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GOVERNOR

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

ELIZA TOWNSEND
COMMISSIONER

Ninth Procedural Order

**In the Matter of
Development Permit DP 4860
TransCanada Maine Wind Development, Inc.
Kibby Expansion Project
October 15, 2010**

To: Juliet Browne, Verrill Dana, counsel for TransCanada (TC or Applicant)
Kelly Boden, Verrill Dana, counsel for TC
Jenn Burns Gray, MAS, for Consolidated Parties (CP)
Cathy Johnson, NRCM (CP)
Dave Publicover, AMC (CP)
Bob Weingarten, Friends of the Boundary Mountains (FBM)
Nancy O'Toole, FBM

cc: LURC Commissioners
Amy Mills, Maine Assistant AG
Catherine Carroll, LURC Director
Samantha Horn-Olsen, LURC Planning Division Manager
Marcia Spencer Famous, LURC Senior Planner
Jim Palmer, Scenic Quality Consultants
Warren Brown, EnRad
Steve Timpano, MDIFW
Bob Cordes and Dave Boucher, MDIFW
Philip DeMaynadier, MDIFW
Dave Rocque, State Soil Scientist
Molly Docherty, MNAP
Alan Stearns, BPL
Kirk Mohney and Robin Stancampiano, MHPC
Jay Clement, U.S. Army Corps of Engineers
Mark McCollough and Wende Mahaney, USFWS
Town of Eustis/Stratton
Town of Carrabassett Valley
Franklin County Commissioners

From: Gwen Hilton, Presiding Officer

Subject: Development Permit DP 4860; Ninth Procedural Order – Re-opening of record to accept agency review comments

I. Background. On September 8, 2010, the Presiding Officer issued the Eighth Procedural Order regarding the review of the Applicant's revised proposal for the Kibby Expansion Project submitted on August 16, 2010. The record was re-opened for a 30-day review period and 10-day rebuttal period by the Applicant. The purpose of re-opening the record was to provide an opportunity for the Commission to receive comment from state and federal agencies, the Parties, and the public relevant to the Commission's legal criteria applicable to the Applicant's request for Development Permit DP 4860, and specifically with respect to the revised proposal for the Kibby Expansion Project; and to provide the Applicant and the Intervening Parties an opportunity to address the Commission on relevant issues relating to the revised proposal.

- A. The 30-day comment period for the Intervening Parties, state and federal agencies, and interested persons extended from September 8th to October 12, 2010. Following the 30-day review period, the Eighth Procedural Order provided that the Applicant may respond in writing to the agencies' and Intervening Parties' comments during the subsequent 10-day rebuttal period, ending on October 22nd.
- B. The Eighth Procedural Order set the date for the closing of the record as October 12th, except for the receipt of the Applicant's rebuttal comments until October 22nd, at which time the record will then close. The Eighth Procedural Order also established November 10, 2010 as the due date for submittal of legal briefs by the Parties, and provided an opportunity for the Parties to present a brief closing argument at the Commission's December 1, 2010 monthly business meeting.

II. Agency review comments. Three state agency reviewers, specifically the Maine Department of Inland Fisheries and Wildlife, the State Soil Scientist, and the Maine Public Utilities Commission, have submitted review comments after the October 12th end of the 30 day review period (attached). State agency comments are an essential component of the Commission's review process and, therefore, the record is re-opened to accept the review comments submitted by the three agencies that are attached to this Order, and thereafter closed. The remainder of the Eighth Procedural Order remains unchanged, that is, the record remains open for the Applicant's rebuttal comments until October 22nd, at which time the record will then close; November 10, 2010 is the due date for submittal of legal briefs by the Parties, and the Parties will have an opportunity to present a brief closing argument at the Commission's December 1, 2010 monthly business meeting.

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

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

DATED AT AUGUSTA, MAINE THIS 15th DAY OF OCTOBER, 2010

By:



Gwen Hilton, Presiding Officer

Maine Department of Inland Fisheries and Wildlife review comments on the revised proposal for the Kibby Expansion Project

MDIFW has reviewed the amendment to the application for development of the Sisk Mountain-Kibby Wind Expansion. MDIFW still believes that additional pre-construction studies at this site are not necessary. This determination is based on state regulations and review policies. Considerations relative to federal law (Migratory Bird Treaty Act, U.S. Endangered Species Act, or Bald Eagle – Golden Eagle Protection Act) are under the jurisdiction of the U.S. Fish and Wildlife Service.

Similar to the initial application, we offer the following comments regarding several habitats for species of concern

Bicknell's Thrush habitat: The original proposal included 5 turbines, which would have occurred within potential Bicknell's Thrush habitat. Turbine # 11 and its access road were the greatest concern to MDIFW, because this turbine and road would have bisected the occupied habitat. We originally recommended that the applicant remove Turbine # 11 and its access road. The applicant moved that turbine and road to the outside of the habitat currently occupied by Bicknell's Thrush, which reduced impacts to this habitat. In the current amendment, the applicant proposes to remove the southern 4 turbines, which will further reduce impacts to Bicknell's habitat associated with this site. The removal of the southern 4 turbines, not only reduces direct habitat loss, but also reduces the fragmentation of habitat currently occupied by Bicknell's Thrush, as well as any future habitat that may occur within the Fir-Heart-leaved birch Subalpine Forest identified on-site. Although significantly reduced, impacts to Bicknell's Thrush habitat still exist with the remaining 2 turbine pads and access roads. Therefore, MDIFW still requests a detailed post-construction monitoring protocol to be implemented for this species with at least the same rigor and scope as the pre-construction studies.

Northern Bog Lemming: The applicant identified several wetlands that are suitable and potentially occupied by Northern Bog Lemmings. As currently proposed, all access roads, turbine pads, and collector lines are located outside of the minor watersheds that contain these wetlands. Removal of the southern 4 turbines further separates any proposed development from a potentially occupied wetland. Therefore, MDIFW does not anticipate negative impacts this species/ habitat.

Roaring Brook Mayfly/Spring Salamander: The removal of the southern 4 turbines does not minimize potential impacts to both Roaring Brook Mayfly and Spring Salamander, known to occur within the Gold Brook Watershed. MDIFW initial comments still apply, and are as follows: "The applicant conducted surveys for both of these species in the Kibby Stream Watershed. The surveys did not document either species within Kibby Stream, however suitable habitat for both species is present in the watershed. The applicant has agreed to follow MDIFW management guidelines (in final draft form and will be forthcoming ASAP) developed to protect the habitat for both species. As currently proposed, the "mile 5 access Rd" has 4 stream crossing with the greatest potential for this species to occur: C-09-S-0-1b, E-09-S-2-1, A-09-S-102-1, and F-09-S-2-1, for these access road stream crossings, we recommend that these crossings be upgraded to in-kind crossings that span at least 1.5 times the bankfull width of the stream

channel and provide an openness ratio² of at least 0.60 meters. The rest of the perennial stream crossings associated with the access road can follow fisheries recommendations of 1.2 times the bankfull width. All collector line crossings of perennial streams should follow guidelines similar to DEP's Minimum Performance Standards for Electric Utility Corridors, found in Appendix A of Chapter 375 Rules.

http://www.maine.gov/dep/blwq/topic/site_storm_revisions/site_rules/fourth_informal_draft/AP_PENDIX_A_2_cl.pdf.”

Vernal Pools: In order to clarify some confusion regarding vernal pools surveys and previous MDIFW comments, we submit the following comments:

Typically, MDIFW requests vernal pool surveys as part of any large development application. Currently, MDIFW utilizes Natural Resources Protection Act- Significant Vernal Pools standards, regardless of actual regulatory jurisdiction (DEP NRPA Chapter 335 Rules; Section 9, Significant Vernal Pools). NRPA rules only provide protection for vernal pools that are determined to be “Significant Vernal Pools.” There are several criteria used to determine significance of a vernal pool (outlined in Section 9 of Chapter 335 rules).

NRPA rules allow for vernal pools to be surveyed in any season. An applicant can identify potential vernal pools, using indicators such as flat topography with depressions or pit-and-mound topography, wetland flora, fingernail clams, caddisfly cases, and evidence of temporary flooding. These potential vernal pools can either be surveyed again during the appropriate window for official determination of significance or in lieu of additional surveys the applicant can apply the habitat management standards for “Significant Vernal Pools.” It is important to note that official determination of pool Significance is made by MDIFW and not the applicant or the certified professional conducting the survey.

TransCanada, through consultation with MDIFW, adopted a protocol to identify vernal pools as part of their pre-construction study package based on these NRPA standards and definitions. The objective of the protocol employed by TransCanada was to identify, map, and characterize all vernal pools that are in proximity to their proposed development. TransCanada submitted their vernal pool data forms to MDIFW. All pools submitted were determined to be non-significant, because the vernal pools identified in the survey were all of unnatural origin. Therefore, additional surveys during the identification period for pool-breeding amphibians were unnecessary, and would not have changed the determination of Significance. In most circumstances, unnatural vernal pools are not determined to be Significant or subject to habitat management standards (under NRPA rules). Regardless of this determination, TransCanada is proposing to apply NRPA habitat management standards to all identified vernal pools, including a 250-ft upland buffer.

Finally, a detailed post-construction monitoring plan should be developed and approved as part of the Development Permit. MDIFW re-states our willingness to work with the applicant in developing this monitoring plan. The post-construction monitoring efforts should be at least as rigorous as the pre-construction efforts. This monitoring plan should be conducted for a minimum of two years (preferably three) and can be distributed over a period of several years

post-construction (i.e., years 1, 3, 5). We request that the post-construction monitoring plan is reviewed and approved by MDIFW and LURC prior to operation of any wind turbines

Post-construction monitoring protocols for wind projects are rapidly evolving. Many of the same techniques used at the Mars Hill and Stetson Mountain Wind Power Facilities should be used for the Sisk Mountain-Kibby Wind Expansion project and refined through consultation with MDIFW. This post-construction monitoring protocol should be adaptive as continued wind power projects shed new information on possible ways to minimize impacts on birds and bats. This may result in the modification of proposed studies through discussions among the applicant, MDIFW, and DEP.

Thank you for extending our opportunity to comment, if you have any questions or would like further input, just let me know.

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MAINE PUBLIC UTILITIES COMMISSION
Review Comments

TransCanada Maine Wind Development
Revised Proposal for the Kibby Expansion Wind Power Project

October 14, 2010

Introduction

The Land Use Regulation Commission (LURC) has requested that the Public Utilities Commission (PUC) provide review comments with respect to TransCanada Maine Wind Development, Inc.'s (TransCanada) revised proposal for the Kibby Expansion Wind Power Project located in the unincorporated townships of Kibby and Chain of Ponds in Franklin County, Maine (Revised Kibby Expansion Project).

The Act to Implement Recommendations of the Governor's Task Force on Wind Power Development (Act) requires LURC to determine whether the Revised Kibby Expansion Project will provide "significant tangible benefits."¹ The Act provides that the PUC (among other agencies) shall submit review comments at the request of the siting authority.² The PUC is pleased to provide review comments within its areas of expertise.

"Tangible benefits" are defined by statute to mean:

environmental or economic improvements or benefits to residents of this State attributable to the construction, operation and maintenance of an expedited wind energy development, including but not limited to: property tax payments resulting from the development; other payments to a host community, including but not limited to, payments under a community benefit agreement; 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

¹ P.L. 2007, ch. 661, section C-4 (codified at 12 M.R.S.A. § 685-B(4-B)).

² P.L. 2007, ch. 661, section A-7 (codified at 35-A M.R.S.A. § 3454).

the host community or communities to the extent practicable and affected neighboring communities.³

The Act specifies that the siting authority shall presume the general energy and emissions-related benefits stated in statute (e.g. reduced reliance on fossil fuels, avoidance of air pollution and greenhouse gas emissions and improved state and regional energy security) and make additional findings regarding other tangible benefits.⁴ Thus, the PUC submits the following comments on whether the Revised Kibby Expansion Project provides significant tangible benefits in the areas of electricity market and pricing.

Discussion

In its original application for the Kibby Expansion Project, TransCanada asserted that the project will provide tangible benefits in the form of electricity market and price benefits. TransCanada stated that the project will increase diversification of energy resources and reduce dependence on fossil fuel based energy generation. TransCanada also stated that an increase in renewable energy production will also help to reduce both the level and volatility of electricity prices in the region and assist Maine in meeting its renewable energy portfolio standards, which require an increasing percentage of the electricity provided in Maine to come from eligible renewable energy sources.

In TransCanada's Revised Proposal for the Kibby Expansion Project, TransCanada incorporated these benefits by reference and noted that the emission free energy produced by the revised project will be 92,000-MWwhs per year.

Although the PUC agrees that the Revised Kibby Expansion Project will have the energy diversity, price stability and portfolio standard benefits cited by TransCanada, these benefits should not be considered by the LURC in its evaluation of significant tangible benefits because the Act specifies that the general energy and environmental benefits of an expedited wind energy development should be assumed and do not constitute "tangible benefits" for purposes of satisfying the significant tangible benefits requirement. The PUC suggests that the LURC consider as an electricity market tangible benefit the sale of a significant amount of the output of the wind power project to customers (particularly industrial and commercial customers) within the area or to the utility under the PUC's long-term contracting authority at fixed prices projected to below

³ 35-A M.R.S.A. § 3451(10).

⁴ 35-A M.R.S.A. 3402(1), 3454.

market prices or at a stated discount off of market prices.⁵ The PUC is not aware of any such benefit conferred by the Revised Kibby Expansion Project.

It is important to note, however, that the Act does not require that a wind project provide tangible benefits from each of the categories listed in statute to meet the significant tangible benefits requirement. The project could offer no electricity pricing tangible benefits and still satisfy the requirement if there are enough benefits from the other categories listed in the statutory definition of tangible benefits. The determination of whether the overall package of benefits satisfies the significant tangible benefit requirement is for the "primary siting authority," in this case LURC.⁶

The PUC appreciates the opportunity to provide these comments and would be happy to answer any questions you may have.

DATED: October 14, 2010



Mitchell M. Tannenbaum
Deputy General Counsel
Maine Public Utilities Commission
State House Station # 18
Augusta, Maine 04333-0018

⁵ Under statute, the PUC has the authority to solicit proposals from generators for long-term electricity contracts and to direct utilities to enter into such contracts. 35-A M.R.S.A. § 3210-C.

⁶ 35-A M.R.S.A. § 3454.

Review comments submitted by the State Soil Scientist on the revised proposal for the Kibby Expansion Project

“I had no objections to the revised Kibby Expansion project and still do not, from a technical view point. The main revision was the elimination of a few wind towers with the remainder of the project being essentially the same as the original expansion proposal. All wind farm projects on mountains include construction in areas with unique hydrologic features and soils that need tailored construction techniques to minimize alteration of the natural hydrology and provide stable roads. The higher and steeper the mountain, the more likely and numerous the features and soils are. That is the reason for the “tool box” approach and why I like to do a site visit before making final comments on design of roads.”

From: Rocque, David

Sent: Friday, October 15, 2010 8:16 AM

To: Spencer-Famous, Marcia

Subject: Kibby Expansion (Sisk)

“I did send you comments on the proposed Kibby expansion project quite a while ago but, like you, can’t find a copy now. I know those comments did not express any concerns but I would like to amend them now, on the basis of a site walk along the proposed access road September 29 with Dana Valleau. My revision does not include concerns but during the site walk, I noticed that virtually the entire access road path contains oxyaquic soils (soils with oxygenated groundwater). There were numerous seeps and standing water all along the way (I took a number of pictures). Because of the high seasonal groundwater table in the soils along the proposed access road, I recommend the road base be constructed of blast rock with numerous rock sandwiches. Ditching should not be used to collect ground water and convey it long distances downslope.”