



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

CHAMPLAIN WIND, LLC	) SITE LOCATION OF DEVELOPMENT ACT
Kossuth Township, Washington County	) NATURAL RESOURCES PROTECTION ACT
Carroll Plantation, Penobscot County	)
BOWERS WIND PROJECT	) WATER QUALITY CERTIFICATION
L-25800-24-D-Z (Denial of appeal)	) SIGNIFICANT WILDLIFE HABITAT
L-25800-TE-E-Z (Denial of appeal)	) FINDINGS OF FACT AND ORDER
L-25800-IW-F-Z (Denial of appeal)	) ON APPEAL

Pursuant to the provisions of 38 M.R.S. §§ 341-D (4), 480-A et seq; & 481 et seq; 35-A M.R.S. §§ 3401-3459; and Section 401 of the Federal Water Pollution Control Act, the Board of Environmental Protection (Board) has considered the appeals of CHAMPLAIN WIND, LLC and DOUGLAS E. HUMPHREY AND BOWERS MOUNTAIN, LLC (collectively “appellants”), the material filed in support of the appeals, the responses to the appeals, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On October 3, 2012, Champlain Wind, LLC submitted a Site Location of Development Act (Site Law) application and a Natural Resources Protection Act (NRPA) application to the Department, proposing the construction of a wind energy development with 16 turbines. The project site is located in Carroll Plantation and Kossuth Township.

The Department held a public hearing on the application on April 30 and May 1, 2013 in the Town of Lee. As part of the public hearing process, the Department granted intervenor status to the Conservation Law Foundation (CLF), Maine Renewable Energy Associates (MREA), the Partnership for the Preservation of the Downeast Lakes Watershed (PPDLW), and David Corrigan. CLF and MREA were consolidated into one intervenor group. All intervenors participated in the public hearing process.

A draft Department order was issued on July 24, 2013, for public comment. After consideration of the comments received, the Department denied the application in Department Order #L-25800-24-A-N/L-25800-TE-B-N/L-25800-IW-C-N, dated August 5, 2013. The Department denied the application based on its finding that the proposed project would result in an unreasonable adverse effect on the scenic character or existing uses related to the scenic character of nine scenic resources of state or national significance (SRSNS).

Two timely appeals to the Board were filed on September 4, 2013 by the applicant, Champlain Wind, LLC, and the owners of the property on which the proposed project would

be located, Douglas E. Humphrey and Bowers Mountain, LLC. The appellants requested that the Board reverse the Department's denial, find that the project meets the scenic impact standards, and approve the project. The Department received responses to the appeals from two of the intervenors, PPDLW and MREA/CLF. The Department received numerous other responses to the appeal, both supporting and in opposition to the project.

2. STANDING:

Champlain Wind, LLC qualifies as an aggrieved person, as defined in Chapter 2, § 1(B) of the Department's Rules, because its Site Law and NRPA applications to develop the wind energy development were denied.

Douglas E. Humphrey and Bowers Mountain, LLC are also aggrieved, because they own the land on which the proposed project was to be constructed.

The Board finds that both appellants, Champlain Wind, LLC and Douglas E. Humphrey and Bowers Mountain, LLC, have demonstrated they are aggrieved persons as defined in Chapter 2 § 1(B) and may bring these appeals before the Board.

3. PROJECT DESCRIPTION:

The applicant proposes to construct a wind energy development consisting of 16 turbines. In addition to the turbines, the project would include an operations and maintenance (O&M) building as well as associated facilities. The turbines would be located in Carroll Plantation and Kossuth Township and the O&M building would be located in Carroll Plantation on Route 6. The O&M building would result in approximately 7,000 square feet of impervious area. The proposed project overall would include a total of 33.92 acres of impervious area and 33.92 of developed area. The project is shown on a set of plans included in the application, the first of which is entitled "Overall Location Plan," prepared James W. Sewall Company, and dated September 26, 2012.

- A. Wind Turbines. The applicant proposes to construct 16 wind turbines; it has requested approval to use either the Siemens 3.0 megawatt (MW) turbine (model SWT-3.0-113) or the Vestas 3.0 MW turbine (model V112 3.0-MW) for a total of 48 MW of generation capacity. The turbines would be either 446 (Siemens) or 459 (Vestas) feet in total height to the tip of the fully extended blade. The turbines would be located on Dill Hill and Bowers Mountain.
- B. Turbine Pads. The turbines would be constructed on 16 pads. The total impervious area associated with the turbine pads would be 0.66 acre.
- C. Access Roads and Crane Path. The applicant is proposing 3.0 miles of 24-foot wide access roads and 4.0 miles of 35-foot wide crane paths. The total impervious area associated with the linear portion of the project is 21.74 acres.

- D. Electrical Collector Substation and O&M building. The applicant proposes to construct an electrical substation adjacent to the existing Line 56 in Carroll Plantation. The applicant is proposing a 7,000 square foot O&M building adjacent to the express collector line. The total new impervious area associated with the electrical substation and the O&M building is 5.65 acres.
- E. Meteorological Towers. The applicant is proposing to construct one permanent meteorological tower on the site to monitor turbine performance.
- F. Express Collector Line. The applicant is proposing to collect the power from the turbines in a 34.5 kilovolt (kV) express collector line. The express collector line would run approximately 5.2 miles to the proposed substation.

4. BASIS FOR APPEALS:

The appellants assert that the Department erred in making the finding that the proposed project would have an unreasonable adverse effect on the scenic character and existing uses related to scenic character. The appellants' arguments are based on the following contentions:

- A. The Wind Energy Act (WEA) criteria require the Department to balance economic benefits of a project against its scenic impact;
- B. The Department improperly aggregated impacts to multiple SRSNS and the evidence demonstrates that the proposal meets the requirements of the WEA's scenic standard;
- C. The Department's application review process violated the requirements of the Administrative Procedure Act; and,
- D. The Department failed to consider that approval of the project would help to sustain working forests and result in the continuation of their availability to the public for recreational use.

5. REMEDY REQUESTED:

The appellants request that the Board reverse the August 5, 2013 Department decision denying a permit for the construction of the Bowers Wind project in Carroll Plantation and Kossuth Township and approve the proposed project.

6. DISCUSSION AND FINDINGS:

A. Statutory Framework.

To obtain a Site Law and a NRPA permit for the proposed development, Champlain Wind, LLC, must demonstrate that the project meets the criteria set forth in the Site Law and the NRPA. The scenic and aesthetic impacts criteria of both statutes are further specified, and narrowed, for projects such as this one, which meet the definition of an expedited wind energy development. The WEA, 35-A M.R.S. § 3452 (1), provides in pertinent part that:

In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to [the Site Law] or [the NRPA], the [Department] shall determine, in a manner provided in subsection 3, whether the development significantly compromises views from a 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 [the Site Law].

With this language the Legislature directs a narrower analysis for expedited wind energy developments in the determination of whether the scenic and aesthetic criteria of the Site Law and the NRPA are met and a permit may be issued under those laws.

The WEA directs that the following factors be considered in making the determination on scenic impacts:

- 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.

The WEA directs that in the determination of scenic impacts, the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a SRSNS should be considered insignificant. A finding 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 development has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a SRSNS.

The proposed project contains "generating facilities" including wind turbines and towers as defined by 35-A M.R.S. § 3451 (5) and "associated facilities" such as buildings, access roads, substations as defined by 35-A M.R.S. § 3451 (1).

Each application for a wind energy development is required to include a visual impact assessment that addresses each of the six evaluation review criteria listed above. The applicant submitted a visual impact assessment evaluating the project's scenic impacts within eight miles of the SRSNS.

#### B. Analysis and Findings.

The appellants assert that the Department erred in its finding that the project would have an unreasonable adverse effect on the scenic character or existing uses related to scenic character based on the following contentions:

- 1) The appellants argue that the WEA criteria require the Department to balance economic benefits of a project against its scenic impact;
- 2) The Department improperly aggregated impacts to multiple SRSNS and the evidence demonstrates that the proposal meets the requirements of the WEA's scenic standard;
- 3) The Department's application review process violated the requirements of the Administrative Procedure Act; and,
- 4) The Department failed to consider that approval of the project would help to sustain working forests and a resulting continuation of their availability to the public for recreational use.

#### I. Consideration of Economic Benefits in Scenic Analysis.

The appellants assert that the intent of the WEA is to facilitate development of wind energy and realize energy, economic and environmental benefits that such developments can provide. They contend that the expedited permitting areas were designated and a modified regulatory process put into effect for projects in such areas, including a modified scenic impact standard, to encourage the construction of grid-scale wind energy developments.

The Board agrees that this project is proposed to be located in an expedited permitting area, which was defined by the Legislature, and is therefore subject to the modified scenic impact analysis. However, the WEA does not allow wind energy developments other special considerations for approval solely due to the fact that the project would be located in an expedited permitting area. The burden of proof remains on the applicant to demonstrate that the proposed project meets all the applicable regulatory standards, specifically, the standards of the Site Law, and the NRPA.

The appellants assert that the Department was required to balance the project's potential adverse scenic impacts against its potential benefits and the failure to do so was legal error. The appellants also contend that the Department did not consider the wind energy development's purpose and the context, which is Criterion D in 35-A M.R.S. § 3452 (3) (the WEA).

The Board disagrees with the appellants that the Department committed legal error by not balancing the project's potential adverse scenic impacts against the project's potential benefits. In order to obtain a permit under the Site Law and the NRPA, each of the statutory criteria must be met. The WEA further specifies certain language of the Site Law and the NRPA but the Board finds no language in the WEA requiring a balancing of a wind energy development's adverse scenic impacts with the development's benefits, either in 35-A M.R.S. §3452 or 35-A M.R.S. §3454. An applicant for a permit must demonstrate that the proposed project complies with each of the applicable review standards under the Site Law, and the NRPA, as further refined by the WEA. The Board is obligated to make a determination as to whether each of the applicable review standards has been met. The Board finds that it is appropriate to weigh and balance the evidence on each individual criterion when making a finding under that particular criterion, however, the WEA does not direct or even allow a balancing of one standard against another standard, or a balancing of a proposed project's overall benefits against the proposed projects overall adverse impacts.

The wind energy development's purpose and the context of the proposed activity must be considered in the assessment of the proposed project's potential impacts on scenic character or existing uses related to scenic character, and the Board interprets this language in light of its placement in the WEA's framework for assessment of scenic impacts. The purpose of the proposed development is to generate energy using the wind. The context of the proposed activity, in the physical sense, is the nature of the general area surrounding the project. The Board also considers the context in a practical sense, which includes the size of turbines generally used in grid-scale developments and the fact that such projects must be located in areas with significant wind resources. This is consistent with the Legislature's acknowledgement of the unusual nature of a grid-scale wind energy development when, in the WEA, it made inapplicable the Site Law's requirement that such a project fit harmoniously into the natural environment. Here the Board considered the topography, level of development, and scenic quality of the surrounding area as visible from the SRSNS, the size of grid-scale turbines, and, given the purpose of wind energy developments, the need to locate the project where there will be wind available, in its assessment of the scenic impacts of a proposal. In this way the development's purpose and the context of the proposed activity were considered in the Board's assessment of whether the proposed project would significantly compromise views from a SRSNS.

The appellants assert that the proposed project is supported by the host communities, landowners in the vicinity, recreational organizations, environmental organizations and businesses and the Department should have given weight to the economic interests of the host communities in determining whether the scenic impacts are unreasonable.

Support from the host community is not one of the statutory licensing criteria of the Site Law or the NRPA, nor is it a factor listed to be considered in the WEA. The Board agrees with the appellants that host communities' testimony with regard to economic benefits of the proposed project should be given consideration, however, such evidence

goes to the analysis of the project's tangible benefits under the Site Law criterion pertaining to tangible benefits (38 M.R.S. §484(10)), as further specified in the WEA (35-A M.R.S. §3454).

Based on the language of the Site Law and the NRPA, as well as the WEA, the Board concludes that a balancing of the project's benefits under one criterion against its adverse impacts under a different criterion is not required or appropriate.

## II. Impacts to Multiple Scenic Resources of State or National Significance.

The appellants argue that the Department concluded that the impact of the project's visibility on any single lake was not unreasonable, and therefore the Department could not deny the permit applications based on adverse scenic impacts. The appellants assert that the applicant's evidence on scenic impacts demonstrated that the proposed project would not result in an unreasonable adverse effect on the scenic character or existing uses related to scenic character of any specific SRSNS. The appellants contend that the applicant's scenic consultant, David Raphael, appropriately applied the statutory criteria and concluded that there is no unreasonable adverse impact on any single SRSNS. The appellants assert that Dr. Kevin Boyle, retained by the applicant to design user surveys for the project, also determined that there would not be an unreasonable adverse impact on scenic character or existing uses related to scenic character.

As part of the licensing review process, the Department retained a scenic consultant, Dr. James Palmer, to assist the Department in its analysis of the technical aspects of the submittals pertaining to scenic impacts.

Both of the applicant's consultants and the Department's consultant opined on the reasonableness of the scenic impacts of this proposed project; however, initially the Department and now the Board is the fact finder and the entity with the legal authority to make that determination under the law. It is not the responsibility of either the applicant's or the Department's scenic consultant to make that determination. The analysis and conclusions of the applicant's scenic consultant are evidence in the record regarding scenic impacts for consideration. The Board has considered the comments and review of the applicant's scenic consultants and the analysis of that evidence by the Department's consultant. However, neither the Department nor the Board is obligated to agree with the opinion of the scenic consultants, and reach the same conclusions. The Department, and now the Board, must reach its own conclusion based on its assessment of all the evidence in the record.

To assess whether the scenic impacts criteria of the Site Law, the NRPA, and the WEA have been met, the Board used the six statutory evaluation criteria related to scenic impacts, as set forth in the WEA at Title 35-A M.R.S. § 3452 (3). In order to make this determination, the Board weighed the evidence in the project record. The Board considered the public comments in the record regarding the proposed project, and used

its discretion in applying more weight to testimony from those existing users most impacted by the proposed project.

The Board concurs with the Department's analysis and findings in the August 5, 2013 denial of the project as to what constituted an unreasonable adverse effect on scenic character. The Board makes the following findings:

- A. Dr. Palmer's assessment of the impacts to eight of the great pond SRSNS within eight miles of the proposed turbines (Duck Lake, Junior Lake, Shaw Lake, Keg Lake, Scraggly Lake, Bottle Lake, Pleasant Lake and Sysladobsis Lake) was that they would sustain a Medium level of adverse scenic impact, based on the scenic review analysis method used by the applicant. A ninth lake, Pug Lake, was assessed by Dr. Palmer to sustain a low level of adverse scenic impact. The evidence in the record shows that, of the proposed 16 turbines, the number of turbines potentially visible within eight miles of the affected SRSNS are: Duck Lake – up to 14, Junior Lake – up to 13, Shaw Lake – up to 14, Keg Lake – up to 12, Scraggly Lake – up to 16, Bottle Lake – up to 10, Pleasant Lake – up to 16, Sysladobsis Lake – up to 10, and Pug Lake – up to 6. For Pleasant Lake, the distance to the nearest visible turbine would be 2.4 miles. The Board finds that Pleasant Lake would sustain a greater scenic impact than the Medium assessed by Dr. Palmer, but does not conclude that Pleasant Lake would have an overall scenic impact of High based on mitigating factors. The Board finds that it is significant that eight of the fourteen SRSNS within eight miles of the proposed project would sustain an overall scenic impact of Medium, or possibly higher in the case of Pleasant Lake.
- B. The Board considers the existing scenic quality of each of the nine affected great ponds (Duck Lake, Junior Lake, Shaw Lake, Keg Lake, Scraggly Lake, Bottle Lake, Pleasant Lake, Sysladobsis Lake, and Pug Lake) to be high. While the generating facilities are proposed to be located in the expedited permitting area and therefore were appropriately subject to review under the WEA, the majority of these nine great ponds within eight miles of the proposed turbines are not located within the expedited permitting area. The Board concludes that since the subject great ponds were excluded from the expedited permitting area, the Legislature considered these great ponds to have a high value of scenic significance.
- C. The Board notes that the Commissioner and DEP staff conducted a site visit on May 21, 2013 by motor boat on Scraggly Lake, Junior Lake and Pleasant Lake. During this site visit the Department noted that these lakes appeared almost completely devoid of development, with only one sporting camp and scattered camps. Thus, the views of turbines would not be interrupted by shoreline development when viewed from these three SRSNS. Therefore, the scenic impact from the proposed project would be greater than if the shorelines of the lakes and the viewsheds from the SRSNS had a higher level of visible development.

- D. The applicant's user survey indicates that 90 percent of the respondents gave the lakes high or the highest scenic value ratings in their current condition, and the Board finds this evidence of the high scenic character of the existing lakes compelling. Further, after respondents were shown photosimulations of the views of the proposed project and asked the same question, those indicating that the lakes would have high or the highest scenic value dropped from 90 percent to 33 percent. The Board finds that this evidence demonstrates that the project would have a significant impact on the scenic character of these lakes.
- E. A unique aspect of the proposed project is that many of the nine affected great ponds within 8 miles of the proposed turbines are interconnected. The record includes credible evidence indicating low multi-day use of the connected lakes, but some use of more than one lake occurs, and this factor was given some consideration by the Board.

The appellants assert that since there are ten wind energy developments now operating in Maine, the Department was required to consider and give significant weight to certain evidence it submitted regarding the impact of turbine visibility on recreational users near other wind energy developments. The appellants assert that their post-construction intercept survey on Baskahegan Lake provides proof that visibility of turbines is not adversely impacting scenic quality or recreational users of that resource. The appellants assert this evidence is probative of the impacts on uses which would result from this proposed development, and that these results show that wind energy developments are compatible with sporting camps.

The Board finds that a consistent review process is utilized in the review of wind energy development applications; however, each wind energy development must be judged on its own merits against the licensing criteria, because each development has unique characteristics affecting scenic character. Comparisons to other developments are difficult and generally not helpful in determining whether the development at issue meets the licensing criteria. The Board reviewed the applicant's post-construction intercept survey which was done to gather information about the Stetson Wind development's scenic impacts, but sees limited value in extrapolating its results to a wind energy development in another location, with different topography, a different array of turbines, and different SRSNS. The intercept survey information the applicant submitted from Baskahegan Lake has many significant differences from the proposed Bowers development, so was therefore given little weight by the Board. These differences include the fact that Baskahegan Lake is not a SRSNS, the fact that the survey point was more than 8 miles from the Stetson Wind development and views of turbines from beyond 8 miles are by statute deemed insignificant, and the lack of pre-development information for the Stetson Wind development for comparison. Dr. Palmer also pointed out that the survey involved only "existing users", thus, former users who find the development so objectionable that they will no longer use Baskahegan Lake would not have been represented in this survey. The Board reviewed

the Baskahegan Lake survey, but did not give it significant weight as it is not probative of the reasonableness of the scenic impact of the proposed development.

As part of its analysis of the expectations of the typical viewer of the proposed project, the Board relied on the applicant's user surveys and public hearing testimony. The record contains numerous letters in opposition to this project from people that were extremely frustrated with the scenic impacts of the nearby Rollins Wind project. The record contains comments and testimony that are both negative and positive in regard to existing wind energy developments. However, in its analysis, the Board gave the most weight to testimony and intercept survey data that could be used to evaluate the expectations of the typical user of the SRSNS that would have visibility of the proposed Bowers Wind project.

Public hearing testimony is in the record from the owners of First Settlers Lodge in Danforth and Maine Wilderness Camps on Pleasant Lake that states that the proposed project would not adversely impact their business. However, the Board also considered the testimony from three other sporting camp owners that noted that their guests and clients were less likely to return to their establishments if the proposed project were to be constructed. These three business owners stated that their guests seek the undeveloped nature of the Downeast Lakes region, and the project would cause a negative effect on the existing uses of the lakes due to a negative impact on the scenic character of those lakes. The Board gave these comments considerable weight when analyzing the effects of the proposed project on existing uses related to scenic character.

The appellants assert that the majority of evidence in opposition to this project comes from guides and commercial camp owners in the Grand Lake Stream area which is approximately 18 miles from the proposed Bowers Wind project. The appellants assert that there is little data to show that guides are using the project lakes. The appellants assert that even if there were evidence of economic harm to the guides, such economic harm cannot be a basis for a denial of a permit.

The evidence in the record regarding adverse scenic impacts of the proposed project came from many different sources. While a number of recreational and sporting camp businesses that voiced concern about the potential adverse scenic impacts of the proposed project are located further than eight miles from the proposed project, the evidence reflects notable use by the clients of these businesses of the SRSNS within eight miles of the proposed project, which the Board considers to be 'existing uses related to scenic character' as delineated in the WEA (35-A M.R.S. § 3452 (1)). The camp owners on the SRSNS lakes frequently use the SRSNS lakes and they testified on the impacts the proposed project would have on their use and enjoyment of the SRSNS. The Board gave greater weight in its review to comments and testimony from people who actually use the SRSNS lakes impacted by this proposed project. The applicant's user surveys for the specific SRSNS showed that the actual users would be impacted. For example, the applicant's user intercept survey on Scraggly Lake showed that 50%

of the respondents noted that the proposal would have a negative effect on their enjoyment of the lake and 23% of those surveyed responded that the proposal would have a negative effect on their continued use of the lake. The applicant combined the user surveys results from the three lakes, Scraggly, Junior and Pleasant Lakes, and those results show that 45% of those surveyed said the proposal would have a negative effect on their enjoyment of the SRSNS.

In the applicant's VIA, a methodology was selected by the applicant's consultant to demonstrate the level of the project's scenic impacts by assigning values of low, medium, or high to each of the six factors to be considered under the WEA (35-A M.R.S. § 3452 (3)), in order to reach an overall scenic impact rating for each SRSNS. The applicant's evidence supports a conclusion that three of the SRSNS would suffer a medium adverse scenic impact. The applicant's scenic consultant concluded that the project would not have an unreasonable adverse impact on the scenic character or existing uses related to scenic character of the SRSNS within eight miles of the project. The Department's scenic consultant disagreed with the applicant's conclusions on overall scenic impacts. Dr. Palmer concluded that eight of the fourteen SRSNS within an eight mile radius of the proposed project (Duck Lake, Junior Lake, Shaw Lake, Keg Lake, Scraggly Lake, Bottle Lake, Pleasant Lake and Sysladobsis Lake) would sustain an overall scenic impact of 'medium' or higher. The appellant argues that one or more SRSNS would have to sustain a high adverse impact rating in order to support a conclusion that a proposed project would result in an unreasonable adverse effect on scenic character.

The appellants assert that the Department improperly denied the project based on an aggregation of impacts which they argue is not allowed under the applicable laws. The appellants assert that the WEA states that the Department must consider the scenic impact on each single resource independently, not as a collection of resources. They claim that the Department found that each individual SRSNS met the scenic impact criteria, but then the Department improperly considered the overall impacts on the SRSNS as a whole. The appellants assert that the Department created a new standard with its analysis of the impacts as a whole and that this analysis was arbitrary. They also contend that the alleged new standard is unconstitutional due to vagueness.

The Board finds that the adverse scenic impacts of this proposed project are widespread in nature, and this characteristic of the scenic impacts is a factor that may be considered in the ultimate determination of the reasonableness or unreasonableness of the impacts under the Site Law, NRPA and WEA licensing criteria. Whereas a medium level of adverse impact on one SRSNS might not rise to the level of unreasonableness, a medium level of adverse impact to several SRSNS is significant. Such a level of impact on the scenic character or existing uses related to scenic character of eight SRSNS (Duck Lake, Junior Lake, Shaw Lake, Keg Lake, Scraggly Lake, Bottle Lake, Pleasant Lake and Sysladobsis Lake) supports a finding that the proposed project would result in an unreasonable interference with existing scenic and aesthetic uses under the NRPA and an adverse effect to existing uses and scenic character under the Site Law.

The Board disagrees that the Department aggregated or created a new category of SRSNS in its denial. The Department discusses on page 23 of the August 5, 2013 order that:

“...the Department concludes that since a majority of the SRSNS (eight lakes out of the fourteen SRSNS, or 57%) received an overall scenic impact of Medium, and the Department concludes this is a *significant impact* [emphasis added] on SRSNS by the proposed project, then that must be factored into the Department’s analysis. The Department, however, further considered evidence in the record with regard to whether the proposed project would have an unreasonable adverse effect on scenic character and existing uses related to scenic character.”

The Department did not conclude that the proposed project would cause an unreasonable adverse effect solely on the basis of there being eight SRSNS that would sustain a medium level of overall scenic impact.

The WEA (35-A M.R.S. §3452(3)(F)) requires the Department to consider the number and extent of turbines visible from a SRSNS. There are 14 SRSNS within eight miles of the project, nine of which have views of the project. Six of the 14 SRSNS are connected by water and an additional six are connected by a short portage. The applicant’s user surveys demonstrate that users were traveling from one resource to another. The evidence in the record reflects that the only public boat launch facility to Junior Lake is from a boat launch on either Bottle Lake or Scraggly Lake. Therefore, the Board finds that the boating users of Junior Lake would have to travel through Bottle Lake or Scraggly Lake and would see views of the proposed project from multiple SRSNS. In addition, the applicant’s user survey also showed that 49% of the users had used at least two lakes on the day they were interviewed, indicating usage of the lakes. The evidence also reflects that there is a loop canoe/kayak trail throughout many of these lakes with primitive campsites. Because some of these lakes are interconnected, the Board concludes that some users may be impacted by seeing the turbines repeatedly from more than one SRSNS. It should be noted that the applicant also reported the results of their user survey by combining the results for all lakes.

The appellants assert that the Bowers Wind project is located within a working forest landscape and emphasize that the majority of the area surrounding the project is subject to the Sunrise Conservation easement, which is a working forest easement. They note that there is a 66 lot subdivision just north of Shaw Lake with houses and associated roads.

The WEA requires the Department to make a finding whether the proposed project will have an unreasonable adverse effect on scenic character or existing uses related to scenic character on the affected SRSNS. Specifically, the WEA specifies in 35-A M.R.S. §3452(1) that the determination must be made as to whether ‘the development significantly compromises views *from* [emphasis added] a scenic resource of state or

national significance...'. Therefore, the Department and Dr. Palmer conducted their analysis of the project's potential effects on scenic character on views from the affected SRSNS. The Board acknowledges the evidence in the record regarding the working forest and the amount of development in the project vicinity, as evidenced by aerial photographs and other testimony. However, based on the applicant's VIA, Dr. Palmer's review, and the site visits by Department staff, the Department observed the overall lack of development that was visible from the SRSNS that were visited, which contributed to the Department's finding on scenic impacts.

The Department considered the review methodology created by the applicant's own scenic consultant. This methodology was supported by the Department's consultant, Dr. Palmer, but this methodology by itself was not used to guide the Department in its final determination. The applicant's VIA utilized a methodology for evaluating the project's effects on scenic character by assigning values of low, medium or high to each of the WEA's six statutory requirements. The Department and Dr. Palmer supported this approach, but disagreed with the applicant's conclusions. The Board finds credible evidence in the record that this development will result in adverse scenic impacts of a medium level to eight SRSNS. The evidence in the record including the applicant's VIA, the applicant's user surveys, the Department site visits, and the significance of the SRSNS, supports the conclusion that the proposed project would unreasonably adversely affect scenic character and existing uses related to scenic character.

### III. The Department's Application Review Process.

The appellants contend that the Department's procedure in the processing of this permit application did not comply with the protections provided by the Administrative Procedure Act. They argue the Commissioner's denial of the application is legally flawed and should be reversed because: a) the Department should have promulgated rules further specifying the scenic impact criteria under the Site Law, the NRPA and the WEA; and b) the Commissioner did not attend the public hearing and her designee did not prepare written findings or recommendations. The appellants also contend that the Commissioner and DEP staff should not have done a site visit without the parties and without the Department's scenic consultant in attendance.

The Board disagrees with the appellants' contention that regulations further specifying the scenic impact criteria are legally required. As discussed in Section II, neither the Department's analysis nor the Board's analysis includes a new standard pertaining to scenic impacts. The criteria are set forth in the Site Law and the NRPA and are made more specific by the WEA for wind energy developments' review. These criteria give sufficient direction for the Board to assess the nature and the severity of impacts of wind energy developments. In fact, the Law Court has found that the Site Law and NRPA statutory framework on scenic impacts is not unconstitutionally vague and the WEA provides significant additional direction.

With regard to procedural rules, the Department's Chapter 3 Rules (Rules Governing the Conduct of Licensing Hearings) were utilized in the conduct of the public hearing held April 30 and May 1, 2013. In accordance with Chapter 3 § 4(A) the Commissioner designated a Presiding Officer for the public hearing. As provided in Chapter 3 § 5, Department staff assisted the Presiding Officer in gathering facts, identifying issues, analyzing evidence and making recommendations regarding licensing criteria. Additionally, Department staff wrote a draft order summarizing the information in the record, including testimony gathered through the public hearing process, for the Commissioner's consideration, which is in accord with Chapter 3 § 5(E). The draft Department order was issued on July 24, 2013, after the public hearing. There is no requirement in Chapter 3 or elsewhere that the Commissioner attend the public hearing, nor is there a requirement that a written report of the hearing be filed by the Presiding Officer.

The Department has the discretion to inspect the site of a proposed development when reviewing permit applications. Department staff conducted a site visit with the Department's scenic consultant on December 13, 2012, and a site visit which included the Commissioner on May 21, 2013. The Commissioner had all of the evidence pertaining to scenic impact, including the applicant's reports and information that the Department's consultant had compiled, available to her before and after the site visit.

The Board finds that regulations further specifying the scenic impact review criteria are not required under the Administrative Procedure Act and that the procedure followed by the Department in its review of the application was fair and accorded all parties and interested persons ample opportunity to participate.

#### IV. Impacts on the Sustainability of Working Forests.

The appellants assert that the scenic impacts of the project must be balanced against landowner rights and the financial interests of the forestry community. The appellants assert that wind power is critical to the long term sustainability of Maine's working forests and the continued use of those lands by Maine's recreating public.

Appellants Douglas E. Humphrey and Bowers Mountain LLC state that land lease payments the commercial forest products industry receives for wind energy developments are important to the financial health of the industry, and without this income stream there might be less commercial forest land accessible to the public for recreation. The appellants assert that public access to the lakes that are the SRSNS affected by the project is limited and the lakes have low use. They argue that the timber industry's importance to the economy of the region should be given more weight than potential impacts to the use of the affected SRSNS lakes by guides, sporting camps and their customers.

The timber industry is clearly important to the economy of this region. However, the Board finds no language in the WEA regarding a leasing landowner's financial benefits

or the financial interests of any particular industry being balanced against potential scenic impacts of a project. The criteria that the WEA directs the Board to consider are specific to scenic character and existing uses of the SRSNS related to scenic character. The possibility of changes in nearby landowners' public access policies is not relevant to whether the construction of this project meets the scenic impact criteria under the relevant statutory provisions.

The Board considered the testimony of sporting camp owners, guides, and any business owners regarding their concerns that are related to scenic character and existing uses related to scenic character of the SRSNS, as required by the WEA. Consideration of the project's economic benefits occurs under the review of the tangible benefits of the project as outlined in the tangible benefits standard of the WEA, 35-A M.R.S. §3454, not under the scenic impact criteria. The proposed project would provide tangible benefits to the neighboring communities and working forest landowners, but the project would also cause unreasonable adverse effects on scenic character, and these two standards must be reviewed separately and independently.

The Board reviewed the information in the record regarding the project's proposed tangible benefits and the project's potential impacts to scenic character. The Board notes the Department made a positive finding regarding the project's tangible benefits, in addition to the negative finding on impacts to scenic character. As discussed above, the Board did not weigh the evidence in the record of each of these findings against each other in making its final decision.

The Board disagrees with the appellants that the Department committed legal error by not balancing the project's potential scenic impacts against the project's potential financial benefits to the commercial forestry industry. The Board is sensitive to and acknowledges the appellant's concerns regarding Maine's working forests, but finds that such a balancing against adverse scenic impacts is outside of the Board and the Department's regulatory authority under the WEA. The Board finds that the WEA does not allow a balancing of a wind energy development's adverse scenic impacts with potential financial benefits to the landowners leasing the land to the applicant.

## 7. CONCLUSIONS:

Based on the above findings, the Board concludes that:

- A. The appellants filed a timely appeal.
- B. The applicant's proposal to construct a 48 MW wind energy development, known as the Bowers Wind project, in Carroll Plantation and Kossuth Township does not meet the criteria for a permit pursuant to the Site Location of Development Act, 38 M.R.S. § 484, the Natural Resources Protection Act, 38 M.R.S. §480-D, and the Wind Energy Act, 35-A M.R.S. §§ 3452-3458.

THEREFORE, the Board AFFIRMS the Department's denial of the permit application filed by CHAMPLAIN WIND, LLC to construct a 48 MW wind energy development, known as the Bowers Wind project, in Carroll Plantation and Kossuth Township, Maine, as described in Department Order DEP #L-25800-24-A-N, L-25800-TE-B-N and L-25800-IW-C-N. The Board DENIES the appeals of Champlain Wind, LLC and Douglas E. Humphrey and Bowers Mountain, LLC.

DONE AND DATED AT AUGUSTA, MAINE, THIS 5<sup>th</sup> DAY OF June, 2014.

BOARD OF ENVIRONMENTAL PROTECTION

By: Robert A. Foley  
Robert A. Foley, Chair



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

**Dated: March 2012**

**Contact: (207) 287-2811**

### SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's ("DEP") Commissioner: (1) in an administrative process before the Board of Environmental Protection ("Board"); or (2) in a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S.A. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S.A. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S.A. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This INFORMATION SHEET, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

### I. ADMINISTRATIVE APPEALS TO THE BOARD

#### **LEGAL REFERENCES**

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S.A. §§ 341-D(4) & 346, the *Maine Administrative Procedure Act*, 5 M.R.S.A. § 11001, and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 CMR 2 (April 1, 2003).

#### **HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD**

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days of the date on which the Commissioner's decision was filed with the Board will be rejected.

#### **HOW TO SUBMIT AN APPEAL TO THE BOARD**

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by the Board's receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner a copy of the appeal documents and if the person appealing is not the applicant in the license proceeding at issue the applicant must also be sent a copy of the appeal documents. All of the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

#### **WHAT YOUR APPEAL PAPERWORK MUST CONTAIN**

Appeal materials must contain the following information at the time submitted:

1. *Aggrieved Status.* The appeal must explain how the person filing the appeal has standing to maintain an appeal. This requires an explanation of how the person filing the appeal may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.
6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing on the appeal is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.
7. *New or additional evidence to be offered.* The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered by the Board in an appeal only when the evidence is relevant and material and that the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2.

#### **OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD**

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed the license normally remains in effect pending the processing of the appeal. A license holder may proceed with a project pending the outcome of an appeal but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

#### **WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD**

The Board will formally acknowledge receipt of an appeal, including the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, and any materials submitted in response to the appeal will be sent to Board members with a recommendation from DEP staff. Persons filing appeals and interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, a license holder, and interested persons of its decision.

## **II. JUDICIAL APPEALS**

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2; 5 M.R.S.A. § 11001; & M.R. Civ. P 80C. A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. Failure to file a timely appeal will result in the Board's or the Commissioner's decision becoming final.

An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S.A. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

### **ADDITIONAL INFORMATION**

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452 or for judicial appeals contact the court clerk's office in which your appeal will be filed.

---

**Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.**

---