, the total impact, direct and indirect, is 102 acres out of the 358-acre mapped forest.

As it did with respect to Bicknell’s habitat, TransCanada took steps to avoid and minimize impacts to the subalpine forest. Specifically, road alignments were changed to minimize fragmentation, and were moved to the fringes of the mapped community. Further, turbine locations were also moved toward the edges of the community in an effort to maintain the largest contiguous blocks of the forest community practicable. In its review comments, MNAP noted that Turbine 11 fragmented the remaining core of the northern portion of the

⁵⁴ Tr. at 222-23.

⁵⁵ Hudson Testimony at 4. In his post-hearing testimony, David Publicover hypothesized that few of the unmapped occurrences would be ranked as “exemplary,” suggesting that they “count less.” Rebuttal Testimony of David Publicover at 2. The example on Sisk Mountain is also not “exemplary,” and therefore by his own logic, the impacts to it are of less concern. In any event, Dr. Publicover’s post-hearing rebuttal testimony is not limited to responding to post-hearing comments (by TransCanada or others) and therefore should be stricken. See Fifth Pre-hearing Procedural Order at 9 (May 7, 2010).

⁵⁶ Hudson Testimony at 5 and Exhibit B. Dr. Publicover disputes that TransCanada has properly evaluated the “edge effects” and other indirect impacts, and he suggests that he “agrees” with MNAP that the indirect impacts will be greater than characterized in the Application. Pre-Filed Direct Testimony of David Publicover at 9-11. However, the mapping, including the identification of edge effects and other indirect impacts, was done in accordance with MNAP’s recommendations. MNAP Comments (Feb. 24, 2010) at 1-2 (discussing 50’ buffer to the proposed clearing added by MNAP).

community and that removing it from that location would substantially reduce fragmentation.⁵⁷ In response to MNAP's comments, TransCanada moved Turbine 11 and its associated road, thereby minimizing fragmentation of the forest and ensuring that two large unfragmented portions of 183 contiguous acres and 73 contiguous acres remained intact.⁵⁸

Don Hudson, who is responsible for mapping the majority of the subalpine forests in the State of Maine, and except for the Kibby and Kibby Expansion projects has not testified before the Commission in support of development, concluded that the impacts to the subalpine forest community were acceptable.⁵⁹ His conclusion was based on the fact that the area on Sisk was not "one of the more special examples of the community, even in Maine."⁶⁰ It is consistent with other examples in the Boundary Mountains and does not appear as fragile as other areas due to clear differences in topography and substrate.⁶¹ Additionally, when considered regionally, the forest community is not particularly rare, and although there would be an impact to the mapped area on Sisk, significant intact blocks remain.⁶² As Dr. Hudson testified during the hearing, "the impacts here are well defined and limited and do not threaten the forest on that ridge overall. It will persist and persist nicely for the full life of this project and beyond."⁶³

Dr. Hudson's conclusions in this proceeding are entirely consistent with those reached in Maine's Comprehensive Wildlife Strategy, where the State concluded that this forest community is "relatively stable in overall extent and are extensive on Maine's higher mountains," "major occurrences are well protected within public lands or private conservation lands," and

⁵⁷ MNAP Comments at 2.

⁵⁸ *Id.*; Hudson Testimony at Exhibit B.

⁵⁹ Hudson Testimony at 4-7.

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 4.

⁶² *Id.* at 5-6.

⁶³ Tr. at 91.

“recreation and windpower generation could locally degrade other minor sites, but these uses are unlikely to present a significant threat to the integrity of these forests.”⁶⁴

During the hearing AMC’s witness on subalpine issue, David Publicover, agreed that some impacts to subalpine forest community are acceptable.⁶⁵ Moreover, although initially Dr. Publicover claimed that AMC had never supported a project with greater impacts to a subalpine forest, after being reminded of his support of the Granite Reliable project in New Hampshire, Dr. Publicover conceded that AMC had, in fact, supported such a project.⁶⁶ Specifically, the Granite Reliable project resulted in direct impacts of 37 acres out of a 226 acre community—16% of the mapped area, with a greater impact if indirect effects are considered.⁶⁷ Dr. Publicover agreed that the subalpine forest in the Granite Reliable project was “a higher value forest community” and that it included a “rare pristine old growth subalpine forest,” two state-listed endangered species, and Bicknell’s thrush habitat.⁶⁸ Ultimately, AMC concluded that notwithstanding these impacts, the Granite Reliable project **“would not constitute an unreasonable adverse effect on the natural environment.”**⁶⁹

In summary, the record shows that the impacts of the Project to subalpine forest are minimal, and that although this forest community is considered rare in Maine, it is not rare regionally, LURC’s regulations expressly omit any special consideration of this S3 community, and the great majority of subalpine forest in Maine (including the higher value communities) is already protected. The impacts from the Project are well-defined and significant blocks remain intact and will persist for the life of the Project and beyond.

⁶⁴ TransCanada Hearing Exhibit 5 at 7 (emphasis added).

⁶⁵ Tr. at 224-25.

⁶⁶ Tr. at 225-27.

⁶⁷ Tr. at 225.

⁶⁸ Tr. at 225-26.

⁶⁹ TransCanada Hearing Exhibit 10 at 1; Tr. at 227.

VII. THE KIBBY EXPANSION PROJECT WILL NOT RESULT IN AN UNDUE ADVERSE EFFECT ON VERNAL POOLS, BOG LEMMINGS, ROARING BROOK MAYFLY, OR SPRING SALAMANDER

Construction of the Kibby Expansion Project will not result in any undue adverse impacts to the 14 man-made, non-state regulated, vernal pools identified in the Project area. The evidence in the record is undisputed that TransCanada followed appropriate survey protocols, which, consistent with IF&W guidance⁷⁰ for surveys conducted outside of the optimal spring window, required TransCanada to treat all identified pools as though they were “significant” regardless of what the classification would have been if conducted during the spring window. In fact, all pools identified during TransCanada’s extensive surveys and confirmed by Bob Cordes of IF&W,⁷¹ were man-made, likely the result of skidder activity associated with forest management activities in the area. Although FoBM argues that TransCanada should be required to conduct additional surveys during the spring identification period for pool-breeding amphibians, IF&W has repeatedly stated that they are satisfied with TransCanada’s surveys and results demonstrating that the identified pools are not regulated by the State.⁷² Moreover, notwithstanding the pools’ regulatory classification, TransCanada will implement the habitat management guidelines applicable to significant vernal pools. Accordingly, there will be no undue adverse environmental effect to any natural or man-made vernal pools as a result of the Kibby Expansion Project.

⁷⁰ Letter from Juliet Browne to Commission Chair Hilton (May 18, 2010) attaching IF&W May 21, 2007 Memorandum regarding vernal pool survey protocol.

⁷¹ E-mail from Bob Cordes to Dana Valleau (May 10, 2010) (copying Marcia Spencer Famous).

⁷² E-mail from Bob Cordes to Marcia Spencer Famous (May 24, 2010) (stating that “additional surveys during the identification period for pool-breeding amphibians are unnecessary”); e-mail from Bob Cordes to Marcia Spencer Famous (June 1, 2010) (stating that “MDIFW is satisfied with TransCanada’s effort to document wetlands associated with the project, including vernal pools. Therefore, we did not request additional pre-construction studies.”); see also Me. Dep’t of Env’tl Prot., 06 096 CMR 335(9) (stating that vernal pools must, among other criteria, be naturally occurring).

TransCanada identified and designed the Kibby Expansion Project to completely avoid three potential northern bog lemming habitats located on Sisk Mountain.⁷³ As a result, TransCanada has demonstrated and IF&W has concluded that no adverse impacts to the bog lemming are anticipated from the Project.⁷⁴

The evidence in the record also clearly demonstrates that TransCanada, working in close consultation with IF&W, has appropriately surveyed areas where both the Roaring Brook mayfly and the spring salamander are known to occur and, although neither species was identified in that area, has committed to implement IF&W draft guidance to protect potential habitat located within the Kibby Stream watershed.⁷⁵ As a result, the Kibby Expansion Project will not result undue adverse effects to the Roaring Brook mayfly or spring salamander.

VIII. THE CONSTRUCTION TECHNIQUES HAVE BEEN SUCCESSFULLY FIELD TESTED IN SIMILAR CONDITIONS

During construction of the Kibby Project, TransCanada implemented construction techniques and use of Best Management Practices (“BMPs”) to minimize soil movement and loss, preserve the integrity of environmentally sensitive areas, and maintain existing water quality during construction.⁷⁶ The collective set of techniques, referred to as the “toolbox approach,” anticipated certain known development conditions but also allowed engineers flexibility on the ground to exercise professional judgment in how best to respond to actual field conditions. Although the toolbox approach was new during the Kibby permitting/construction process, it has, according to Mr. Rocque, “been used successfully on 3 windfarm projects, now, including the Kibby Range.”⁷⁷

⁷³ Cinnamon/Valleau Testimony at 24; Tr. at 26.

⁷⁴ E-mail from Bob Cordes to Marcia Spencer Famous (March 3, 2010).

⁷⁵ Cinnamon/Valleau Testimony at 25; Tr. at 26; e-mail from Bob Cordes to Marcia Spencer Famous (March 3, 2010).

⁷⁶ Pre-filed Direct Testimony of Corey Goulet, et al., at 15.

⁷⁷ Memorandum from Dave Rocque to Marcia Spencer Famous (May 24, 2010).

TransCanada will implement the same effective toolbox approach during construction of the Kibby Expansion Project.⁷⁸ In response to FoBM's criticism of the toolbox approach, Mr. Rocque described them as "the only logical way to makes sure stable roads are built that also minimizes any alteration to the natural hydrology of the mountains, so important to many down slope natural resources."⁷⁹ By using the toolbox approach successfully implemented at Kibby and expressly endorsed by the State Soil Scientist, TransCanada will ensure that the Kibby Expansion Project will not result in unreasonable soil erosion or a reduction in the capacity of the mountainous soil to absorb and hold water.

IX. THE KIBBY EXPANSION PROJECT WILL NOT HAVE AN UNDUE ADVERSE EFFECT ON THE SCENIC CHARACTER OF ANY RESOURCE OF STATE OR NATIONAL SIGNIFICANCE

The Kibby Expansion Project will not have an undue adverse effect on scenic character or existing uses related to scenic character because it will not significantly compromise views from any scenic resource of state or national significance.

A. The State Wind Energy Act Creates a Focused, Defined Scope of Review for Impacts to Scenic Character for Wind Power Projects

The Legislature has found that wind energy development "is unique in its benefits to and impacts on the natural environment [and] makes a significant contribution to the general welfare of the citizens of the State,"⁸⁰ and that, given the realities of constructing grid-scale wind power projects, there are going to be necessary, but acceptable, visual impacts from this development. As a result, the Legislature has established a focused scope of review using a defined methodology that applies to wind energy development proposals in the expedited permitting area.

⁷⁸ FoBM acknowledged the successful and professional construction of the Kibby Project. Tr. at 246.

⁷⁹ Mr. Rocque specifically disagreed with Mr. Lambert's post-hearing comments where he contends that the "tool box" approach to the use of Best Management Practices for erosion/sediment control and stormwater management is "totally wrong." *Id.*

⁸⁰ 35-A M.R.S.A. § 3402 (1).

Pursuant to the Wind Energy Act, the scope of review for impacts to scenic character is limited to expressly identified “scenic resources of state or national significance,” and seeks to determine whether a proposed project “significantly compromises views” from these resources “such that the development has an unreasonable adverse effect on scenic character or existing uses related to scenic character” of these resources.⁸¹ Unlike scenic impacts analyses for other types of development, the Wind Energy Act provides a specific set of standards for assessing scenic impacts to the identified resources.⁸² Those standards require that the Commission consider the significance of the potentially affected scenic resource, the character of the surrounding area, the expectations of the typical viewer, the extent, nature and duration of potentially affected public uses of the scenic resource, and the potential effect of views of the turbines on the public's continued use and enjoyment of the resource.⁸³

The Wind Energy Act further mandates that “[a] finding by [the Commission] that the development’s generating facilities are a highly visible feature in the landscape,” is not by itself a “sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character.”⁸⁴ Additionally, there is a presumption that visual impacts to areas farther than three miles from the Project are less significant and do not require a visual impact assessment.⁸⁵

⁸¹ 34-A M.R.S.A. § 3452 (1). This section of the Wind Energy Act further provides that no other determination of harmonious fit regarding scenic character or existing uses related to scenic character is required.

⁸² In his comments at the public hearing, Bureau of Parks and Lands Deputy Director Stearns stated that the Wind Energy Act does not provide “much guidance for applicants in terms of . . . what the methodology should be, let alone the rigor of the methodology” for evaluating scenic impacts to resources of state or national significance. Tr. at 284-85. This is not accurate. In fact, the Wind Energy Act gives greater guidance than presently exists for other development under LURC’s statute and Rules.

⁸³ 35-A M.R.S.A. § 3542 (3). The complete review standards are attached as Exhibit B.

⁸⁴ 35-A M.R.S.A. § 3452 (3).

⁸⁵ On its own initiative, TransCanada submitted a visual impact assessment (Aesthetic Impact Assessment, Kibby Expansion Wind Power Project [hereinafter “AIA”]) that included an analysis of the impacts to all scenic resources of state or national significance within an 8-mile area (the limit for which such an assessment may be required). TransCanada’s application and hearing testimony addressed those resources and the Project’s potential impacts on them. Application Attachment A.1.

B. The Project Will Not Result In An Undue Adverse Effect on Any Scenic Resource of State or National Significance

There are nine scenic resources of state or national significance located within eight miles of the Project.⁸⁶ From four of these resources (the Dead River, Spencer Stream, the Natanis Point overlook, and the Sarampus Falls overlook) there will be no views of the Project, and therefore no scenic impacts to the resource, whatsoever.⁸⁷

Of the five remaining resources, three (Arnold Pond, Crosby Pond, and Kibby Stream) have insignificant or extremely limited visibility of the Project. Arnold Pond, Crosby Pond, and one of the two viewpoints on Kibby Stream, are all between 6.5 and 8 miles from the Project, thus minimizing the impact of what views might exist.⁸⁸ In addition, where there is visibility from Arnold Pond and Crosby Pond, the prominent landform of Mount Pisgah dominates the views, thereby further diminishing the appearance of the Project.⁸⁹

The second location from Kibby Stream where views are likely is an area approximately three miles from the Project, that is heavily used for parking and storage of harvesting machinery, log sorting, and other industrial forestry activities, and, as such, there is no viewer expectation of scenic values. The remainder of Kibby Stream is heavily wooded along its banks, such that views of the Project are unlikely.⁹⁰

In addition to this location on Kibby Stream, only two other resources – Chain of Ponds and portions of the Arnold Trail — are within three miles of the Project. As noted in the AIA, and as **confirmed by the Commission’s independent visual expert**, the Project will be visible from only a fraction of these resources and will not have an unreasonable adverse effect on the

⁸⁶ Pre-Filed Direct Testimony of Jean Vissering at 7-8 [hereinafter “Vissering Testimony”].

⁸⁷ AIA at 3; James Palmer Aesthetic Impact Assessment (Apr. 16, 2010) [hereinafter “Palmer Comments”] at 12.

⁸⁸ Palmer Comments at 19.

⁸⁹ Vissering Testimony at 32-33; Tr. at 304.

⁹⁰ Vissering Testimony at 37.

scenic character or existing uses related to scenic character of the these resources.⁹¹ A summary of the key factors related to scenic impacts to these resources is as follows.

1. Chain of Ponds

- Chain of Ponds is designated as having outstanding scenic values primarily due to its scenic foreground features, including very dramatic relief, cliffs, ledges, beaches, boulders, diverse shoreline, and excellent water quality, rather than for views of distant mountains or other scenery.⁹²
- Other natural foreground features contribute to and enhance the overall scenic quality of Chain of Ponds, including Mount Pisgah, Sisk Mountain, and the Bigelow Mountains, which provide strong focal points and reduce the visual impact of the turbines.⁹³
- Although Chain of Ponds has many scenic features, it is not remote or primitive, and Jim Palmer testified that any suggestion that this area is a “vast wilderness” is “hyperbole.”⁹⁴
- In the Flagstaff Region Management Plan (the “Plan”), BPL characterized several parcels of state owned land as “remote,” providing a “backcountry recreation experiences,” including the Bigelow Preserve and Mount Abraham.⁹⁵ In contrast, although scenic, BPL does not characterize Chain of Ponds as possessing any such “remote” qualities.⁹⁶ Mr. Palmer noted that his own fieldwork confirmed that the area is “neither remote nor primitive.”⁹⁷
- Indeed, NRCM’s reliance on a single quote on page 31 of the Plan to argue that the draw of Chain of Ponds is its “wild and scenic” character is misleading.⁹⁸ The discussion on page 31 of the Plan relates to the entirety of the Plan area, which includes the Bigelow Preserve and Mount Abraham, both of which are undeniably wild and scenic areas. The section of the Plan devoted to Chain of Ponds does not reference remoteness. Kathy Eickenberg, Chief Planner at BPL, submitted written comments at the close of the hearing on this same topic. BPL’s comments, like NRCM’s testimony, takes the same quote out of context and therefore suffers from the same flaw.⁹⁹

⁹¹ Vissering Testimony at 7, 8; Tr. at 302.

⁹² Maine State Planning Office Critical Areas Program, Maine’s Finest Lakes, The Results of the Maine Lake Study (Oct. 1989) at 86.

⁹³ Vissering Testimony at 9; Palmer Comments at 18.

⁹⁴ Palmer Comments at 19; Tr. at 312.

⁹⁵ Management Plan at 51, 113, 149.

⁹⁶ Management Plan pp. 91-98.

⁹⁷ Palmer Comments p. 19.

⁹⁸ Tr. at 136 (Johnson cross-examination of Titus) and (Browne cross-examination of Johnson); Post Hearing Rebuttal Testimony of Catherine Johnson at 4.

⁹⁹ There are strong parallels between Ms. Eickenberg’s written comments and NRCM’s pre-filed testimony and cross-examination of John Titus, both of which occurred before these comments were made public. For example, in several instances, the identical quotes or portions of quotes relied on by Ms. Johnson appear in Ms. Eickenberg’s

- The existing viewer experience along Chain of Ponds already includes human development, including the constant presence of Route 27 and its heavy traffic, several privately-owned camps, the developed campground at Natanis Point, and motorized recreational use of the water and adjacent land.¹⁰⁰
- Of the five ponds that constitute Chain of Ponds, visibility of the Project is limited only to portions of Bag, Natanis, and Long Ponds.¹⁰¹
 - Bag Pond. The Project will not be visible from roughly two thirds of Bag Pond.¹⁰²
 - Natanis Pond. The Project will not be visible from the vast majority of Natanis Pond, including the commercial campground and all of the State’s primitive campsites. There also will be no visibility of the Project when looking south toward the very distant peaks of the Bigelow range. Where there is visibility, only the tops of four turbines (behind Mount Pisgah) will be visible from a very small area along the southeastern-most shore of Natanis Pond.¹⁰³
 - Long Pond. The majority of views of the Project occur from Long Pond, where there will be visibility from approximately half of Long Pond. Long Pond also is the only area from where the entire Project can be viewed.¹⁰⁴
- For Bag, Natanis and Long Ponds, views will include the more dominant landforms of Mount Pisgah and/or Sisk Mountain, making the Project turbines appear more distant, lower in elevation, and less prominent¹⁰⁵
- In total, there will be no views of the Project from more than two-thirds of Chain of Ponds. Where there are views, they are primarily of only portions of the Project and often include only the tops of turbines or tips of blades.¹⁰⁶
- With regard to “cumulative impacts,” as noted by Mr. Palmer and Ms. Vissering, because the Kibby Project will be visible from Long Pond, locating additional turbines in this area (even when visible) is appropriate as the incremental impacts will not be significant, and locating the projects in proximity will reduce the overall impact of wind energy projects in the state.¹⁰⁷
- It is possible to travel the entire length of Chain of Ponds without seeing a single turbine. Where there is visibility, turbines will enter and recede from view across a

comments, including the quote that was taken out of context to suggest that the principal draw of Chain of Ponds is its “wild and scenic” character. Because Ms. Eickenberg was not present at the hearing and her written comments were provided only after-the-fact, TransCanada was not afforded an opportunity to cross-examine Ms. Eickenberg. In any event, the best evidence of BPL’s characterization of the Chain of Ponds unit is in the specific section of the Plan discussing that unit. Plan at 91-98.

¹⁰⁰ Vissering Testimony at 9, 10; John Titus Pre-Filed Testimony p. 7; Palmer Comments pp. 18-19

¹⁰¹ AIA at 7.

¹⁰² Vissering Testimony at 14.

¹⁰³ Vissering Test. at 25.

¹⁰⁴ Vissering Test. at 17.

¹⁰⁵ Vissering Test. at 14, 17, 25

¹⁰⁶ Vissering Test. at 5,6; Palmer Comments pp. 18-19.

¹⁰⁷ Vissering Testimony p. 39, 40; Tr. AT 315-16.

changing landscape, and will not have an unreasonable adverse effect on the scenic character.¹⁰⁸

It is important to note that the Commission's visual expert testified that the simulations are the most important tool for evaluating visual impacts and the simulations done by Ms. Vissering were appropriate and reflected maximum visibility. No other party has retained a visual expert to conduct an independent assessment or peer review the AIA.¹⁰⁹ Further, neither the Intervenors nor BPL have alleged any inaccuracy in the visual simulations, areas of visibility, or number of turbines visible from each viewpoint as stated in the AIA.¹¹⁰ Although BPL has commented on the process involved in conducting an aesthetic impact assessment, and on the nature of the scenic resources themselves, BPL has not taken a position that there is an unreasonable adverse effect on those resources.¹¹¹ Similarly, although Mr. Stearns referenced a "collision of four scenic assets,"¹¹² the Scenic byway, the BPL unit, Chain of Ponds, and the Arnold Trail, it is undisputed that there are essentially no views of the Project from either the Scenic byway or BPL lands,¹¹³ and the impacts to Chain of Ponds and the Arnold Trail are the same because, as Mr. Stearns acknowledged, they occupy the same geographic area.¹¹⁴ As a result his concerns seem misplaced.

The Intervenors have objected to scenic impacts of the Project primarily on the grounds that the Project will be visible (allegedly "prominently" so) from those portions of Chain of Ponds identified in the AIA, and NRCM claims that Mr. Palmer agrees the turbines will be

¹⁰⁸ Tr. at 303.

¹⁰⁹ Tr. at 309, 232. Cathy Johnson, the Consolidated Intervenor's visual impact witness, admitted that she is not a visual expert, and that she is offering only her "personal opinion" of the scenic impacts of the Project. (Tr. at 232).

¹¹⁰ See generally Pre-Filed Direct Testimony of Cathy Johnson [hereinafter "Johnson Testimony"]; Tr. at 283-84.

¹¹¹ Tr. at 310.

¹¹² Tr. at 288.

¹¹³ Post-Hearing Testimony of Jean Vissering at 1-3

¹¹⁴ Tr. at 288.

“prominent.”¹¹⁵ During the hearing, however, Mr. Palmer clarified that when he stated the turbines would be “prominent,” he meant only that they would be “really visible.”¹¹⁶ The Wind Power Act is clear, however, that “really visible” or “highly visible” is not sufficient grounds to constitute an unreasonable adverse effect.¹¹⁷ In contrast, Mr. Palmer concluded that the “predominant” visual features—important in determining whether there would be an undue adverse effect—are the “high peaks” that surround Chain of Ponds.¹¹⁸

2. Arnold Trail

The Arnold Trail is listed in the National Register of Historic Places for its military significance as the 194-mile route traversed by colonial soldiers under Benedict Arnold’s command during the American Revolution.¹¹⁹ The Trail travels through many cities, towns and villages including Augusta, Hallowell, Skowhegan, Eustis and Stratton. The Trail runs generally parallel to state highways for much of its length, including Route 27 from Stratton and through Chain of Ponds in Franklin County and terminates at the Canadian border in Coburn Gore. No direct effects to the Arnold Trail will occur as a result of the Project. Indirect (visual) effects will occur along a limited 1.6 mile section of the 194-mile Trail. A summary of key findings regarding the minimal impacts to the Trail follows.

- The Arnold Trail shares much of its route in the study area with Chain of Ponds. Project visibility along the Arnold Trail would be limited to the areas of Chain of Ponds identified above and as such, the scenic impacts will be similar, and not unreasonable.
- As noted by both Ms. Vissering and Mr. Palmer, distant views were likely of little concern to Arnold’s company, and the presence of turbines in portions of the Arnold

¹¹⁵ Johnson Testimony at 7.

¹¹⁶ Tr. at 304.

¹¹⁷ 35-A M.R.S.A. § 3542 (4).

¹¹⁸ Tr. at 304.

¹¹⁹ Application Attachment B.15-3 (Historic Structures Report) at 2-1.

Trail viewshed is unlikely to materially diminish the historic experience along the Arnold Trail.¹²⁰

- The Project will be visible from only a 1.6 mile section of a 194-mile trail (0.8%), in an area under intensive forest management, in close proximity with Route 27, with heavy truck and car traffic.¹²¹
- The “threats to site integrity” identified by the State are focused on immediate activity along the trail—including camp development and “amateur archeological digging.” Visual impacts from projects two miles from the trail are not identified as any issue of concern.¹²²

As part of a parallel federal permitting process, the Maine Historic Preservation Commission (“MHPC”) made a determination that the Project will have an adverse effect on an approximately 1.6 mile section of the Arnold Trail.¹²³ This determination is not finding of undue or unreasonable adverse impact under LURC’s (or any other State review) criteria and is consistent with similar adversity findings made during review of other large-scale projects approved in Maine, including two recently permitted wind power projects, the Oakfield Wind Project (“Oakfield”)¹²⁴ and the Record Hill Wind Project (“Record Hill”).¹²⁵ Findings of adversity and subsequent mitigation are typical components of the federal review process. If required, mitigation may take many different forms.¹²⁶ For example, in the Record Hill Project, mitigation consisted of a requirement that the applicant provide photographic documentation of farmsteads identified as visually impacted by that project.¹²⁷ In the Oakfield Project, MHPC is

¹²⁰ Vissering Testimony at 37; Tr. at 298.

¹²¹ Palmer Comments at 10.

¹²² Battlefield Assessment at 20 (attached to letter from Kirk Mohny, MHPC, to Steve Wallace, TRC (Feb. 2, 2010) (copying Marcia Spencer Famous)).

¹²³ Letter from Kirk Mohny, MHPC, to Steve Wallace, TRC (Feb. 2, 2010) (copying Marcia Spencer Famous); Letter from Kirk Mohny, MHPC, to Dana Valleau, TRC (May 6, 2010) (copying Marcia Spencer Famous).

¹²⁴ MHPC finding of adversity for the Oakfield Wind Power Project (Dec. 22, 2009).

¹²⁵ MHPC finding of adversity for the Record Hill Wind Power Project (Sept. 18, 2009).

¹²⁶ Tr. at 294.

¹²⁷ Record Hill Wind Army Corps Permit #NAE-2008-03763; Tr. at 316-17.

seeking a broad documentation effort to itemize historic properties in and around the impacted area of Aroostook County.¹²⁸

TransCanada is continuing the federal consultation process with MHPC. As discussed above, TransCanada will contribute \$100,000 to the AEHS for use in land protection surrounding the Arnold Trail north of the Chain of Ponds or other projects that will enhance the mission of AEHS to interpret and share with the public the history of the Arnold Trail. We believe that donation is consistent with and exceeds mitigation typically required as part of the federal review process.

X. EFFORTS TO REQUIRE CONSERVATION OR OTHER MITIGATION FOR IMPACTS OF WIND DEVELOPMENT WITHIN THE EXPEDITED PERMITTING AREA MUST BE DIRECTED TO THE LEGISLATURE, NOT THE COMMISSION

Both BPL and the Consolidated Intervenors are asking the Commission to impose requirements and establish standards relating to conservation and mitigation that do not exist in law. These policy arguments should be directed to the Legislature. Importantly, they should not muddy the analysis of whether the existing standards, which are clearly set forth in law, have been met.

Mr. Stearns was very clear that BPL does not object to the project and, specifically, BPL has not concluded that the visual impacts are unreasonable: *“To be clear, BPL does not oppose the Kibby Expansion.”*¹²⁹ At the hearing, Mr. Stearns stated, “I have been very careful not say that I find that there is an unreasonable adverse impact.”¹³⁰ Instead, and as he stated on cross-examination, Mr. Stearns seeks to shape future policy on wind power projects.¹³¹ Mr. Stearns’ desire to have the Commission establish precedent for scenic mitigation and conservation to

¹²⁸ Tr. at 294.

¹²⁹ Memorandum from Alan Stearns to Marcia Spencer Famous (Feb. 26, 2010) at 5 (emphasis in original).

¹³⁰ Tr. at 301.

¹³¹ Tr. at 310-11 (“Q: Is it fair to say that the real thrust of your comments address your desire to shape future policy in this area? A. Correct.”)

balance wind power development, however, is based on the flawed premise that existing law not only allows but requires mitigation for scenic impacts. Mr. Stearns testified that,

. . . the thing that I've been frustrated with from the beginning is I like mitigation. I used to do mitigation. I don't think there needs to be black and white decisions of dancing on the head of unreasonableness. A finding of adverse effect is not a rejection, it is a starting point for discussion of mitigation.¹³²

The approach advocated by Mr. Stearns is more appropriate for a concept plan such as the Moosehead Lake Concept Plan, in which there is an express requirement that the plan “strike a reasonable and publicly beneficial balance between appropriate development and long-term conservation” and “any development gained through any waiver of the adjacency criteria is matched by comparable conservation measure.” LURC Ch. 10.23,H.6. Here, wind power is a use allowed by law and there is not a requirement to offset the impacts of that use through conservation or mitigation.

NRCM and the Consolidated Intervenors have joined BPL in arguing that mitigation for scenic impacts is required. For example, in this proceeding NRCM testified that the visual impacts of the northern eight turbines were acceptable, but should be off-set by a one-time payment to BPL of \$100,000.¹³³ In the Moosehead Lake Concept Plan, however, NRCM and Maine Audubon argued and the Commission concluded that while a wind power project located in the expedited area must undergo a review process, additional conservation to “mitigate and balance the adverse impacts of commercial wind development [on scenic resources]” would not be relevant at that time.¹³⁴ Instead, the sole test is whether the project meets the review criteria

¹³² Tr. at 290.

¹³³ Direct Pre-filed Testimony of Cathy Johnson at 11.

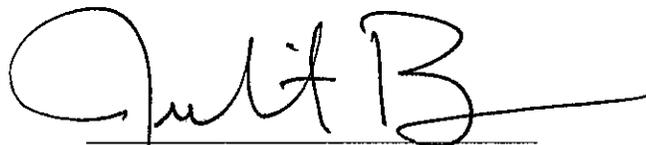
¹³⁴ NRCM and Maine Audubon Society Joint Comments in Response to LURC Request for Comments on Windpower Siting in ZP 707 at 5 (attached as Exhibit C); Order in ZP 707 at 175 (excerpts attached as Exhibit D). In ZP 707, Maine Audubon and NRCM argued that the Commission should consider the visual impacts associated with potential future wind development within the conservation easement area because there was no mechanism to require mitigation for those impacts during the permitting process for expedited wind energy developments.

set forth in Chapter 10 of LURC regulations for activities that are an allowed use, as modified and supplemented by the specific criteria set forth in the Wind Energy Act.

CONCLUSION

For the foregoing reasons, TransCanada respectfully requests that the Commission approve DP 4860.

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APPENDIX A

TRANSCANADA'S PROPOSED KEY FINDINGS OF FACT

1. Bicknell's Thrush

Finding. Bicknell's thrush is not listed as threatened or endangered under state or federal law. (Pre-Filed Testimony of Susan Gallo [hereinafter Gallo Testimony] at 7; MDIFW Endangered Species Program/State List, at www.maine.gov/ifw/wildlife/species/endangered_species/state_list.htm).

Finding. The Bicknell's thrush population is approximately 40,000 individuals and the population is not declining in Maine. (Pre-filed Testimony of Peter Vickery [hereinafter Vickery Testimony] at 4; Hearing Transcript at 196; TransCanada Post-Hearing Submission, Dana Valleau Testimony [hereinafter Valleau Post-Hearing testimony], Tab C, Exhibit C [Tom Hodgman Comment #3]).

Finding. At least 83,000 acres of Bicknell's thrush habitat exist in Maine, spread over 60 mountain peaks. (Vickery Testimony at 4; Pre-filed Testimony of Dr. Jeffrey Wells in ZP 702 [hereinafter Wells ZP 702 testimony] at 3 [contained in TransCanada Hearing Exhibit 13]).

Finding. In 2007, when Maine IF&W evaluated whether to add Bicknell's thrush to this state list of threatened or endangered species, it did not add the species to the list "largely because of its population size and the large number of sites where it occurs in Maine." (Valleau Post-Hearing Testimony at Tab C, Exhibit C [Tom Hodgman Comment #3]).

Finding. Within a one mile radius of Sisk Mountain, there is approximately 882 acres of potential Bicknell's thrush habitat and within a five mile radius there is approximately 14,811 acres of potential habitat. (BRI Breeding Bird Survey Report for the Sisk Mountain Wind Power Project, Appendix F at 104-05, attached to e-mail from Juliet Browne to Marcia-Spencer Famous (May 6, 2010)).

Finding. Regenerating timber harvest clear cuts, ski trails, and other areas impacted by human activity provide potential breeding habitat for Bicknell's thrush. (National Audubon Society Bicknell's thrush Watchlist, cited in Pre-filed Testimony of Susan Gallo and contained in TransCanada Hearing Exhibit 12 at 1; Valleau Post-Hearing Testimony at Tab C, Exhibit C [Tom Hodgman Comment #3]; Wells ZP 702 Testimony at 7-8; Partners in Flight NA Landbird Conservation Plan at 43 [contained in TransCanada Post-Hearing Submission at Tab E, Exhibit 9]).

Finding. If regenerating clear cut areas are added as potential breeding habitat, this increases Bicknell's thrush habitat in Maine by approximately 98,000 additional acres. (Wells in ZP 702 Testimony at 8).

Finding. TransCanada has identified actual breeding Bicknell's thrush in regenerating clear cuts, below 2,700 feet, on Kibby. (Valleau Post-Hearing Testimony at 1-2 and Exhibit B).

Finding. Bicknell's thrush survey protocols were approved in advance by Maine IF&W, and are consistent with the protocols approved by Maine Audubon in the Kibby Project. (Pre-filed Direct Testimony of Christine Cinnamon and Dana Valleau [hereinafter Cinnamon/Valleau Testimony] at 22).

Finding. In response to comments from Maine IF&W, TransCanada moved turbine #11 out of the Bicknell's thrush habitat, reducing the clearing impacts from 12.4 to 8 acres. (Vickery Testimony at 9).

Finding. In this proceeding, Dr. Vickery has concluded that the loss of 8 acres due to direct clearing of habitat is "of no significance biologically" to Bicknell's thrush. (Vickery Testimony at 8).

Finding. In the Black Nubble proceeding, NRCM concluded that the loss of 64 acres due to direct clearing of habitat was "inconsequential" to Bicknell's thrush. (Wells ZP 702 Testimony at 3).

Finding. In the Redington proceeding, Maine IF&W concluded that the loss of 300 acres due to direct clearing of habitat was "very slight" when compared to available habitat in the region. (Valleau Post-Hearing Testimony at Exhibit C [Tom Hodgman Comment #3]).

Finding. Most of the available northern breeding habitat, in Maine and in the region, is "reasonably extensive and well-protected overall" (Letter from Chris Rimmer to Christine Cinnamon (Apr. 21, 2010) [hereinafter Rimmer Letter], contained in TransCanada Post-Hearing Submission at Tab G, Exhibit 1; see also Wells ZP 702 Testimony at 9 ["much of the [Bicknell's] breeding range in North America is within existing protected areas. . . ."]).

Finding. Loss of Bicknell's thrush wintering habitat is the "greatest threat to the species' long-term viability," according to Audubon New York, the Nature Conservancy, Cornell Lab of Ornithology, Chris Rimmer's organization (VCE), and the Wildlife Conservation Society. (Wells ZP 702 Testimony at 3).

Finding. TransCanada intends to make a contribution of \$100,000 to the BITH Fund for preservation of the wintering habitat in the Caribbean. (Rimmer Letter).

Finding. Mr. Rimmer has concluded that the TransCanada donation will "provide a very important boost, enabling a first-ever disbursement of monies to local conservation partners on Hispaniola by the end of 2010." (Rimmer Letter).

Finding. The Consolidated Intervenors agree "absolutely" that Chris Rimmer is "widely considered" an expert on Bicknell's thrush. (Transcript at 212).

2. Subalpine Forest

Finding. The subalpine forest community on the Sisk ridgeline is ranked "S3" by the Maine Natural Areas Program (MNAP). (MNAP Comments p. 1).

Finding. An S3 ranking is in contrast to an MNAP S2 ranking (imperiled because of rarity) or an S1 ranking (critically impaired because of extreme rarity). (<http://www.maine.gov/doc/nrimc/mnap/features/rank.htm>).

Finding. According to MNAP, approximately 40,000 acres of mapped subalpine forest exists in Maine. (Hudson Pre-Filed Direct Testimony p. 2).

Finding. There are approximately 358 acres of mapped subalpine forest on the Sisk ridgeline. (Hudson Test., Ex. B; MNAP Comments p. 1).

Finding. The Project will result in the clearing of 39 acres of this mapped area, or approximately 10%. (Hudson Test., Ex. B).

Finding. Including direct and indirect impacts (“edge effects” and fragmentation), the total impact from the Project is 102 acres. (Hudson Test., Ex. B).

Finding. The calculation of edge effects and fragmentation was done in consultation with MNAP. (Feb. 24, 2010 MNAP Comments pp. 1-2).

Finding. The total impacts of the Project constitute 0.25% of the mapped subalpine forest in Maine. (Tr. p. 223 [testimony of David Publicover]).

Finding. There is approximately 3,000 acres of additional unmapped subalpine forest in the “immediate area” of Sisk Mountain. (Tr. p. 92 [testimony of Don Hudson]).

Finding. As there exists unmapped subalpine forest in Maine, the actual percentage of impact due to the Project is less than one quarter of one percent. (Tr. p. 223 [testimony of David Publicover]).

Finding. Moving turbine #11 out of the mapped subalpine forest “considerably reduces fragmentation.” (MNAP Comments p. 2).

Finding. This subalpine forest community in Maine is “relatively stable in overall extent and are extensive on Maine’s higher mountains,” “major occurrences are well protected within public lands or private conservation lands,” and “recreation and windpower generation could locally degrade other minor sites, but these uses are unlikely to present a significant threat to the integrity of these forests.” (Maine’s Comprehensive Wildlife Conservation Strategy p. 7 [TransCanada Hearing Exhibit 5]).

Finding. Some amount of clearing impacts to subalpine forest community are acceptable. (Tr. at 224-25 [testimony of David Publicover]).

Finding. The Appalachian Mountain Club has supported a wind energy project (the “Granite Reliable” project in New Hampshire) with impacts to mapped subalpine forest that AMC characterized by AMC as a “higher value forest community” than the community on Sisk. (Tr. p. 225 [testimony of David Publicover]). AMC concluded that the impacts in the Granite Reliable project (direct impacts of 37 acres out of a 226 acre community) “would not constitute an unreasonable adverse effect on the natural environment.” (Tr. p. 227 [testimony of David Publicover]).

Finding. The Commission has issued permits for timber harvesting above 2,700 feet in areas with subalpine forest, including a recent permit for BPL that included mapped S3 subalpine forest. (Dana Valleau Post-Hearing Submission, Ex. C, D, E; Didisheim ZP 702 Testimony at 2).

3. Vernal Pools

Finding. TransCanada conducted vernal pool surveys in accordance with IF&W guidance, which expressly allows surveys to occur outside of the spring amphibian identification period and these surveys have been affirmatively approved by IF&W. (e-mails from Mr. Cordes, IF&W to Ms. Spencer-Famous dated May 24, 2010 and June 1, 2010).

Finding. TransCanada identified 14 man-made, non-state regulated, vernal pools in the Project area. (Application Section b.15.6.10, Cinnamon et al. Direct Pre-Filed Testimony at 10 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated May 24, 2010).

Finding. TransCanada will treat all man-made and, therefore, non-state regulated vernal pools as though they were significant by applying the habitat management standards required under the Natural Resources Protection Act to all identified vernal pools. (Cinnamon et al. Direct Pre-Filed Testimony at 10 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated May 24, 2010).

4. Bog Lemming

Finding. TransCanada identified three wetlands that are suitable for and potentially occupied by northern bog lemmings on Sisk Mountain and has located all project elements to completely avoid the watersheds that contain these wetlands. As a result, IF&W concluded that no adverse impacts to the bog lemming are anticipated from the Project (Pre-Filed Direct Testimony of Cinnamon et al. at 24 and e-mail from Mr. Cordes, IF&W, dated March 3, 2010).

5. Roaring Brook Mayfly/Spring Salamander

Finding. TransCanada, in consultation with IF&W, conducted surveys for the Roaring Brook Mayfly and the Spring Salamander within the Kibby Stream watershed where both species are known to occur. Although the surveys did not document either species, TransCanada has committed to implement IF&W management guidelines to protect the habitat of both species. (Cinnamon et al. Pre-Filed Direct Testimony at 24 and e-mail from Mr. Cordes, IF&W, to Ms. Spencer-Famous dated March 3, 2010).

6. Erosion/Capacity of the Land to Absorb and Hold Water

Finding. TransCanada will implement the construction techniques and use the Best Management Practices developed in connection with and successfully implemented

during construction of the Kibby Project. (Goulet et al. Pre-Filed Direct Testimony at 15 and memorandum from Mr. Rocque, State Soil Scientist, dated May 24, 2010).

Finding. TransCanada's implementation of the "toolbox approach" developed and endorsed by the State Soil Scientist, will be used during construction of the Kibby Expansion Project to minimize soil erosion and maximize the ability of the mountainous soil to absorb and hold water. (Goulet et al. Pre-Filed Direct Testimony at 15 and memorandum from Mr. Rocque, State Soil Scientist, dated May 24, 2010).

7. Historic Resources

Finding. The Arnold Trail shares much of the route in the study area with Chain of Ponds and, for this reason, the visual impacts are similar. The Project will be visible only from a 1.6 mile developed section of a 194 mile trail, resulting in 0.8% visibility. (Vissering Pre-Filed Direct Testimony at 37, [Testimony of Jean Vissering at 298]).

Finding. As part of a parallel federal permitting process, the Maine Historic Preservation Commission ("MHPC") made a determination that the Project will have an adverse effect on an approximately 1.6 mile section of the Arnold Trail. (Letter from Kirk Mohney, MHPC, to TRC dated May 6, 2010). MHPC's determination of adversity is not a finding of undue or unreasonable adverse impact under LURC's (or any other State review) criteria.

8. Tangible Benefits:

Finding. TransCanada will provide extensive tangible benefits in connection with the Kibby Expansion Project, which include:

- a. displacement of air pollution associated with fossil-fuel based generation and contribution towards the State's greenhouse gas reduction objectives;
- b. energy benefits related to increased diversification of energy sources; direct and indirect ;
- c. direct and indirect economic benefits related to construction;
- d. creation of at least one additional permanent employment position;
- e. property tax contributions in excess of \$500,000 per year of operation;
- f. state income taxes on the income generated from operation of the project;
- g. a host community benefit payment of \$45,000 per year or \$900,000 over a 20-year period;
- h. \$150,000 contribution to the Department of Labor to support green jobs education and training in Franklin County;
- i. \$150,000 contribution to the High Peaks Alliance for land conservation and trail corridor acquisition in Franklin County;
- j. \$100,000 contribution to the Arnold Expedition Historical Society for use in land protection surrounding the Arnold Trail north of the Chain of Ponds or other

- projects that will enhance the mission of the Society to interpret and share with the public the history of the Arnold Trail; and
- k. \$100,000 contribution to the Bicknell's Thrush Habitat Protection Fund for conservation of wintering habitat in the Caribbean.

(Pre-Filed Direct Testimony of Bennett et al. at 10-15).

Finding. TransCanada, although not required to do so, will meet the requirements of a recent amendment to the Wind Energy Act requiring applicants to establish a community benefits package of no less than \$4,000 per turbine per year averaged over a 20-year period. Specifically, through an annual payment of \$45,000 per year to the Town of Eustis, a one-time contribution of \$150,000 for renewable jobs in Franklin County and \$150,000 for trail corridor acquisition in Franklin County, totaling \$1,200,000 over a 20-period, TransCanada will exceed this requirement. (Pre-Filed Direct Testimony of Bennett et al. at 14 and P.L. 2009, Ch. 642).

9. Visual

Finding. There are nine scenic resources of state or national significance located within the 8-mile visual impact study area for the Project. There will be no Project visibility from four of these resources: the Dead River, Spencer Stream, the Natanis Pond overlook and the Sarampus Falls overlook. (Application Attachment A.1, Aesthetic Impact Assessment (AIA), TransCanada Hearing Ex. 6).

Finding. There are five scenic resources of state or national significance with some Project visibility: Arnold Pond, Crosby Pond, Kibby Stream, Chain of Ponds and the Arnold Trail. (TransCanada Hearing Ex. 6).

Finding. Views from Arnold Pond and Crosby Pond would be very limited, seen at a distance of 6.5 miles away and diminished by the prominent landform of Mount Pisgah. (Vissering Pre-Filed Direct Testimony at 37).

Finding. Minimal views of the Project are possible from two viewpoints on Kibby Stream. The first is a location where Gold Brook Road crosses over the stream approximately three miles from the Project area and the second an open wetland area approximately eight miles away. (Vissering Pre-Filed Direct Testimony at 37, 38).

Finding. The Project will not be visible from more than two-thirds of Chain of Ponds. (Vissering Pre-Filed Direct Testimony at 5,6).

Finding. Chain of Ponds is designated as having outstanding scenic values primarily due to its scenic foreground features, including very dramatic relief, cliffs, ledges, beaches, boulders, diverse shoreline, and excellent water quality, rather than for views of distant mountains or other scenery. (Maine State Planning Office Critical Areas Program, Maine's Finest Lakes, The Results of the Maine Lake Study (Oct. 1989) at 86.).

Finding. Other natural foreground features contribute to and enhance the overall scenic quality of Chain of Ponds, including Mount Pisgah, Sisk Mountain, and the Bigelow Mountains, which provide strong focal points and reduce the visual impact of the turbines. (Vissering Pre-Filed Direct Testimony at 9; Palmer Comments p. 18.).

Finding. The existing viewer experience along Chain of Ponds already includes human development, including the constant presence of Route 27 and its heavy traffic, several privately-owned camps, the developed campground at Natanis Point, and motorized recreational use of the water and adjacent land. (Vissering Pre-Filed Direct Testimony at 9-10, John Titus Pre-Filed Direct Testimony p. 7, Palmer comments, pp. 18-19).

Finding. Of the five ponds that constitute Chain of Ponds, visibility of the Project is limited only to portions of Bag, Natanis, and Long Ponds. (Application Attachment A.1 (AIA) at 7).

Finding. The Project will not be visible from roughly two thirds of Bag Pond and visibility is minimized the prominent landforms of Mount Pisgah and the southern peak of Sisk Mountain dominate views toward the Project, making the turbines appear much less prominent and lower in elevation. (Vissering Pre-Filed Direct Testimony at 14).

Finding. The Project will not be visible from the vast majority of Natanis Pond, including the commercial campground and all of the State's primitive campsites. There also will be no visibility of the Project when looking south toward the very distant peaks of the Bigelow range. Where there is visibility, only the tops of four turbines (behind Mount Pisgah) will be visible from a very small area along the southeastern-most shore of Natanis Pond. (Vissering Pre-Filed Direct Testimony at 25).

Finding. The majority of views of the Project occur from Long Pond, where there will be visibility from approximately half of Long Pond. Long Pond also is the only area from where the entire Project can be viewed. (Vissering Pre-Filed Direct Testimony at 17).

Finding. From Bag, Natanis and Long Ponds, views will include the more dominant landforms of Mount Pisgah and/or Sisk Mountain, making the Project turbines appear more distant, lower in elevation, and less prominent (Vissering Pre-Filed Direct Testimony at 14, 17, 25).

Finding. In total, there will be no views of the Project from more than two-thirds of Chain of Ponds. Where there are views, they are primarily of only portions of the Project and often include only the tops of turbines or tips of blades. (Vissering Pre-Filed Direct Testimony at 5,6, Palmer Comments pp. 18-19).

Finding. With regard to "cumulative impacts," as noted by Mr. Palmer and Ms. Vissering, because the Kibby Project will be visible from Long Pond, locating additional turbines in this area (even when visible) is appropriate as the incremental impacts will not be significant, and locating the projects in proximity will reduce the overall impact of wind energy projects in the state. (Vissering Pre-Filed Direct Testimony p. 39, 40, Tr. [testimony of Jean Vissering pp. 315-316]).

Finding. It is possible to travel the entire length of Chain of Ponds without seeing a single turbine. Where there is visibility, turbines will enter and recede from view across

a changing landscape, and will not have an unreasonable adverse effect on the scenic character. (Testimony of Jean Vissering p. 303).

Finding. The Arnold Trail shares much of the route in the study area with Chain of Ponds and, for this reason, the visual impacts are similar. The Project will be visible only from a 1.6 mile developed section of a 194 mile trail, resulting in 0.8% visibility. (Vissering Pre-Filed Direct Testimony at 37, [Testimony of Jean Vissering at 298]).

Finding. As noted by both Ms. Vissering and Mr. Palmer, distant views were likely of little concern to Arnold's company, and the presence of turbines in portions of the Arnold Trail viewshed is unlikely to materially diminish the historic experience along the Arnold Trail. (Vissering Pre-Filed Direct Testimony at 37, (Tr. p. 298 [testimony of Jean Vissering]).

Finding. The Wind Energy Act states “[a] finding by [the Commission] that the development’s generating facilities are a highly visible feature in the landscape,” is not by itself a “sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character.” (35-A M.R.S.A. § 3452 (3)).

Exhibit A

10.24 GENERAL CRITERIA FOR APPROVAL OF PERMIT APPLICATIONS

In approving applications submitted to it pursuant to 12 M.R.S.A. §685-A(10) and §685-B, the Commission may impose such reasonable terms and conditions as the Commission may consider appropriate in order to satisfy the criteria of approval and purpose set forth in these statutes, rules and the Comprehensive Land Use Plan.

“The commission may not approve an application, unless:

1. Adequate technical and financial provision has been made for complying with the requirements of the State’s air and water pollution control and other environmental laws, and those standards and regulations adopted with respect thereto, including without limitation the minimum lot size laws, [12 M.R.S.A.] sections 4807 to 4807-G, the site location of development laws, 38 M.R.S.A. §481 to §490, and the natural resource protection laws, 38 M.R.S.A. §480-A to §480-Z, and adequate provision has been made for solid waste and sewage disposal, for controlling of offensive odors and for the securing and maintenance of sufficient healthful water supplies; and
2. Adequate provision has been made for loading, parking and circulation of land, air and water traffic, in, on and from the site, and for assurance that the proposal will not cause congestion or unsafe conditions with respect to existing or proposed transportation arteries or methods; and
3. Adequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character, and natural and historic resources in the area likely to be affected by the proposal; In making a determination under this paragraph regarding an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, the commission shall consider the development’s effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452; and
4. The proposal will not cause unreasonable soil erosion or reduction in the capacity of the land to absorb and hold water and suitable soils are available for a sewage disposal system if sewage is to be disposed on-site; and
5. The proposal is otherwise in conformance with this chapter and the regulations, standards and plans adopted pursuant thereto.
6. In the case of an application for a structure upon any lot in a subdivision, that the subdivision has received the approval of the commission.

The burden is upon the applicant to demonstrate by substantial evidence that the criteria for approval are satisfied, and that the public’s health, safety and general welfare will be adequately protected. Except as otherwise provided in Title 35-A, section 3454, the commission shall permit the applicant and other parties to provide evidence on the economic benefits of the proposal as well as the impact of the proposal on energy resources.” 12 M.R.S.A. §685-B(4).

In addition, the applicant must demonstrate “evidence of sufficient right, title or interest in all of the property that is proposed for development or use.” 12 M.R.S.A. §685-B(2)(D).

Exhibit B

G. A scenic turnout constructed by the Department of Transportation pursuant to Title 23, section 954 on a public road that has been designated by the Commissioner of Transportation pursuant to Title 23, section 4206, subsection 1, paragraph G as a scenic highway; or

H. Scenic viewpoints located in the coastal area, as defined by Title 38, section 1802, subsection 1, that are ranked as having state or national significance in terms of scenic quality in:

(1) One of the scenic inventories prepared for and published by the Executive Department, State Planning Office: "Method for Coastal Scenic Landscape Assessment with Field Results for Kittery to Scarborough and Cape Elizabeth to South Thomaston," Dominie, et al., October 1987; "Scenic Inventory Mainland Sites of Penobscot Bay," Dewan and Associates, et al., August 1990; or "Scenic Inventory: Islesboro, Vinalhaven, North Haven and Associated Offshore Islands," Dewan and Associates, June 1992; or

(2) A scenic inventory developed by or prepared for the Executive Department, State Planning Office in accordance with section 3457.

10. Tangible benefits. "Tangible benefits" means environmental or economic improvements attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: construction-related employment; local purchase of materials; employment in operations and maintenance; reduced property taxes; reduced electrical rates; natural resource conservation; performance of construction, operations and maintenance activities by trained, qualified and licensed workers in accordance with Title 32, chapter 17 and other applicable laws; or other comparable benefits, with particular attention to assurance of such benefits to the host community to the extent practicable and affected neighboring communities.

11. Wind energy development. "Wind energy development" means a development that uses a windmill or wind turbine to convert wind energy to electrical energy for sale or use by a person other than the generator. A wind energy development includes generating facilities and associated facilities.

§ 3452. Determination of effect on scenic character and related existing uses

1. Application of standard. In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to Title 12, section 685-B, subsection 4 or Title 38, section 484, subsection 3 or section 480-D, the primary siting authority shall determine, in the manner provided in subsection 3, 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 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 either Title 12, section 685-B, subsection 4, paragraph C or Title 38, section 484, subsection 3.

2. Exception; certain associated facilities. The primary siting authority 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 or Title 38, section 484, subsection 3, in the manner provided for development other than wind energy development, if the primary siting authority determines that application of the standard in subsection 1 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.

3. Evaluation criteria. 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 primary siting authority 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 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. 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.

4. Visual impact assessment; rebuttable presumption. An applicant for an expedited wind energy development shall provide the primary siting authority with a visual impact assessment of the development that addresses the evaluation criteria in subsection 3 if the primary siting authority 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 primary siting authority 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. Information intended to rebut the presumption must be submitted to the primary siting authority by any interested person within 30 days of acceptance of the application as complete for processing. The primary siting authority shall determine if the presumption is rebutted based on a preponderance of evidence in the record.

§ 3453. Additions to the expedited permitting area

The Maine Land Use Regulation Commission may, by rule adopted in accordance with Title 5, chapter 375, add a specified place in the State's unorganized or deorganized areas to the expedited permitting area. In order to add a specified place to the expedited permitting area, the Maine Land Use Regulation Commission must determine that the proposed addition to the expedited permitting area:

1. Geographic extension. Involves a logical geographic extension of the currently designated expedited permitting area;

2. Meets state goals. Is important to meeting the state goals for wind energy development established in section 3404; and

3. Principal values and goals. Would not compromise the principal values and the goals identified in the comprehensive land use plan adopted by the Maine Land Use Regulation Commission pursuant to Title 12, section 685-C.

Rules adopted by the Maine Land Use Regulation Commission pursuant to this section are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

§ 3454. Determination of tangible benefits

In making findings pursuant to Title 12, section 685-B, subsection 4 or Title 38, section 484, subsection 3, the primary siting authority shall presume that an expedited wind energy development provides energy and emissions-related benefits described in section 3402 and shall make additional findings regarding other tangible benefits provided by the development. The Department of Labor, the Executive Department, State Planning Office and the Public Utilities Commission shall provide review comments if requested by the primary siting authority.

§ 3455. Determination of public safety-related setbacks

In making findings pursuant to Title 12, section 685-B, subsection 4 or Title 38, section 484, subsection 3 on whether a wind energy development must be constructed with setbacks adequate to protect public safety, the primary siting authority must consider the recommendation of a professional.

Exhibit C

Plum Creek - ZP 707

Natural Resources Council of Maine and Maine Audubon Joint Comments in Response to LURC Request for Comments on Windpower Siting

1. A Full Scenic Analysis of a Specific Project is Required

LURC's Fifteenth Procedural Order seeks comments on "Whether wind power siting on any or all of the ridge formations within the southwest quadrangle of the proposed Concept Plan area would cause adverse impacts to existing recreational uses and resources and, if so, whether any such impacts would be offset by the recreational opportunities and resource protections afforded by the concept plan proposal as a whole."

In order to definitively determine whether or not wind power is an appropriate use on Misery Ridge or other nearby ridges within the proposed conservation easement area, a site specific scenic analysis would be needed to determine the impacts of commercial wind development on recreational uses and resources in the Moosehead Lake region. Scenic impacts vary depending on the distance of the viewer from the turbines, the extent or placement of turbines on the landscape, and on the type of recreational experience being engaged in and the expectations of users.¹ For example, the adverse impacts will be much greater if the viewer is close to the turbines and engaged in nature-based outdoor type recreation such as wildlife watching, camping, paddling, fishing and hiking. The adverse impacts will be less if the viewer is far away from the turbines and/or located in a more developed environment.

However, in order to respond to the Fifteenth Procedural Order on the appropriateness of allowing commercial wind power development within the conservation easement, we have done a preliminary analysis of a hypothetical wind project on Misery Ridge which identifies sensitive resources that could be adversely impacted by a commercial wind facility.

2. Preliminary Scenic Assessment

The first part of our analysis was a view shed analysis using a USGS digital elevation model base map with 30 m resolution. We placed eight points along the ridge approximately 2.5 miles apart that represented hypothetical turbine locations. We then raised the view points 250 feet above ground level, which is the height of a nacelle for a modern wind turbine.

¹ See 35-A MRS §3452 for a relevant list of evaluation criteria, e.g. "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... the number and extent of turbines visible ... the distance from the scenic resource ... and the effect of prominent features of the development on the landscape."

Using the “viewshed” command in the ARC view GIS program, we mapped the surrounding landscape with color-coded values based on the number of hypothetical turbines that would be visible from any given location (see Figure 1). We used this map to identify resources that could be adversely impacted by wind power development.

The values on the map are not the number of turbines that would be visible from an actual wind project, since actual turbines are spaced much closer together. If we assume a fully built-out project included 5 turbines per mile and we know the distance between the end turbines in our analysis (approximately 17 miles), then the total number of turbines on Misery Ridge would be approximately 85. Therefore, each value on our map can be multiplied by a factor of 10 turbines (85/8).

Assumptions and Limitations of the Viewshed Analysis

It is important to note the following assumptions and limitations of this preliminary analysis.

We did not have the opportunity to assess all potentially developable areas in the quadrant, therefore our list of resources with potential adverse impacts cannot be considered complete. In particular, wind resource maps show additional areas northwest of Misery Ridge, within the easement area, which have significant potential for commercial wind development. Depending on the topography of the land, commercial wind development in these areas could have adverse impacts on Long Pond and the Moose River beyond the impacts resulting from development on Misery Ridge.

In addition, the view shed analysis gives only a coarse representation of one of the most important determinants of impact: distance from the turbines. In principle, ridgetop turbines may be visible from 15 miles away, therefore we used this as the outer bound of the view shed analysis. In practice, turbines greater than 8 miles away may not be highly distinguishable.

Finally, there were two assumptions that work in opposing directions. Turbine blades extend an additional 120 feet above the nacelle when spinning and therefore our analysis tends to underestimate turbine visibility. On the other hand we did not include impacts of trees and vegetation that would screen some views, which tended to overestimate turbine visibility.

Scenic and Recreational Resources Potentially Impacted

The second part of our analysis identified the following scenic and recreational resources of statewide significance that could be adversely impacted:

The following areas are within 8 miles of the hypothetical wind turbines:

- Moosehead Lake – central part of the lake
- Little Brassua Lake – entire lake

- Brassua Lake – entire lake
- Indian Pond – entire lake
- East and West Outlets
- Sugar Island – northwestern end

Brassua and Little Brassua Lakes and the West Outlet are within 3 miles of potential wind turbines.

In addition to the above areas, several areas are within 15 miles of the wind turbines, including:

- Moosehead Lake – all but the most northern and southern ends and isolated pockets throughout
- Lily Bay State Park
- Sugar Island – entire island
- Little Moose Public Reserved Land Unit

The following table identifies the specific recreational and scenic resources of statewide significance that could be adversely impacted in the above areas and that are the basis for recreational uses in the region:

Resource Name	Recreational Resources²
Moosehead Lake	Outstanding <ul style="list-style-type: none"> • Scenic • Fisheries • Wildlife • Botanical features • Cultural & historical • Physical (geology/hydrology) • Shoreline character (near Big Moose Twp) Significant <ul style="list-style-type: none"> • Shoreline character (all but Big Moose Twp)
Little Brassua Lake	<ul style="list-style-type: none"> • Outstanding - Cultural resources • Significant - Fisheries • Northern Forest Canoe Trail
Brassua Lake	<ul style="list-style-type: none"> • Outstanding - Cultural resources • Significant - Fisheries • Northern Forest Canoe Trail
Indian Pond	Outstanding <ul style="list-style-type: none"> • Wildlife Significant <ul style="list-style-type: none"> • Fisheries

² From: Maine Wildlands Lake Assessment (see footnote below), Plum Creek Concept Plan.

	<ul style="list-style-type: none"> • Cultural & historical
East and West Outlet	<ul style="list-style-type: none"> • Class A Rivers • Fisheries • Paddling
Lily Bay State Park	<ul style="list-style-type: none"> • Only State Park on Moosehead Lake - outstanding scenic lake • Maine's "Best State Park" – Downeast Magazine, Jan. 2009 • Camping • Paddling • Wildlife watching • Dark skies at night
Sugar Island	<ul style="list-style-type: none"> • Public land within outstanding scenic lake • Remote campsites
Little Moose Public Reserved Land Unit	<ul style="list-style-type: none"> • Hiking on Moose Mountain

Outstanding and significant scenic resources of statewide significance are important recreational resources that require protection.³ Scenic lakes are one of the most vulnerable scenic resources in the state. Of the 1,115 lakes evaluated within the LURC jurisdiction, only 118 lakes (or 8%) were rated outstanding for their scenic qualities⁴.

Scenic assessments of Maine's lakes were guided by two main premises: topographic relief in close proximity (fore, mid and background) and a variety of natural landscape features⁵. Natural scenic features are core to the experience of a wide variety of recreational users including hikers, fishermen, campers, nature photographers, wildlife viewers, boaters, and others, many of whom engage in these recreational activities particularly in order to get away from the human built environment and experience the natural environment. Thus, adverse impacts to scenic views in turn adversely affect the quality of their recreational experiences.

Since these resources in the Moosehead region are among the rarest and highest value scenic resources in the state, it is not possible to mitigate for impacts anymore than we can create a new lake with undeveloped views of Kineo or Moose Mountain. Once these views are impacted, they are gone forever.

3. Context of this information

The southwest quadrangle of Plum Creek's proposed Concept Plan has been designated as an "expedited" area for wind power by the legislature, which means that

³ See 35-A MRSA §3451 (9)

⁴ Giffen, R.A., D.O. Parkin, F.W. Todd. June 1987. *Maine Wildlands Lake Assessment Findings*. Page 3.

⁵ *Maine's Finest Lakes*. 1989. at

<http://www.maine.gov/doc/mfs/windpower/pubs/pdf/Maine's%20Finest%20Lakes.pdf>

wind development would not otherwise require rezoning and would be subject to scenic evaluation with regard to impacts to scenic resources of statewide significance. However, this same area is now proposed to be included in a conservation easement as part of the mitigation package required in order to allow Plum Creek's development plan to move forward. The conservation easement is also part of the conservation required in order to strike "a reasonable and publicly beneficial balance between appropriate development and long-term conservation."

Thus, LURC has before it two questions:

1. Whether the proposed activity is appropriate in areas intended to provide conservation mitigation and balance for resort and residential development; and
2. If so, what additional conservation is required to mitigate and balance the adverse impacts of commercial wind development?

LURC appropriately asks these questions now, when the development permit is being considered and the terms of the easement are being drafted. While any wind project proposed will have to go through the expedited permit review process, the above two questions will not be relevant at that time.

Wind power offers clear advantages over traditional energy sources. However, it can also have a variety of adverse impacts and is not appropriate in all locations. In addition to adverse impacts on scenic and recreational resources, it can also adversely affect wildlife.

The areas on and within the viewshed of Misery Ridge are, in this proceeding, being proposed as mitigation and conservation balance for resort and residential development. If a commercial wind project on Misery Ridge is developed, potential impacts fall into two separate categories: first, the areas actually developed for turbines, roads, and transmission lines will no longer provide the same conservation values of undeveloped land. Second, mitigation and conservation balance for the resort and residential development because the conservation value of at least some of areas within the viewshed of the commercial wind project may also be degraded even if they are not physically altered. Areas within the viewshed include a wide variety of recreational resources of statewide significance.

Given the large number recreational resources that have been rated as having extremely high value, the presence of scenic lakes which are extremely rare and irreplaceable, and the well documented variety of recreational uses of statewide significance that could be adversely impacted, we conclude that the concept plan taken as a whole is not likely to offset the impacts from a significant commercial wind development located close to those resources.

4. Conclusion

Based on our preliminary analysis we conclude there would likely be adverse impacts to some of the scenic and recreational resources listed above. LURC must assure that the conservation easement's dual role of allowing the continuation of industrial forestry while limiting development is not compromised.

We recommend that LURC:

1. Require a full scenic analysis of all areas where wind is proposed to be an allowed use under the easement;
2. Allow wind power development under the easement only in the areas where it is least likely to have an adverse impact on recreational resources of statewide significance, based on the best existing information. Based on our preliminary analysis, this area could include the western portion of Misery Ridge; and
3. Require any areas identified as appropriate for wind power development within the conservation easement to be re-zoned as development zones, and require additional mitigation for the decreased conservation that would result within the concept plan;

Dec. 8, 2008

Figure 1

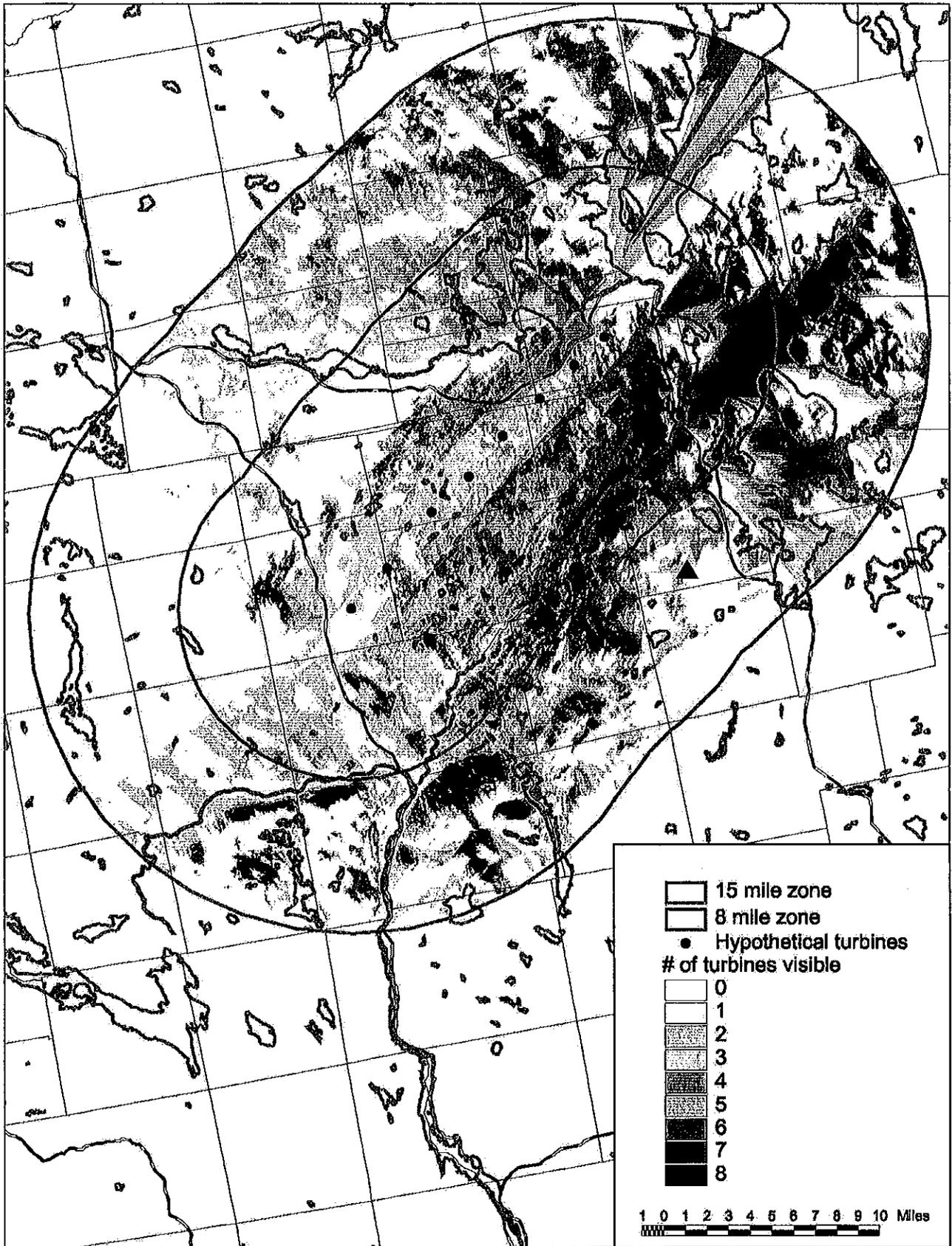


Exhibit D



JOHN ELIAS BALDACCI
GOVERNOR

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



PATRICK K. MCGOWAN
COMMISSIONER

COMMISSION DECISION
IN THE MATTER OF

Concept Plan For The Moosehead Lake Region
For Certain Lands Under The Ownership Of
Plum Creek Maine Timberlands, L.L.C. And Plum Creek Land Company,
Piscataquis And Somerset Counties

Findings of Fact and Decision

ZONING PETITION ZP 707

The Maine Land Use Regulation Commission, at a meeting of the Commission held September 23, 2009, at Bangor, Maine, after reviewing the petition and supporting documents submitted by Plum Creek Maine Timberlands, L.L.C. and Plum Creek Land Company for Zoning Petition ZP 707, public comments, Intervenor and Interested Persons comments, governmental review agency comments and other related materials on file, pursuant to 12 M.R.S.A. Section 681 et seq. and the Commission's Standards and Rules, finds the following facts:

1. PETITIONER

Plum Creek Maine Timberlands, L.L.C., and Plum Creek Land Company ("Plum Creek")¹
999 Third Avenue Suite 2300n
Seattle, Washington 98104

¹ The co-applicants, Plum Creek Maine Timberlands, L.L.C. (formerly known as SDW Timber II, L.L.C.) and Plum Creek Land Company are subsidiaries of Plum Creek Timber Company, Inc. Plum Creek has filed on record (i) complete signed copies of all relevant deeds and title insurance commitments, (ii) legal opinions from its Maine legal counsel that Plum Creek has demonstrated sufficient title, right or interest in all of the property that is proposed for development or use, and (iii) current lease agreements for all leased lots within the Plan Area. Pursuant to Ch. 4.03 of the Commission's rules, the Commission finds that these materials demonstrate to its satisfaction sufficient title, right or interest in all of the property proposed for rezoning.

(5) **The Concept Plan Addresses Specific Relevant Conservation-Related Issues Raised On The Record**

As stated above, many parties, governmental review agencies and members of the public filed testimony and comments regarding the sufficiency of the specific terms of the conservation easements. Below, the Commission sets forth the facts and analysis regarding several of these specific issues raised on the record. However, in reaching its conclusions regarding the sufficiency of the Concept Plan's conservation elements in light of governing review criteria, the Commission carefully considered all of the evidence presented on the record.⁴⁷⁷ Further information on these and other specific conservation-related issues, including Commission staff and consultants' analyses and recommendations on many of these issues, are contained in the administrative record.

(a) **Allowing Wind Development As A Permitted Use In The MRCE Does Not Change The Commission's Conclusions Regarding The Concept Plan's Consistency With The Standards For District Boundaries**

In evaluating the issues presented with respect to wind development, the Commission draws upon the following statutory and regulatory materials:

- The Commission's specific goals and policies pertaining to energy resources, including the goal to provide for the environmentally sound and socially beneficial utilization of indigenous energy resources where there are not overriding, conflicting public values which require protection.⁴⁷⁸
- Emergency legislation adopted by the Legislature and signed by the Governor in 2008 (Public Law, Ch. 661), which specifically provides that for wind energy development located within designated "expedited" wind power permitting areas,⁴⁷⁹ "the commission shall consider the development's effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452."
- 35-A M.R.S.A., § 3452, which sets the criteria for approval and establishes visual impact assessment requirements for wind development projects.

⁴⁷⁷ See, e.g., LURC: Staff and Consultants, Sep. 16, 2008, Notebook 2; see also LURC: Staff and Consultants, May 26, 2009, Memorandum to Commission: Summary of staff/consultant recommended revisions to March 2, 2009 draft Concept Plan.

⁴⁷⁸ CLUP, 1997, p. 139.

⁴⁷⁹ The southwest quadrangle of the Plan Area has been designated by the Legislature as such an "expedited" area, meaning that wind development would not otherwise require Commission rezoning to a D-PD Subdistrict and would instead be subject to the scenic impact criteria and evaluation requirements set forth in 35-A M.R.S.A. § 3452.

The Concept Plan identifies wind development – i.e., the siting of wind power turbines and associated roads and utility infrastructure – as a permitted use, subject to certain restrictions and limitations, on three ridge formations within the southwest quadrangle of the Plan Area generally known as the Misery Ridge area, all on lands covered by the MRCE.

Nine parties (COALITION, FPL, MA-NRCM, MRFC, MSCC, PCEDC, SEDC, WMF and Plum Creek) presented testimony and comments regarding whether such wind development is an appropriate permitted use within portions of lands covered by the MRCE.⁴⁸⁰ All of these parties generally acknowledged the public benefits that wind development can provide, and most parties stated that prematurely closing off the opportunity to undertake wind development would not be in the public's interest and would be inconsistent with the Legislature's intent in promulgating expedited wind development permitting reviews within certain parts of the State of Maine.⁴⁸¹ Two parties (MA-NRCM and MRFC), however, raised concerns with respect to wind development's potential adverse impacts on scenic and recreational resources within and surrounding the Plan Area, concluding that such development would likely lead to adverse impacts to some of the scenic and recreational resources in the area.⁴⁸²

In considering whether wind development should be a permitted use within the MRCE, the Commission finds the two questions presented by MA-NRCM in its comments especially helpful. MA-NRCM suggested that the Commission consider:

1. Whether the proposed activity is appropriate in areas intended to provide conservation mitigation and balance for resort and residential development; and
2. If so, what additional conservation is required to mitigate and balance the adverse impacts of commercial wind development?⁴⁸³

⁴⁸⁰ See, e.g., Dec. 8, 2008 filings by these parties.

⁴⁸¹ E.g., "...it would be contrary to Maine's best interest to close off the opportunity to undertake wind development siting ... Also, it is the Coalition's understanding that areas in question proposed for potential wind power development siting are located within the 'expedited permitting areas' as established by the Governor's Task Force on Wind Power Development. Therefore it was the Legislature's intention to signal that these areas should receive serious and thorough consideration for wind power development. Such consideration may only take place if these areas are not barred from the opportunity of possibly hosting wind facilities." (COALITION: Dec. 8, 2008 filing.) "Whether an application for wind power development gets approved or under what conditions it gets approved should be the subject of the specific proceeding that takes place in the processing of the particular application." (FPL: Dec. 8, 2008 filing.) "...good planning practice at this scale requires that opportunities not be prematurely rejected. It cannot be determined at the Concept Planning level that the potential siting of wind power would have an adverse impact on the benefits offered by the Plan as a whole." (MSCC: Dec. 8, 2008 filing.)

⁴⁸² Specifically, MRFC stated that it "cannot support industrial wind power development within any lands that are designated as conservation balance for resort and residential development elsewhere within the Concept Plan area" (MRFC: Dec. 8, 2008 filing) and MA-NRCM concluded "there would likely be adverse impacts to some of the scenic and recreational resources" in the area and that "LURC must assure that the conservation easement's dual role of allowing the continuation of industrial forestry while limiting development is not compromised" by permitting wind development in portions of the Plan Area (MA-NRCM: Dec. 8, 2008 filing).

⁴⁸³ MA-NRCM: Dec. 8, 2008 filing.

The Commission agrees with MA-NRCM that these are timely and relevant questions because “[w]hile any wind project proposed will have to go through the expedited permit review process, the above two questions will not be relevant at that time.”⁴⁸⁴

Based on its review of the record evidence, the Commission finds that the potential amount of MRCE land that may be utilized for wind turbines and the associated infrastructure, as limited by the terms of the MRCE, is an insignificant and small percentage the total easement, and further finds that there are no known special natural resource values in these areas that could not be protected as part of a wind power development. Therefore, the Commission finds that in this case wind development is an appropriate permitted use within a limited portion of the area serving as conservation mitigation and balance for residential and resort development, and therefore does not change its conclusions that the amount and location of land protected by the MRCE and RCE is sufficient to satisfy the “balance” and “comparable conservation” review criteria.

Further, while the Commission concurs with MA-NRCM that any wind project is likely to have some adverse impacts to certain scenic and recreational resources in the area, the Commission finds that the criteria contained in 35-A M.R.S.A. § 3452 will ensure that such impacts are evaluated as part of future development permit reviews and will further ensure that such impacts are not unduly adverse. As such, the Commission amended the terms of the MRCE to allow wind development subject to the receipt of all necessary permits pursuant to applicable laws and regulations. Specifically, the MRCE states:

Subject to the receipt of (1) all necessary permits pursuant to applicable laws and regulations, and (2) Holder approval, Grantor shall have the right to undertake Wind Power Turbine Activities in the Wind Power Facility Area and Wind Power Associated Activities in all other locations on the Protected Property (“proposed activity”). If all necessary permits have been received for the proposed activity, Holder approval is deemed granted, unless the Holder makes an affirmative finding that the regulatory standards used in making the permitting decision(s) regarding the proposed activity were inadequate to determine whether the proposed activity would cause an undue adverse effect on the Conservation Values. Holder and Third Party acknowledge that the regulatory standards in effect on the date of execution of this Conservation Easement are adequate to make said determination of undue adverse effect on the Conservation Values.⁴⁸⁵

⁴⁸⁴ MA-NRCM: Dec. 8, 2008 filing.

⁴⁸⁵ See Concept Plan, Sep. 23, 2009, Appendix C, Sec. 3.C.5.

While this MRCE language is deferential to the new law, it prevents possible future changes to the law from undermining its current regulatory rigor, leading the Commission to find that any potential adverse impacts to recreational and scenic resources from wind development located within the designated ridge formations will never be unduly adverse. Therefore, the Commission finds that no additional conservation is required to mitigate the potential impacts of commercial wind development in this limited portion of the MRCE.

Based on the facts and analysis presented above, the Commission concludes that the conservation benefits and protections afforded by the MRCE satisfy regulatory requirements even with wind development as a permitted use within a limited portion of the conservation easement area.

(b) Under the Governing Statutory and Regulatory Standards, Whether Plum Creek Receives Some Form of Private Compensation for the MRCE or RCE is Immaterial

Five parties (FEN-RESTORE, MA-NRCM, MWGO, MRFC and NFN) argued that Plum Creek should not be allowed to include the Moosehead Legacy Conservation Easement – which is now a 266,000 acre portion of the MRCE – and the Roaches Ponds Tract as part of the conservation required in return for the development rights granted in the Concept Plan. FEN-RESTORE and MA-NRCM in particular devoted substantial comments to this issue. The objecting parties argue generally that, *e.g.*, because Plum Creek has arranged to receive private compensation for this conservation land, it is or should be *per se* barred from using the land to satisfy regulatory requirements.⁴⁸⁶

The Commission appreciates that the policy issues that these parties raise in their comments are significant, and that reasonable people may differ on the appropriate public policy that should be adopted to resolve these issues. However, the Commission concludes as a matter of existing law that whether Plum Creek receives financial compensation from private parties for the MRCE or RCE is immaterial under the statutory and regulatory requirements governing this decision. As set forth above, the Commission has found that the location, scale and terms of MRCE and RCE are legally required for approval of this Concept Plan and associated P-RP Subdistrict, and as part of this requirement has determined that execution of these two conservation easements is mandated prior to any development occurring. As such, Plum Creek's obligations to cause these

⁴⁸⁶ The comments also include warnings about the precedent that would be set unless the Commission rules that conservation land cannot be used to satisfy regulatory requirements if the landowner is compensated for it. The suggestion is that developers will somehow exploit conservation buyers by making the terms of a conservation sale contingent on regulatory approval for a development proposal, and by implication that TNC was exploited here. However, the Commission is aware that conservation buyers have control over the terms of purchase and sale, and cannot be forced to agree to such contingencies. To the extent that the Commission's approach to the unique transaction between Plum Creek, TNC and AMC sets any "precedent" influencing future land conservation deals, the precedent may be to encourage conservation buyers to await the outcome of regulatory proceedings that will require, through regulation, significant land conservation from the landowner if significant development is approved, rather than first agreeing to the terms of a transaction that is expressly contingent on that regulatory approval.