



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

PAUL RICHARD LEPAGE  
GOVERNOR

WILLIAM H. BEARDSLEY  
COMMISSIONER

## Sixteenth Procedural Order

**In the Matter of  
Development Permit DP 4889  
Champlain Wind, LLC.  
Bowers Wind Project  
April 4, 2012**

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

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

**From:** Gwen Hilton, Presiding Officer

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

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### I. Background

On November 8, 2011, the Applicant filed a request to withdraw its application for the Bowers Wind Project (Project) "for the purpose of reconfiguring the Project to address the concerns expressed by the Commission during deliberations and the guidance that has been developed during the pendency of this proceeding."

At the December 7<sup>th</sup> meeting, after hearing comment from the Applicant and Intervenors concerning the Applicant's request to withdraw its application, the Commission voted to table the request for withdrawal for consideration at the April 6, 2012 Commission meeting, indicating it would take up a previously requested decision document denying the Project on Friday, May 4, 2012, as necessary.

On December 12, 2011, the Chair issued the Fifteenth Procedural Order which, among other things, required the Applicant to submit, by March 9, 2012, a written description of its plans for reconfiguring the Project to address the concerns expressed by the Commission and to support its request to withdraw. The other parties to this proceeding and the public had until March 23, 2012 to submit comments on the Applicant's March 9<sup>th</sup> filing.

The Applicant submitted the required March 9<sup>th</sup> filing, and the Commission has received numerous comments and objections in response. Those requiring attention by the Commission are addressed below.

## **II. Comments and objections regarding Applicant's March 9<sup>th</sup> filing**

***Objection by PPDLW to Applicant's March 9<sup>th</sup> filing:*** In the Applicant's submission of March 9, 2012, reference was made to three bodies of information:

1. James Palmer's "Maine's Experience Evaluating When Scenic Impacts From Wind Energy Development Are Unreasonably Adverse"
2. "Review of the Pleasant Lake/Mattawamkeag Lake Wind Power Project Intercepts"
3. "Draft Report of OEIS Assessment of Cumulative Visual Impacts from Wind Energy Development (Feb 2, 2012)"

PPDLW filed a response,<sup>1</sup> requested an opportunity to review these documents, and further requested that these works not be considered by the Commission as part of the Applicant's request to withdraw. PPDLW states the submissions should not be considered because they are not part of the administrative record.

***Applicant's response to PPDLW's objection:*** The Applicant subsequently provided copies of these documents to all the parties to this proceeding and, in so doing, stated that "the Applicant has not requested that these materials be made part of the record for purposes of determining the Project's compliance with applicable review criteria. They are referenced in this submission simply because they are relevant to the reasons that the Applicant is not able to identify the specifics of a reconfigured project at this time, as had been requested by the Commission at the December meeting."

***Applicant's motion to strike PPDLW's on-line survey:*** In responding to the Applicant's March 9<sup>th</sup> filing, the PPDLW also submitted comments on March 21, 2012, and attached a document titled "Downeast Lakes User Survey" as Exhibit A. The Applicant filed a motion on March 27, 2012 to strike this survey as well as any discussion of that survey included in PPDLW's March 21 filing. The Applicant stated "the survey is being used by PPDLW to support its claim that the Bowers Project will have an 'unreasonable scenic impact.' The evidentiary record in this proceeding, however, has long since closed and PPDLW has not sought to reopen nor is there a basis for reopening the record to allow new evidence at this time." The Applicant goes on to state: "The issue before the Commission at this time is not whether the Bowers Project meets the applicable review criteria. The Commission has already taken a vote to deny the Project on the basis of visual impacts, and, while we respectfully disagree, Champlain is not seeking to revisit that decision. Instead, Champlain has only requested that it be allowed to withdraw its application."

***PPDLW's response to motion to strike:*** The PPDLW responded to the motion to strike by stating that the survey is responsive to the Applicant's claim, in the context of the request to withdraw, that

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<sup>1</sup> It is noted that two people who pre-filed testimony on behalf of PPDLW (Mike Lawrence and Gary Campbell) individually—in addition to PPDLW's response—provided public comment on the Applicant's March 9<sup>th</sup> filing. No procedural order or other provision prohibits this, *see* Third Procedural Order (April 29, 2011) section IV, D (addressing only party testimony), and thus the comments are accepted with the noted affiliation.

user surveys are problematic. The PPDLW further stated that if the Chair is inclined to strike their user survey, the Partnership would in turn request that certain statements in the Applicant's March 9<sup>th</sup> response also be stricken.

***Applicant's request for leave to file with incorporated response to PPDLW's March 21<sup>st</sup> filing:***

On April 2, 2012, the Applicant filed a request for leave to file together with an incorporated response to PPDLW's filing, stating that PPDLW, in its responsive filings, has mischaracterized First Wind's pleadings before the PUC in an unrelated proceeding. The Applicant states that PPDLW has not accurately described PUC orders or the basis for delay in the PUC's final deliberations on the merits of the transaction at issue in that proceeding. The Applicant attached two PUC orders, in their entirety, to its April 2<sup>nd</sup> filing.

***PPDLW's response to Applicant's request for leave and response to the March 21<sup>st</sup> filing:*** On April 3, 2012, PPDLW responded by stating, essentially, it was choosing not to respond to the Applicant's April 2<sup>nd</sup> filing, and that the Applicant has simply failed to provide a proper basis for the Commission to allow the withdrawal of the application.

**III. Order.**

***Objection by PPDLW to Applicant's March 9<sup>th</sup> filing:*** The evidentiary record with respect to whether this Project satisfies the applicable review criteria is closed. Before the Commission is the Applicant's request to withdraw its application. The Commission has indicated, *see* Fourteenth Procedural Order (November 15, 2011) & Fifteenth Procedural Order (December 12, 2011), that it will take comment relevant to this narrow issue. The three documents submitted by the Applicant are relevant to its assertions regarding why withdrawal is appropriate, and therefore the Commission will consider them in resolving the request to withdraw. These documents, however, are not otherwise part of the evidentiary record and will not be considered by the Commission should the Commission deny the request to withdraw and take up the previously requested decision document denying the Project.

***Applicant's motion to strike PPDLW's on-line survey:*** As stated above, the evidentiary record regarding this Project is closed, and the Commission has provided only a narrow opportunity to comment on the pending request to withdraw. The Applicant has asserted that withdrawal is appropriate because, among other reasons, there is no established methodology for conducting intercept surveys. Such surveys may provide one means, among others, for the Commission to consider how a project's visual impact may affect the expectations of a typical viewer. *See* 35-A M.R.S.A. § 3452(3). Thus, solely for the purpose of reaching a decision on the Applicant's request to withdraw, the Commission will consider PPDLW's on-line survey for the purpose of demonstrating that on-line intercept surveys may be possible. In this context, however, the Commission cannot and does not reach any finding or conclusion as to the reliability of the methodology employed by the submitted on-line survey, and thus this survey has limited relevance with respect to the pending request to withdraw. The on-line survey is not otherwise part of the evidentiary record and will not be considered by the Commission should the Commission deny the request to withdraw and take up the previously requested decision document denying the Project.

***Applicant's request for leave and response to March 21<sup>st</sup> filing:*** As stated above, the evidentiary record regarding this Project is closed. In support of its request to withdraw, however, the Applicant has stated that it is unable to propose a specific revised project at this time because of, among other things, an unresolved proceeding before the PUC that will impact the Applicant's access to operating capital. To the extent the PPDLW's discussion of the PUC proceeding and the Applicant's April 3<sup>rd</sup> response are relevant to the narrow issue before the Commission, the Commission will consider these filings, which will not otherwise be considered should the Commission reach the merits of the Applicant's pending application for the Project.

#### **IV. Oral argument schedule.**

The Fifteenth Procedural Order (December 12, 2011) indicated that time may be allocated at the April 6, 2012 meeting for the parties to present oral argument to the Commission regarding the Applicant's request to withdraw. The parties have requested an opportunity to do so, and the order, time allocations, and approximate scheduled times for Friday morning are set forth below:

- 10:15: Introduction (Chair and staff)
- 10:20: Champlain (may reserve part of 10 minute allotment for rebuttal)
- 10:30: PPDLW
- 10:40: Corrigan
- 10:50: Mott

#### **V. Authority and Reservations**

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

Questions regarding this Order or rulings of the Presiding Officer should be directed to Samantha Horn Olsen, the Commission's Acting Director, or Fred Todd, at the Commission's office in Augusta. No ex parte communication may occur with the Presiding Officer or any other Commission member.

DATED AT AUGUSTA, MAINE THIS 4<sup>th</sup> DAY OF APRIL, 2012



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