Appeal filed by Champlain Wind, LLC

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September 4, 2013

VIA Electronic and U.S. Mail
Robert A. Foley, Chair
c/o Cynthia Bertocci, Executive Analyst
Maine Board of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Re: Champlain Wind, LLC's Appeal of Department Order
L-25800-245-A-N, L-25800-TE-B-N, L-25800-IW-C-N (denial)

Dear Chair Foley:

Enclosed please find Champlain Wind, LLC's Appeal of the Department of Environmental Protection's Order denying the Bowers Wind Project.

The Department held a two-day adjudicatory public hearing on the Bowers Project and therefore the record on appeal is extensive. In lieu of attaching hard copies of various excerpts from the administrative record, we are providing the attached initial list of key record evidence that we believe would be helpful for the Board to have before it as it considers this appeal. We expect others with an interest in the appeal as well as the Department may want to submit their own material for the Board's consideration. To minimize unnecessary duplication and facilitate preparation of an organized and logical set of material for the Board (either electronically or in hard copy), we will work with the Department and others with an interest in the appeal to finalize material for the Board's consideration. Please note that the attached list is preliminary and we request an opportunity to supplement it (with record material) based upon filings by others.

Thank you for your attention and consideration of this appeal.

Sincerely,

Juliet T. Browne

JTB/prf
Enclosure
cc: Commissioner Patricia Aho (via e-mail and U.S. Mail)
Neil Kiely (via e-mail only)
Bowers Service List (via e-mail only)

4628161

INDEX OF PROPOSED RECORD MATERIAL
CHAMPLAIN WIND, LLC

1. Pre-Filed Direct Testimony of David Raphael (Submitted 3/15/13)
2. Pre-Filed Rebuttal Testimony of David Raphael (Submitted 4/5/13)
3. Pre-Filed Direct Testimony of Kevin J. Boyle (Submitted 3/15/13)
4. Pre-Filed Rebuttal Testimony of Kevin J. Boyle (Submitted 4/5/13)
5. Pre-Filed Direct Testimony of Champlain Wind, LLC (Submitted 3/15/13)
6. James F. Palmer Part 2 Review of Bowers Project (Independent Analysis) (Dated 3/8/13)
7. James F. Palmer Review of Michael Lawrence & Associates' Bowers Wind Project Critique of Project Developer's VIA (Dated 4/12/13)

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CHAMPLAIN WIND, LLC	)
KOSSUTH TOWNSHIP, WASHINGTON	)
COUNTY, CARROLL PLANTATION,	)
PENOBSCOT COUNTY,	)
BOWERS WIND PROJECT	)
L-25800-24-A-N (denial)	)
L-25800-TE-B-N (denial)	)
L-25800-IW-C-N (denial)	)

CHAMPLAIN WIND, LLC'S APPEAL OF DEPARTMENT ORDER

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Exhibit A	Summary Table from Visual Impact Assessment of James F. Palmer dated March 8, 2013
Exhibit B	Summary Table from Pre-filed Direct Testimony of David Raphael from LandWorks dated March 14, 2013
Exhibit C	Summary Table from Pre-filed Direct Testimony of Kevin Boyle dated March 8, 2013
Exhibit D	Map Depicting the Ride the Wind Trail And Operating Wind Farms (Exhibit 15 to Champlain Wind, LLC Direct Testimony)
Exhibit E	Not admitted.

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CHAMPLAIN WIND, LLC KOSSUTH TOWNSHIP, WASHINGTON COUNTY, CARROLL PLANTATION, PENOBSCOT COUNTY, BOWERS WIND PROJECT L-25800-24-A-N (denial) L-25800-TE-B-N (denial) L-25800-IW-C-N (denial)	))))))))	CHAMPLAIN WIND, LLC'S APPEAL OF DEPARTMENT ORDER

Champlain Wind, LLC appeals the Order of the Department of Environmental Protection (the "DEP" or "Department") denying the Bowers Wind Project (the Order). Specifically, and for the reasons set forth below, the Applicant objects to and appeals from the Department's findings and conclusions regarding the Project's compliance with the scenic impact standard as reflected in Finding 6, Conclusion A under NRPA, and Conclusion B under Site Law.

INTRODUCTION

Champlain Wind, LLC ("Champlain" or the "Applicant") proposes development of a 48 MW wind energy development located in Carroll Plantation and Kossuth Township within the expedited wind permitting area (the "Project"). It is the right Project, in the right place, at the right time. Importantly, the Project enjoys the strong support of its host communities, Carroll Plantation, Kossuth Township, and Washington County. While wind development has been controversial in some communities, Carroll, Kossuth and Washington County have embraced the Project. Their strong support is a critical consideration that is entitled to, but was not accorded, substantial weight in the review process, including review of scenic impacts.

Additionally, while no development is without impacts, the Project is unique in that it avoids almost entirely the environmental and land use impacts typically associated with large-

scale development and that have been contentious in other projects. Specifically, the Project will not fill any wetlands or result in impacts to vernal pools and their buffers and, except for a *de minimis* impact to an upland buffer of a wading bird and waterfowl habitat, does not impact any significant wildlife habitat. The Project is sited on low elevation hills and it avoids impacts to sensitive plants or natural area communities, including subalpine habitat that has been of concern in higher elevation projects. The Project utilizes a short connection to the grid, thereby reducing the overall clearing and impacts associated with lengthier generator leads. The results of the avian and bat surveys indicate the site is low risk for potential impacts to those species. In light of this undisputed evidence, the Department correctly concluded that the Project satisfies all the standards governing impacts to wildlife, fisheries, and other natural resources.

The Project also meets the new more conservative sound limits and therefore does not present the conflicts that exist for projects in more densely populated areas. And, there are no predicted shadow flicker impacts beyond the Project boundary.

The only issue in this case is the potential impact of Project visibility on nine lakes located within eight miles of the turbines. As discussed below, the overwhelming record evidence as well as the Department's own findings establish that the scenic impacts are reasonable and meet the standard set forth in the Act. Moreover, when assessing whether the impacts here are reasonable the Department should have but did not, (i) take into account the policies and objectives of the Wind Energy Act, which specifically encourage the siting of wind projects in this location, (ii) balance the Project's scenic impacts with its significant energy, environmental and economic benefits, and (iii) consider the consensus view by the following diverse groups that visibility of Project turbines is reasonable and will not adversely impact recreation in the area:

CONSENSUS VIEW IN SUPPORT OF THE BOWERS PROJECT

Host Communities	Local and Statewide Sporting Organizations
• Carroll Plantation • Kossuth Township • Washington County	• Maine Snowmobile Association and local clubs • Maine ATV Association and local clubs • Sportsman's Alliance of Maine • Downeast Salmon Federation • Atlantic Salmon Federation • International Appalachian Trail
Sporting Camps Close to Wind Projects	**Tourism/Economic Development Organizations**
• Maine Wilderness Camps, sporting camp located on lake closest to Project and which runs ATV tours to Stetson for its sports • First Settler's Lodge near Stetson, which has views of the Stetson project and caters to fisherman on Baskahegan Lake, also in view of Stetson	• Aroostook County Tourism, which promotes turbines in its marketing material • Sunrise County Economic Council • Maine State Chamber of Commerce
Environmental Non-Profits	**Large Landowners**
• Conservation Law Foundation • Maine Audubon • Sierra Club • Environment Maine • Maine Lung Association	• Wagner Forest Management, which owns/manages the Sunrise Conservation Easement and the majority of land around key lakes at issue (Pleasant, Shaw, Scraggly, Junior) • Passamaquoddy Tribe, which has significant holdings around key lakes at issue (including Scraggly, Shaw and Junior) • Baskahegan Company, major landholder including land around the Stetson Project and Baskahegan Lake • Haynes, major landowner with holdings in Kossuth, Carroll and Lakeville

All Projects have impacts and all wind energy developments have significant visibility of turbines. The Bowers Project is unique because it has minimal environmental impacts and it

enjoys widespread support from divergent local, energy, environmental, and economic interests. Its scenic impacts must be considered within that overall context and the substantial record evidence that demonstrates turbine visibility will not adversely impact recreational uses in the area.

STANDING

The Applicant has suffered a particularized injury as a result of the Department's denial of the Bowers Project and therefore has standing to bring this appeal. Specifically, the decision adversely impacts the Applicant's legal rights, duties and privileges, including its right to make its intended use of real estate on which it holds significant real estate interests.[1]

STANDARD OF REVIEW

Pursuant to 38 M.R.S.A. § 341(4)(D), the Department's Chapter 2 regulations, and the decision of the Maine Supreme Judicial Court in Concerned Citizens to Save Roxbury v. Board of Environmental Projection,[2] the Board is not bound by the Commissioner's findings of fact or conclusions of law and may adopt, modify or reverse those findings or conclusions.

SUMMARY OF ARGUMENT

The evidence before the Department establishes that the Bowers Project meets the scenic impact standard of the Wind Energy Act. This evidence includes comprehensive evaluations by the Applicant's and the Department's scenic experts in which they applied each of the statutory review criteria and concluded that the scenic standard was met. Their conclusions are in accord with the experience of people recreating in Maine, including Maine's most significant recreational groups, who confirm that not only is turbine visibility not adversely impacting their experience, but in many instances wind projects are a point of interest and a recreational

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[1] 06-096 CMR 002(1)(B) (definition of aggrieved person) and 002(24) (persons who may appeal Department licensing decisions to the Board).

[2] 2011 ME 39, ¶ 16, 15 A.3d 1263, 1269-70.

destination. Additionally, in evaluating overall impacts the Department erroneously concluded that it could not consider the Project's benefits or the purpose of the Wind Energy Act in determining whether Project visibility crossed the threshold from reasonable to unreasonable. The Wind Energy Act, however, directs the Department to consider the objectives of the Act and the energy, environmental and economic benefits of a Project when evaluating scenic impacts. These considerations outweigh the potential adverse impact of visibility of turbines on the area lakes.

Even without consideration of Project benefits, the Department agreed with its expert that visibility of the Bowers Project would not unreasonably impact scenic character or uses relating to scenic character on any of the individual lakes at issue. This conclusion should have ended the inquiry. Inexplicably, the Department created a new standard – "aggregation of impacts" – and applying that standard for the first time concluded that overall Project impacts violated the Act's scenic standard. The new standard not only violates the clear language of the Wind Energy Act, which limits the analysis to visibility on individual resources, but it is also contrary to An Act To Ensure Regulatory Fairness and Reform that, among other things, prohibits agencies from applying rules that have not been adopted in accordance with the rulemaking procedures and protections of the Administrative Procedures Act. The Department's new standard and its use here also violate the constitutional safeguards to protect against arbitrary decisionmaking. Simply put, the Department may not, in the context of reviewing an individual application, create and apply a new standard.

The record evidence, including the expert testimony and the Department's own findings, establish that the Bowers Project does not compromise 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. Accordingly, the Applicant respectfully requests that the Board grant the appeal, reverse the Department's finding that the Project does not meet the scenic impact standard, and approve the Project.

ARGUMENT

I. THE WIND ENERGY ACT IS INTENDED TO PROMOTE WIND DEVELOPMENT IN MAINE

As reflected in both the Report of the Governor's Task Force on Wind Power Development (the "Task Force Report") and the language of the statute, the intent of the Wind Energy Act was to facilitate development of wind energy and thereby realize the significant energy, economic and environmental benefits associated with such development.[3] The Legislature recognized that wind energy development would have positive environmental, energy and economic benefits and established aggressive goals that were intended to bring about those benefits. In the words of Senator Bartlett, a member of the Task Force and Chair of the Utilities and Energy Committee at the time of the Act's passage, the Legislature set aggressive wind energy goals and modified the review process because "we wanted to drive the government in the regulatory process towards approval" of wind power projects.[4]

One of the specific tools for bringing about wind energy development and its attendant environmental, energy, and economic benefits was to identify specific areas for development and enact measures to encourage developers to site projects in such areas. Delineation of the so-called expedited permitting area was the result of a comprehensive, deliberate and open process in which input from regulatory agencies, environmental organizations, and members of the

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[3] Task Force Report at 8; 35-A M.R.S.A. §§ 3402.1, 3404.

[4] Transcript of Public Hearing beginning on April 30, 2013 and concluding on May 1, 2013 (hereafter "Tr.") at 598, 599.

public as well as the wind industry, was sought.[5] For projects sited within the expedited permitting area, a modified regulatory process applies that is intended to facilitate the permitting of such projects.[6]

Most relevant for this appeal, the visual impact standard was modified to reflect both the nature of the turbine visibility and to limit and clarify the Department's discretion and its scope of review. The Legislature recognized that turbines are necessarily a highly visible feature on the landscape and directed that such visibility is not alone a sufficient basis for concluding that scenic impacts are unreasonable.[7] Review of scenic impacts was also limited to an exclusive list of statutorily-defined scenic resources.[8] Additionally, the Act removed the "harmonious fit" standard of the Site Law and replaced it with the following test for assessing scenic impacts:

> 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.[9]

The reason for this change in the standard was because the Legislature recognized the difficulty that a wind energy project would have in meeting the "harmonious fit" standard and that a less stringent standard was necessary if the State was to meet its wind development goals.[10]

The Act also identifies six specific evaluation criteria (A through F) that must be considered by the agency in its review and which guide the exercise of agency discretion in its

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5 Bartlett/Fitts Direct Testimony (hereafter "Test.") at 2, 3; Tr. at 536-538.

6 E.g., Task Force Report at 5, 6; Bartlett/Fitts Direct Test. at 5-7.

7 35-A M.R.S.A. § 3452.3.

8 35-A M.R.S.A. § 3451.9, 3452.1 and 3.

9 35-A M.R.S.A. § 3452.1. This standard governs the Department's consideration of scenic impacts under both Site Law and NRPA. Id.

10 Tr. at 596 (testimony of Senator Bartlett indicating that the Legislature wanted a reduced visual impact standard: "we know the current test was too high").

application of the scenic standard.[11] These changes were intended to narrow the scope of review and provide more certainty and greater clarity to the regulated community and others with an interest in wind development (both those seeking to increase as well as those opposed to such developments).

While opponents have introduced multiple bills intended to undo the Act, the Legislature has rejected those efforts, thereby reaffirming its support for the Act's policies and goals.[12] There have been minor adjustments to the Act, including more specific requirements related to tangible benefits, but no changes to the scenic standard. Moreover, to date, the Department has not undertaken any rulemaking to further refine the scenic standard. The Act remains the law of the land and its scenic standard and the statutorily defined review criteria that must be considered in applying that standard govern this Project.

II. THE EVIDENCE ESTABLISHES THAT THE PROJECT MEETS THE ACT'S SCENIC STANDARD

The record evidence, including most importantly the undisputed expert testimony and the Department's own findings, establish that the Bowers Project meets the scenic impact standard of the Wind Energy Act. Specifically, the Department's expert and each of the Applicant's two experts concluded that there would not be an unreasonable adverse effect on scenic character or existing uses related to scenic character for any of the nine regulated lakes with visibility of the Project. Their conclusions were reached after a careful and thorough review of the evidence and application of each of the statutory review criterian. The Department agreed with its expert and likewise concluded that when considered individually, visibility of the Bowers Project does not cross the threshold from reasonable to unreasonable for <u>any</u> of the nine regulated lakes.

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[11] 35-A M.R.S.A. § 3452.3.

[12] Tr. at 566-567 (no changes to the core principles of the Act, and all 13 bills introduced last session in an effort to do so were defeated).

Moreover, the conclusions of the experts are in accord with the evidence that people recreating in Maine are not adversely impacted by visibility of turbines. This evidence includes the only post-construction wind development intercept survey conducted in Maine, the testimony from Maine's largest recreational groups, many of whom view wind turbines not as a negative impact on the landscape but as an attractive destination, and economic development groups that have witnessed and would like to increase the tourism opportunities associated with wind development in Maine.

A. The Expert Testimony Is In Accord And Establishes That The Bowers Project Meets The Act's Scenic Standard

The State's scenic expert, James Palmer, and Applicant's scenic expert, David Raphael, systematically applied the statutory criteria and concluded that there is no unreasonable adverse impact on any single scenic resource of state or national significance, and that the Project meets the Act's scenic standard. Both experts prepared comprehensive reports that made specific findings on each of the factors that must be considered when evaluating scenic impacts under the Act. Attached as Exhibits A and B are summary tables from Dr. Palmer's and Mr. Raphael's respective reports that (i) identify scenic resources of state or national significance within the study area that have visibility of the generating facilities, (ii) list the evaluation criteria that must be considered when evaluating scenic impacts, (iii) give a rating of None or Low to High for application of each of the evaluation criteria to the individual scenic resources, and (iv) provide an overall scenic impact rating of Low to High for each individual resource.

While there has been an evolution in the interpretation and application of the statutory criteria over the course of multiple proceedings before both the Department and the former Land Use Regulation Commission, key points of agreement among scenic experts have crystallized for determining whether impacts have crossed the threshold from reasonable to unreasonable. Both

Dr. Palmer and David Raphael review each of the statutory criteria and their complete reports and testimony are available. The following summarizes key factors relating to scenic impacts of the Project.

First, while the Project area has landscape qualities that are appealing to those who live and travel to the region, both experts concluded that neither the Project ridges nor surrounding lakes exhibit features associated with high scenic quality. Specifically, the Project ridges are not steeply rising; they are not visual focal points; they are not unique landforms; the ridges around the Project lakes are generally rolling; and neither the Project ridges nor area landscape possess dramatic relief or prominent landforms.[13] The lakes and surrounding ridges are of an average scenic quality for lakes in Maine.[14]

Second, Project visibility occurs in a small portion of the overall landscape, thereby reducing its impact on recreational users. Both Dr. Palmer and David Raphael agree that one of the key factors to consider in evaluating visual impacts is the percentage of the landscape in which Project visibility exists or, the "angle of view."[15] A turbine array that occupies a narrow angle of view typically has less of an impact than an array that occupies a wider angle of view. In all instances, visibility of the Project occurs in a relatively narrow portion of the overall landscape, ranging from 7° to 10.25° for four of the lakes, between 15° - 17.25° for two of the lakes, and 36.4° to 44.7° for three of the lakes.[16] Moreover, because these are based on maximum Project visibility on each lake, the angle of view will decrease as the number of visible

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[13] March, 2013 Palmer Part 2 Review of VIA at 19 (landscape is of "typical" scenic quality), 23 (area is of "typical" but not "spectacular" scenic quality); April, 2013 Palmer Review of Lawrence Report at 2 (ridges surrounding the lakes are not "steeply rising" or "unique focal points," do not offer "a distinct memorable profile", but instead are "rolling"); Raphael Direct Test. at 6, 7; VIA at §§ 3.7 and 4.3.

[14] E.g., March, 2013 Palmer Part 2 Review of VIA at 19; Raphael Direct Test. at 6, 7.

[15] E.g., Raphael Direct Test. at 22; Tr. at 209.

[16] See Applicant's Response to the Fourth Procedural Order, Table 9 (summarizing maximum angle of view from each of the Project area lakes); Raphael Direct Test., Section VI at 34-47 (lake-by-lake analysis including data on angle of view). Note that Tables 8 and 9 of the Applicant's Response to the Fourth Procedural Order mistakenly identified the angle of view from the Pleasant Lake Boat Launch as 37.55°. The correct number is 30°. VIA at 82.

turbines decreases and/or the location of the viewer changes.[17] Additionally, the undisputed evidence establishes that the views of recreational users of the lakes are not directed to the Project ridges, but extend to the full 360 degree panorama, thereby reducing further the impact of Project visibility.[18, 19]

Third, both Dr. Palmer and David Raphael reviewed the evidence and concluded that the area lakes are not highlighted in tourist publications either for their scenic value or as a significant tourist destination.[20] Although at times PPDLW claimed (without supporting data) that the area was a tourist destination, they conceded that in fact the lakes receive very low use and are not host to significant numbers of tourists.[21] Thus, PPDLW's claim that Project visibility will result in a significant adverse impact to the tourist economy is simply wrong. The undisputed evidence establishes that very few people will even see the Bowers Project from the Project lakes.

Fourth, both Dr. Palmer and David Raphael reviewed the scope and scale of Project visibility and took into account factors such as the numbers of visible turbines, the distance to visible turbines, and the percentage of the viewshed occupied by turbines. David Raphael concluded that the scope and scale of Project visibility on the lakes ranged from Low to Medium; Dr. Palmer concluded that the scope and scale of Project visibility ranged from Low to Medium for all the lakes except for Pleasant, which he concluded was High-Medium. In no instance was

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[17] See, e.g., Applicant's May 17, 2013 Response to Fourth Procedural Order, Table 6 (identifying number of turbines visible from overall percentage of each lake); Raphael Direct Test., Exhibit 4 page 2 of 2 (viewshed map).

[18] Raphael Pre-Filed Direct Test. at 53; Tr. at 210-212 (Palmer testimony that all of the Project area lakes have 360 degree views and there is no distinctive scenic feature in the surrounding landscape or what one would call "the view").

[19] The Wind Energy Act scenic standard is whether the development "significantly compromises views from a [SRSNS] . . . ." 35-A M.R.S.A. § 3452.1. In this case the Project occupies no more than 44.7° of 360° views. Given this, Project visibility does not come close to "significantly compromising" views.

[20] VIA at § 2.3.4 (listing data sources reviewed); Raphael Direct Test. at 27-29 (summary of results of data review); Raphael Rebuttal Test. at 13, 29; March, 2013 Palmer Part 2 Review of VIA at 19, 20; Tr. at 243.

[21] E.g., Campbell Direct Test. at 9, 12, 13; Tr. at 426 and Lawrence Report at 15, 54; Campbell Rebuttal of Raphael Test. at 8 (low use contributes to the value of these lakes), 9 (lakes "never crowded" . . . "nature of being lightly used enhances their scenic character . . . and value to the State").

the scope and scale of project visibility High. Dr. Palmer specifically evaluated whether there were any locations (particularly on Pleasant Lake) where the turbines would be perceived to "loom" over the viewer and concluded that in no instance would the turbines do so.[22] David Raphael employs a similar concept but refers to it as visual dominance, and he concluded that in no instance would the Project turbines be visually dominant, including on Pleasant Lake.[23]

Fifth, both Dr. Palmer and David Raphael reviewed the results of user intercept surveys conducted at Junior, Scraggly and Pleasant lakes in evaluating Criterion C (expectations of the typical viewer) and Criterion E (extent, nature and duration of use and impact of the Project on such uses). Dr. Palmer has recommended and therefore applicants have conducted pre-construction intercept surveys (also referred to as perception surveys) in which recreational users are shown visual simulations and asked to assess what impact turbine visibility would have on such things as scenic quality, their recreational experience, and their likelihood to return in the future. The use of such surveys in Maine is a new development and the Department has not issued any guidance on their role in the review process. Accordingly, the Applicant retained Dr. Kevin Boyle, a nationally recognized expert in the use of such surveys. He helped design the surveys conducted for this Project and evaluated the significance of their results, as well as the results of prior ones done by the Portland Research Group.[24] As Dr. Boyle cautioned, while they may be a useful tool, perception surveys are not a perfect gauge of and likely overestimate project impacts.[25]

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22 March, 2013 Palmer Part 2 Review of VIA at 7-9; Tr. at 207-208.

23 Raphael Direct Test. at 36-37.

24 Boyle Direct Test. at Section V.

25 Boyle Direct Test. at Section V. In its Order the Department states it gave little weight to the Applicant's "hypersensitivity" argument. Order at 25. As Dr. Boyle explained, it is well established in the literature that respondents in perception surveys may employ certain strategies that have the effect of overestimating the likely impacts of an action. These strategies include the precautionary strategy (which results in respondents providing more conservative responses to questions involving future development) and the hyperdefensiveness strategy (where the fear of change leads to more negative responses). These strategies are not unique to the Bowers surveys but, as

Importantly, as shown on Exhibit C, the combined Bowers survey results are in line with the results of other surveys for permitted wind projects.[26] Specifically, 55% of the respondents said that the Project would have no effect or a positive effect on their experience, and 80% of the respondents said that the Project would have no effect or a positive effect on their likelihood to return. Moreover, with respect to Pleasant Lake, the resource the Department concluded had the greatest potential scenic impact, the survey results are even stronger: **70%** of those respondents said the Project would have no effect (53%) or a positive effect (17%) on their visit, and **87%** of those respondents said the Project would have no effect (30%) or a positive effect (57%) on their likelihood to return.[27] The Board recently cited with approval that the majority of Sapanoc Pond users (59%) would not be adversely impacted by the Passadumkeag Project (the % here is greater at 70%) and 71-74% of Sapanoc Pond users would return (the % here is greater at 87%).[28]

Finally, both Dr. Palmer and David Raphael provided an assessment of the overall scenic impact to each of the individual resources. Although their methodology for determining the overall scenic impact to the resource differs, both Dr. Palmer and David Raphael concluded that in no instance was the impact unreasonable. Dr. Palmer concluded that the overall scenic impact ranged from Low + (on Pug Lake) to Medium (on the remaining lakes with Project visibility) and, as a result, although the Project has an adverse impact, he concluded that it did not cross the

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explained by Dr. Boyle, are normal coping strategies that occur with perception surveys generally. Boyle Direct Testimony at 8-10; Tr. at 50. Thus, the Applicant is not claiming that the Bowers users are hypersensitive, only that users in perception surveys tend to overestimate potential impacts.

[26] Exhibit C presents the combined results of the surveys done at Pleasant (30 intercepts), Scraggly (13 intercepts) and Junior (26 intercepts) lakes. These lakes are in close proximity to one another and share certain similar attributes and therefore the consolidated numbers were presented by Dr. Boyle. The lake-by-lake results are also provided both in the Kleinschmidt report as well as in Dr. Boyle's report and direct testimony. See, e.g., Boyle Direct Test. at 18-19. The Department Order erroneously states that the survey results for Junior, Pleasant and Scraggly lakes indicated that 66%, 57% and 62% of the respondents would be less likely to use the lakes if the Project were built. Order at 20. In fact, those numbers are 27%, 14%, and 23%. Boyle Direct Test. at 16, Table 3; September, 2012 Bowers User Surveys at 36 (Table 20).

[27] September, 2012 Bowers User Surveys at 33 (Table 16) and 36 (Table 20).

[28] Findings of Fact and Order on Appeal of Passadumkeag Project, L-25597-24-C-N (August 1, 2013) at 14.

threshold to unreasonably adverse.[29] David Raphael concluded that the overall scenic impact ranged from Low (on several lakes) to Medium (on Pleasant and Scraggly lakes) and, like Dr. Palmer, concluded the scenic impact was not unreasonably adverse on any of the nine lakes.[30]

Dr. Boyle also evaluated the 2012 Bowers Surveys, as well as a prior telephone intercept survey conducted by the Portland Research Group in connection with the original Bowers project, and two surveys done at Baskahegan Lake, the first in 2010 and the second in 2012. The 2012 Baskahegan survey was specifically designed to evaluate the impact that visibility of the Stetson wind project was having on recreational users of Baskahegan Lake and, as discussed below, provides compelling evidence that that visibility of turbines is not adversely impacting scenic quality or recreational use and enjoyment of lake users. Dr. Boyle concluded that the Bowers Project would have a minimal impact on user perceptions and use of the Project lakes, and certainly less of an impact than is reflected in the Bowers Survey results.[31] Moreover, as Dr. Boyle testified, the four different studies, while not designed such that a statistical test of convergent validity can be applied, provide common insights that establish the credibility and robustness of the insights he draws from their results.[32] Simply put, the different surveys provide complementary results, lending strength to their reliability.

There is no expert testimony that contradicts the conclusions reached by the State's expert, Dr. Palmer, the Applicant's scenic expert, David Raphael, or the Applicant's expert on user surveys, Dr. Boyle. Although he has training and experience as a landscape architect, Michael Lawrence, who testified for PPDLW, did not provide expert testimony in this

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29 E.g., March, 2013 Palmer Part 2 Review of VIA at 41-42.
30 Raphael Direct Test. at 48 (Table 3) and 52-54.
31 Boyle Direct Test. at 3.
32 Boyle Direct Test. at 10.

proceeding and, in any event, his analysis does not apply the statutory criteria set forth in the Act.[33] Dr. Palmer describes the Lawrence report as follows:

> [Michael Lawrence] has presented a selection of photographs that highlight the scenic qualities he so highly values, and he has prepared a critique that uses evocative and picturesque language to emphasize his concerns. However, he has been unable to link his presentation to the WEA Evaluation Criteria, which must form the basis for the DEP's findings and decision. . . . [Michael Lawrence] appears to simply assert that visible wind turbines cause scenic degradation. However, the WEA is clear that an analysis must include more than simple visibility and the assertion that it is unreasonable. Other than photographs, [Michael Lawrence] presents little to no data and no real analysis.[34]

When asked to provide the Department staff with additional information on how he reached his conclusions, Mr. Lawrence described how he felt when he came to the lakes, the memories that the experience evoked, and seeing a bald eagle for the first time.[35] Notably, he did not provide any substantive analysis related to the potential impact of Project visibility based on the statutory criteria, nor did he provide any specific criticism of the work done by LandWorks, Kevin Boyle, or the State's expert, James Palmer, each of whom undertook a review based on the criteria of the Wind Energy Act and based on that review concluded there would not be an unreasonable adverse impact on scenic character or existing uses related to scenic character.

In summary, three experts, including the Department's expert who has been the State reviewer on eight expedited wind energy projects, applied the statutory review criteria and concluded that the Bowers Project meets the scenic standard of the Wind Energy Act. There is no qualified contrary expert testimony.

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[33] Gary Campbell, on behalf of PPDLW, also testified regarding scenic impacts. While he reviews the statutory review criteria, Mr. Campbell acknowledged he has no training as a scenic expert witness. Tr. at 445.

[34] Palmer Critique of Lawrence Report at 13; Tr. at 218 (same).

[35] Tr. at 518-521.

B. The Experts' Conclusions Are In Accord With The Experience Of People Recreating In Maine

As reflected on the map attached as Exhibit D, Maine now has ten operating wind energy projects, located from the Western Mountains in Franklin County to northern Aroostook County. As a result, we have actual evidence upon which to assess the impact of turbine visibility on recreational users. And while regulators and visual experts alike assume that turbine visibility will negatively impact recreational use and enjoyment, the experience of people recreating in Maine in full view of existing projects tells a different story. Visibility of turbines is not adversely impacting perceptions of scenic quality or recreational use. To the contrary, for an increasing number of recreational users turbine visibility is a recreational draw, not detriment.

The evidence that people recreating in and around existing projects in Maine are not adversely impacted by visibility of turbines was not relied on by either Dr. Palmer or the Department in their respective analyses,[36] but it reinforces the conclusions reached by both that the Bowers Project will not have an unreasonable adverse impact on scenic quality or recreational uses related to scenic quality on the nine area lakes.

1. The Baskahegan Survey Provides Compelling Evidence That Significant Turbine Visibility Does Not Adversely Impact Scenic Quality or Recreational Uses Related To Scenic Quality

To obtain objective data on the impact of actual as opposed to potential future turbine visibility on scenic quality and recreational use and enjoyment, the Applicant commissioned the first and to date the only known post-construction intercept survey in Maine. The State's expert has advocated for such a study to provide data on actual, as opposed to hypothetical, impacts that turbine visibility has on recreational users. The survey built on earlier data obtained in

[36] See Order at 25 (the Department gave little weight to the post-construction Baskahegan survey); Tr. at 228-229 (Palmer's analysis based solely on information in his report and he did not rely on Baskahegan results to inform his conclusions).

connection with a study on the Baskahegan Lake watershed. Baskahegan was selected because it has significant visibility of the existing Stetson wind farm and is located five miles from the closest turbines. Specifically, the 55 turbines that make up the Stetson project are visible from Baskahegan Lake at distances ranging from 5 to 9.2 miles; turbines are visible from 90% of the lake; and, more than 30 turbines are visible from 68% of the lake.[37] As Dr. Boyle testified, Baskahegan is particularly relevant for drawing insights on how users of the Project lakes might react to turbine visibility because it is in the same geographic region, it shares common users, and both lakes are host to fishing and recreational boating activity.[38]

The results of the Baskahegan Survey provide compelling proof that visibility of turbines is not adversely impacting scenic quality or recreational users of that resource. Specifically:

- 93% of the respondents said the turbines had no effect or a positive effect on their experience (89% said no effect);
- 93% said the turbines would have no effect on their likelihood to return; and
- 81% said the turbines had no effect or a positive effect on scenic quality (69% said no effect).[39]

The Baskahegan results could not be clearer. Visibility of turbines is not having a significant adverse impact on recreational users of a lake that shares many similar attributes to other undeveloped lakes in Maine. Moreover, a significant percentage (59%) of the Baskahegan Lake users also use the Project lakes, thereby providing additional evidence on how users of the Project lakes will react to visibility of the Bowers Project.[40]

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37 October, 2012 Baskahegan Lake User Surveys at Section 3.0 and Figures 1 and 2.

38 Boyle Direct Test. at 22. While the Department gave little weight to the Baskahegan results, its basis for doing so is fundamentally flawed. Order at 25. Dr. Boyle explained that although there was not a pre-construction survey conducted at Baskahegan, from a statistical standpoint (and drawing an existing use data from 2010), there was no attrition in use as a result of the Stetson Project. Tr. at 60-61. Also, although Baskahegan is not a statutorily defined scenic resource, it shares many key attributes and overlapping users with the Project lakes and, as concluded by Dr. Boyle, is a relevant comparison Tr. at 58-59. Finally, although the survey location, at the boat launch, is more than eight miles from the Stetson Project, the surveys were conducted as users left the lake, after recreating in areas more proximate to the turbines. Tr. at 57-58.

39 October, 2012 Baskahegan Lake User Surveys, Tables 10 and 12 at 19, 21.

40 October, 2012 Baskahegan Lake User Surveys, Table 4 at 16.

2. Recreational Groups And Economic Development Organizations Confirm That Turbine Visibility Does Not Detract And In Many Instances Enhances Recreational Opportunities

Importantly, the Baskahegan results are consistent with the testimony and evidence from recreational groups with the largest and most significant membership in Maine. Specifically, the Maine Snowmobile Association represents an industry with an economic impact estimated to exceed $300 million annually in Maine, and whose clubs groom and maintain approximately 14,500 miles of trails in Maine.[41] Its Executive Director, Bob Meyers, testified in support of what he characterizes as a "model" project, and stated that wind projects are viewed by riders as something new and positive and in many instances become destinations for riders.[42] Letters of support were also submitted by several snowmobile clubs who operate in areas that host existing projects, including Backcountry Snowmobile Club, Quad County, Lincoln Snowhounds, and Lee Mogul Pounders.[43] Based on the popularity of wind projects as a destination for snowmobilers and in response to their request, the Applicant proposed creation of a trail linking all the wind farms in the State. The intent is to attract in-state and out-of-state riders to ride each of the links over multiple trips, thereby drawing increased tourism and business to local restaurants, lodgings, convenience stores and other local businesses in economically challenged areas.[44] The proposal has been enthusiastically embraced and almost 300 people signed a petition supporting its creation and the business and recreational opportunities it will create.[45]

ATV Maine is the statewide organization that represents the interests of ATV riders, which is the fastest growing outdoor recreational group in Maine. The last study, done in 2004,

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41 Tr. at 627-628 (Bob Meyers, Maine Snowmobile Association).

42 Tr. at 627-630 (Bob Meyers).

43 E.g., undated letter from Blain Batchelder, Jr. (Backcountry Snowmobile Club) to Jessica Damon; undated letter from Kevin O'Brien (President Quad County Snowmobile Club) to Jessica Damon.

44 Champlain Direct Test. at 30-31.

45 Champlain Direct Test. At 31 and Exhibit 17.

estimated that at that time the industry contributed more than $220 million annually to the Maine economy. The organization and its local clubs maintain over 6,000 miles of ATV trails in Maine and the collective experience of its members is that wind projects do not detract from the recreational experience, but instead serve as destination points for riders. The Association testified in support of the Project and letters of support were also submitted by a number of local ATV clubs operating in areas of existing wind projects. As noted by ATV Maine's Executive Director, the collective experience of ATV riders is "that rather than detracting from our enjoyment, wind projects have become popular places for ATV riders to visit. They are a favored destination for both new riders to the area as well as local club members . . .We hope that you will take our views into account as you evaluate any potential impact of people seeing the Bowers wind turbines while recreating in the area."[46]

The Sportsmen's Alliance of Maine (SAM), which is Maine's largest sportsman's organization and includes more than 10,000 members, testified in support of the Project. Its mission is to promote conservation of Maine's wildlife resources and advocate for hunters, anglers, trappers and gun owners throughout the State.[47] George Smith, former Executive Director, also testified that visibility of the Bowers Project would not adversely impact the fishing business out of Grand Lake Stream or drive anglers or other sportsmen away. George Smith is particularly well qualified to opine on sportsmen issues as he served for 18 years as SAM's executive director and another 17 years on the SAM board,[48] and is an avid and respected outdoor writer and columnist.

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[46] Undated Letter from Dan Mitchell, ATV Maine, to Commissioner Aho; Tr. at 277-278 (David Phillips, ATV Maine).

[47] November 8, 2012 Letter from David Trahan, Executive Director of SAM to Commissioner Aho; Tr. at 660 (Gerry Lavigne, SAM Board Member).

[48] Direct Testimony of George Smith.

George Smith's conclusions are echoed in the letters and testimony from other groups representing the interests of fishermen, including the Downeast Salmon Federation and the Atlantic Salmon Federation, both of which said they don't believe seeing turbines in the distance is incompatible with their members' interests.[49]

Similarly, tourism organizations and economic development organizations such as Aroostook County Tourism, Sunrise Economic Council, and the Maine State Chamber of Commerce testified that wind projects are an economic and tourist draw, not detriment.[50]

3. The Experience Of Sporting Camps Located Near Or In View Of Existing Wind Projects Demonstrates The Compatibility Of Those Uses

Finally, the experience of two commercial sporting camps located near or with clear views of existing wind projects demonstrates the compatibility of wind projects with those businesses. First Settlers Lodge in Danforth is located approximately seven miles from the Stetson project. Visitors to the lodge include fishermen, hunters, snowmobilers, and ATV riders. Mr. Stephen Mine, owner of the lodge, testified in support of the Project and estimated that "at least 90 percent of the people that visit our lodge [which has a] very good view of [Stetson] think of it as a point of interest, not as a negative."[51] Another supporter, Maine Wilderness Camps, is located on Pleasant Lake and is the closest sporting camp to the Bowers Project. It also manages the campground on the south side of the lake. While most of their customers come for fishing, in

[49] March 28, 2013 Letter from Andrew Goode (Atlantic Salmon Federation) to Jessica Damon; March 10, 2013 Letter from Dwayne Shaw (Downeast Salmon Federation) to Jessica Damon.

[50] E.g., January 30, 2012 Letter from James Bennett (the "Mars Hill wind farm is not a detraction from tourism but instead is something we feature prominently in our tourism promotions") to Jessica Damon; December 13, 2012 Letter from Harold Clossey ("popularity of wind farms as destinations for [snowmobile] rides creates tremendous opportunity to promote tourism in our rural area") to Commissioner Aho; Tr. at 336-339 (Ms. Connie Gemmer, reading statement by Dana Connors); November 19, 2012 and April 26, 2013 Letters from Maine State Chamber of Commerce.

[51] Tr. at 267 (Stephen Mine).

recent years a popular side activity has become ATV tours to see the nearby Stetson project.[52] As the sporting camp closest to and with the greatest visibility of the Bowers Project, Maine Wilderness has the most to lose if visibility adversely impacts recreational use. Their belief (based on experience and customer feedback) that it does not, speaks volumes.

C. Testimony That The Project Would Unreasonably Impact Grand Lake Stream Guides And Sporting Camps Was Unsubstantiated

The majority of opposition to the Bowers Project comes from guides and commercial sporting camp owners in the Grand Lake Stream area. While Grand Lake Stream attracts tourists for hunting, boating, and other activities, it is located approximately 18 miles from the Bowers Project, well beyond the statutory eight-mile area for assessing scenic impacts.[53] Moreover, the record evidence establishes, not surprisingly, that the majority of fishing and guiding activity occurs not on the Project lakes, but is centered around West Grand Lake, Tomah Stream, and the St. Croix River.[54] None of these is within eight miles of the Project.

Moreover, while there was unsubstantiated testimony that the guides use the Project lakes, there was little if any specific data on level of use by the guides.[55] In contrast, the objective data, including from the Bowers Surveys on Pleasant, Scraggly and Junior lakes, as well as boat counts conducted in 2011 and 2012 on Junior Stream, documents that there is very little guiding activity occurring on the Project lakes.[56] This data is confirmed by the owners of the only two sporting camps located on those lakes, both of whom testified that they have

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52 October 5, 2012 Letter from Charlotte Brooks and William Bowes (Maine Wilderness Camps) to Jessica Damon; see also Tr. at 360 to 364 (Test. of Roger Severance); December 9, 2012 Letter from Roger Severance (leads trips from Maine Wilderness Camps specifically to see the Stetson turbines).

53 Raphael Direct Test. at 7.

54 Tr. at 417-421, 454.

55 E.g., PPDLW Direct Test. At 22, 28 and Exhibits K and M.

56 September, 2012 Bowers Surveys, Tables 2, 4, 6 at 13, 21, 25.

observed very little if any use of those lakes by guides.[57] As a result, the concerns voiced by the guides and sporting camps in and around Grand Lake Stream must be weighed appropriately. It is only use of the Project lakes that is at issue and there was no evidence of significant use by these groups of the Project lakes, nor was there substantial evidence that the use that does occur would be unreasonably adversely impacted. [58]

Finally, a number of Maine guides support the Project and voiced what most fishermen know - - it is the fishing that counts. For example, the owner of a lodge on Junior Lake who is also a Registered Maine Guide does not believe that the Project will adversely impact his business or recreational users of the lake. He and his wife asked their clients if "they would return if they could see wind turbines and the response was positive." Their clients are "not concerned too much with the wind towers at all. They're interested in catching fish … and their primary concern is shoreline property, the appearance and setback. As long as the shoreline is nicely maintained and they can catch fish, they will come."[59] Likewise, House in the Woods, in Lee, Maine, runs outdoor retreats for veterans and their family members, and its director Paul House understands that "change can be a little scary, not knowing whether things will work out or not." He does not think that the wind turbines will spoil the view because "when our veterans or I are hunting or fishing, we are too busy looking down and concentrating. We are not focused on the ridgeline."[60] Dave Conley, a Master Maine Guide, also expressed support for the Project. He leads numerous canoe trips within view of Stetson and "does not see any negative impact from a recreational standpoint."[61]

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[57] October 5, 2012 Letter from Charlotte Brookes and William Bowes to Jessica Damon (Pleasant Lake); May 7, 2013 Letter from Lil Caret and Wil Rafuse (Junior Lake); Tr. at 356-357 (Test. of Wil Rafuse).

[58] The guides and sporting camp owners' fear of economic injury cannot be considered under the Site Law, which does not regulate competing economic interests. In re Spring Valley Dev., 300 A.2d 736, 751 (Me. 1973).

[59] May 7, 2013 Letter from Lil Caret and Wil Rafuse; Tr. at 356-357 (Test. of Wil Rafuse).

[60] Undated Letter from Paul House (received by DEP, November 12, 2012).

[61] Tr. at 349 to 351 (Test. of Dave Conley); October 31, 2012 Letter from Dave Conley.

D. The Department's Own Findings Establish That The Scenic Standard Is Met

The Department also concluded that the impact of Project visibility on any single lake was not unreasonable. Specifically, the Department agreed with Dr. Palmer that the overall impact of Project visibility on seven of the lakes was Medium (Duck Lake, Junior Lake, Shaw Lake, Keg Lake, Scraggly Lake, Bottle Lake, and Sysladobsis Lake) and one of the lakes was Low (Pug Lake).[62] The Department partially disagreed with Dr. Palmer that the impact on Pleasant Lake was Medium, concluding that although the impact was Medium, it was close to, but did not reach, High.[63]

In any event, while the Department disagrees with Dr. Palmer on the extent of the impact on Pleasant Lake, like Dr. Palmer, the Department "ultimately concluded that Pleasant Lake would not have an overall scenic impact rating of High."[64] Like Dr. Palmer, the Department concluded that when considered individually and taking into account each of the statutory review criteria, in no instance does Project visibility cross the threshold from adverse to unreasonably adverse for any of the Project lakes. Therefore, the Department's own findings compel a conclusion that the Project satisfies the Act's scenic standard. Moreover, the Department reached its conclusion of no unreasonable adverse impact without consideration of the Baskahegan results or the policies and objectives of the Wind Energy Act, and without balancing scenic impacts with the Projects benefits, all of which it was required to do.

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[62] Order at 23, 24. The Order expressly agrees with Dr. Palmer that the impact is Medium on seven of the lakes and appears to agree with Dr. Palmer that the impact on Pug Lake is Low. See Order at 24, § 4.

[63] Order at 23. The Department did so in part because of its conclusion that Pleasant Lake was 2.4 miles from the closest turbine "and therefore the turbines would appear large and would dominate the viewshed from the lake." Order at 23. In fact, with the exception of a very small portion of the lake, the turbines visible from Pleasant Lake are more than three miles away. E.g., Raphael Direct Test. Exhibit 4, page 2 of 2 (viewshed map). The impact of turbine visibility is diminished at distances greater than three miles, as evidenced by the existence of a rebuttal presumption that a visual impact assessment is not required for those portions of a development's generating facilities located more than three miles from a scenic resource of state or national significance. 35-A M.R.S.A. § 3452.4

[64] Order at 23.

III. THE DEPARTMENT FAILED TO CONSIDER THE OBJECTIVES OF THE WIND ENERGY ACT OR UNDERTAKE THE BALANCING THAT THE ACT EXPRESSLY REQUIRES WHEN ASSESSING SCENIC IMPACTS

Although the Department found that no impact on any Project Lake was High, it failed in its lake-by-lake scenic impact analysis or consideration of overall Project scenic impacts to consider the policy objectives of the Wind Energy Act or undertake the balancing of benefits and impacts that the statute requires. Indeed, the Department concluded that it was not "allowed under the WEA to balance a project's potential scenic impacts with the project's potential benefits." [65] In fact, the Act requires the agency to do so and the Department's failure here constitutes legal error. Moreover, consideration of the Act's policy objectives and a balancing of the Project's benefits with its impacts reinforce the conclusions reached by experts and laypeople alike that the scope of *Project visibility is not unreasonable and is well within what is contemplated under the Act.*

A. The Department Is Required But Failed To Consider The Policy Objectives Of The Wind Energy Act In Assessing Scenic Impacts

As discussed above, the Wind Energy Act includes six evaluation criteria (A through F) that must be considered by the Department in its review and that guide the exercise of agency discretion in its application of the scenic standard. Criterion D expressly requires the agency to consider "the wind energy development's purpose and the context of the proposed activity" in assessing scenic impacts.[66] In its Order the Department does not discuss Criterion D, nor is there any evidence that the Department considered it.

Under the legal rules governing statutory construction, however, this criterion cannot be superfluous and meaningless.[67] It must be construed and applied "in light of the subject matter,

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65 Order at 26.

66 35-A M.R.S.A. § 3452.3.D

67 Blue Yonder, LLC v. State Tax Assessor, 2011 ME 49, ¶ 10, 17 A.3d. 667, 671.

purpose of the statute, and the consequences of a particular interpretation."[68] When asked by the Department during the hearing what the meaning of Criterion D was, Senator Bartlett testified that the purpose and context has to do with the "combination of the purpose of the Act which is very, very aggressive wind energy goals and it was set very aggressively because we wanted to drive the government in the regulatory process towards approval."[69] Representative Fitts answered similarly, stating that "you have to take into account the balancing – and that is part of this – the balancing that is required when you consider all of the other aspects of a project and the visual in the same thought process."[70] As Senator Bartlett and Representative Fitts testified, when applying the visual impact standard and, in particular, determining whether the impacts have crossed the threshold from reasonable to unreasonable, the agency must take into account that this is a form of development that the law seeks to encourage and is necessary to achieve the State's wind energy goals.[71]

In addition to being expressly required pursuant to Criterion D, a balancing is inherent in application of any "reasonableness" standard.[72] Evaluation of scenic impacts and consideration of whether an impact is reasonable or unreasonable cannot occur in a vacuum, but is part and parcel of an overall balancing that takes into account the purpose and objective of the underlying regulatory scheme.

B. The Balancing Of Local, Environmental, Energy And Economic Interests Weighs Strongly In Favor Of Approval

The balancing in this case weighs heavily in favor of approval as the Bowers Project will advance the State's progress in meeting its wind energy goals and, importantly, is supported by

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68 Home Builders Ass'n of Maine, Inc. v. Town of Eliot, 2000 ME 82, ¶ 14, 750 A.2d 566, 571.

69 Tr. at 598-599.

70 Tr. at 599.

71 Bartlett/Fitts Direct Test. at 6.

72 Uliano v. Bd. of Envtl. Prot., 2009 ME 89, ¶ 22, 977 A.2d 400, 410 ("a balancing inheres in any reasonableness inquiry").

its host communities, the landowners who own the vast majority of the land surrounding the Project area and lakes within eight miles, the State's most significant recreational organizations, the State's leading energy and environmental organizations, and the many businesses that will benefit from construction and operation of the Project. The Project will result in significant energy, environmental and economic benefits with minimal environmental impacts, and scenic impacts that have been demonstrated to be well within the range of what is allowed under the Act.

1. The Interests Of The Host Communities Are Entitled To Substantial Weight

To the extent that visibility of turbines is determined to have a negative impact (and as described above there is substantial evidence that the impact is not negative), the Department should have considered the interests of the host communities in determining whether the impacts are unreasonable. Here, the host communities of Carroll Plantation, Kossuth Township, and Washington County support the Project.[73] These communities are familiar with the turbines at Stetson and Rollins, which are visible from their communities, and are in a position to make an informed decision to support the Project.[74] Anita Duerr, the Carroll Plantation Town Clerk, presented a petition to the Department evidencing what she described as a "huge show of

[73] Tr. at 288 (Test. of Anita Duerr); Champlain Pre-Filed Test. at 12, 18; October 17, 2012 Letter from Betsey Fitzgerald, Washington County.

[74] Tr. at 288 (Test. of Anita Duerr); Tr. at 313 (Test. of Holly Worster); Tr. at 652 (Test. of Michael Corbin); November 2, 2012 Letter from Michael Corbin to Jessica Damon; November 2, 2012 Letter from Robin Corbin to Jessica Damon; November 5, 2012 Letter from John Bice to Jessica Damon; November 14, 2012 Letter from Carol Graybeal to Jessica Damon; November 17, 2012 Letter from Jan Thompson to Jessica Damon; January 14, 2013 Letter from Clarence Thompson to Jessica Damon; January 14, 2013 Letter from Edith and David Breed to Jessica Damon; December 2, 2012 Letter from Gail and Christopher Artegian to Jessica Damon.

support" for the Project and described the dire economic challenges her community faces.[75] Betsy Fitzgerald, the Washington County Manager, submitted a letter in support of the Project.[76]

Communities in Maine, particularly those, like Carroll Plantation, suffering from years of economic hardship, should be allowed to decide what types of economic development should occur within their boundaries. For example, the annual average property tax payment to Carroll Plantation will be $287,358, which will significantly reduce the tax rate in that community.[77] In addition, there will be a tangible benefits package paid to the community in an amount of $92,000 per year and an energy rebate fund in the amount of $25,000 per year.[78] These are real, meaningful benefits to a community that has said it may have to de-organize if the Project does not go forward.[79]

Accordingly, the desire of the host communities to advance economic development within their boundaries is entitled to substantial weight, particularly when balanced against the fears of guides, sporting camp owners, and lake front property owners who only spend a portion of their time in the area and who live and work up to 18 miles away in Grand Lake Stream.

2. The Owners Of The Majority Of Land That Surrounds The Project And The Area Lakes Support The Project

Concerns about Project visibility from 3-8 miles (and beyond), must also be balanced against principles of landowner rights and the interests of forest products community. Maine's largest landowners have a long history of allowing recreational access to timber land in the State.[80] Indeed, the guides and sporting camp owners in Grand Lake Stream are dependent upon

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75 November 19, 2012 Letter from Anita Duerr to Commissioner Aho, describing support and attaching a petition demonstrating support for the Project.

76 October 17, 2013 Letter from Betsy Fitzgerald to Commissioner Aho.

77 Champlain Direct Test. at 24.

78 Champlain Direct Test. at 25-26.

79 Tr. at 290 (Test. of Anita Duerr)

80 April 22, 2013 Letter from Tom Colgan to Jessica Damon; January 27, 2013 Letter from Roger Milliken to Commissioner Aho.

such open access for the success of their businesses. Wind project lease payments provide a revenue that is particularly important for the forest products industry, as the income from wind development supplements – not displaces – what landowners typically earn from logging and other traditional uses of the their property. This allows them to continue with commercial forestry operations, a practice that maintains their lands in an undeveloped state and facilitates the recreational activities that are at issue in this proceeding.

The landowners who own the majority of the land around the Project area lakes have expressed support for the Project and their belief that the Project is compatible with existing recreational uses. For example:

- The Passamaquoddy Tribe is one of the largest landowners in the area and owns 3,000 acres within 8 miles of the Project, all south of Route 6. Importantly, they have significant holdings around Scraggly, Shaw and Junior lakes. The Tribe submitted comments that they "do not believe that the visibility of the turbines in the reconfigured Project will negatively impact our traditional uses of our lands and the lakes they surround, including the recreational uses of fishing, hunting, snowmobiling, camping, and hiking." They add that they "believe this project is an appropriate new use that can co-exist with existing uses in this area."[81]

- Wagner Forest Management manages the Sunrise Conservation Easement lands, of which 31,000 acres is located within 8 miles of the Project, all south of Route 6. The easement includes almost all of the land around Pleasant Lake and substantial land around Junior, Scraggly, Shaw and Pug lakes. Tom Colgan, President and CEO, submitted comments in support of the Project and stated that "wind power is not only compatible with our working forests, but provides a critical revenue stream that allows us to maintain such land as a working forest. We have a long and cherished tradition of open access that allows recreational activities to occur on our land. Wind power, as well as working forest easements, helps us to continue that important tradition. The Project is well-sited and compatible with the recreational, conservation, and other land uses in the area."[82]

- The New England Forest Foundation (NEFF), a non-profit land conservation organization, holds the Sunrise Conservation easement and stated that it did not object to the siting of the Project near the conserved lands.[83]

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[81] September 14, 2012 Letter from Tribal Chief, Joseph Socobasin and Tribal Chief, Reuben "Clayton" Cleaves to Commissioner Aho.

[82] April 22, 2013 Letter from Tom Colgan to Jessica Damon.

[83] September 20, 2010 Letter from Whitney Beals to Fred Todd, LURC.

- H.C. Haynes, Inc., Lakeville Shores, Inc. and members of the Haynes family (collectively H.C. Haynes) own significant timberlands in the Carroll/Kossuth/Lakeville area. The family has significant acreage in Lakeville on and near two of the Project lakes and supports the Project and its compatibility with working forests and existing recreational uses, including fishing on the Project area lakes.[84]

- Roger Milliken, from the Baskahegan Company, which has significant land holdings in the region including around the Stetson Project, submitted comments in support of the Project, stating that the Project "will support traditional uses like forestry along with the range of ecological and recreational benefits that flow to the public from a working forest. I do not believe that the project will have an unreasonable adverse impact on recreational interests in the region. Quite the opposite, I believe that it will help Maine's people compatibly sustain our woods and waters, the full range of our forest-based livelihoods and Maine's special values." [85]

The large landowners on whom Maine's outdoor recreation industry depends and which own the majority of the area surrounding the Project's closest lakes support the Project and have concluded that it will not unreasonably impact recreational uses that occur on those lakes. The Department should have, but did not, balance their rights and interests when assessing whether the scenic impacts were reasonable.

3. There Will Be Significant Energy, Environmental And Economic Benefits Associated With The Project That Should Have Been Considered By The Department In The Balancing Required Under The Act

The balancing inherent in consideration of whether the scenic impacts are reasonable must also reflect the substantial energy, environmental and economic benefits associated with the Project. The Department did not consider any of those benefits in assessing the Project's scenic impacts, all of which constitute an important counterbalance to the adverse impacts identified by the Department in its Order.

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84 May 7, 2012 Comments of Dean Beaupain on behalf of Haynes.

85 January 27, 2012 Letter from Roger Milliken to Commissioner Aho.

The comments from the Maine Public Utilities Commission (PUC), ISO-New England studies, and the testimony of Abigail Krich on behalf of CLF, establish that the Project will result in significant energy benefits, including to Maine ratepayers.[86] There was no contrary testimony from persons or groups with expertise in this area.

The Project will also result in significant environmental benefits through the reduction of greenhouse gasses and other pollutants. As Ms. Krich explained, as more electricity in New England is generated by wind energy, it will displace fossil-fuel burning sources.[87] Specifically, the Project is expected to displace 66,000 tons of CO_2, 70 tons of NOx, and 190 tons of SO_2 on an annual basis over the life of the project.[88]

The State's leading environmental and energy groups have expressed support for the Project. Specifically:

- Maine Audubon has 15,000 members and friends and works to conserve wildlife and wildlife habitat by engaging people of all ages in education, conservation and action. They carefully reviewed the Project and its potential impacts and testified in support of the Project.[89]

- Environment Maine is a citizen based advocacy organization with more than 16,000 current members and supporters. It testified in support of the Project and also delivered a petition of support signed by 1,250 citizens, including 1,185 from Maine.[90]

- The Maine Chapter of the Sierra Club, whose mission is to explore, enjoy and protect the wild places on the earth, testified in support of the Project and its compatibility with existing uses, and also delivered a petition of support signed by 86 Mainers.[91]

- Conservation Law Foundation, a public interest advocacy organization that works to solve the environmental problems that threaten the people, natural resources

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86 Kearns Direct Test. at 21-22; Krich Direct Test. at 10-17; December 5, 2012 Comments from Mitchell Tannenbaum, Maine PUC.

87 Krich Direct Test. at 17-20.

88 Kearns Direct Test. at 21.

89 March 29, 2013 Letter from Ted Koffman to Jessica Damon; Tr. at 667-669.

90 Tr. at 293-294.

91 April 29, 2013 and May 1, 2013 Letters from Glen Brand to Commissioner Aho.

and communities of New England, not only testified in support of the Project, but participated as a party in the public hearings in order to advocate on behalf of the critical energy, environmental and policy interests at stake.[92]

- The American Lung Association of the Northeast also wrote in support of the Project due to its important public health benefits.[93]

These groups represent a broad spectrum of Maine's public, including outdoor recreationists and enthusiasts. They do not believe that seeing turbines in the landscape is incompatible with outdoor recreation and, importantly, believe the energy and environmental benefits of the Project are substantial and outweigh potential adverse impacts.

Finally, the importance of the direct and indirect economic benefits that will flow from construction and operation of the Project were articulated by large and small businesses alike and must also be considered in the balancing required by the Act. As reflected in the testimony of a multitude of witnesses, the Project will bring about significant economic benefits. Reed & Reed testified that "the subcontractors that we will use to build this project are just about all from Maine, the materials we purchase for the project will also come from Maine."[94] As the testimony and comments from International Brotherhood of Electrical Workers,[95] Sargent Corporation,[96] the Associated General Contractors of Maine,[97] R.M. Beaumont Corporation,[98] Aerial Survey & Photo,[99] and Harris Media Services[100] demonstrate, the Project will bring about significant economic benefits not only during construction, but continuing throughout the life of the Project. In fact, a recent survey "identified 47 companies that provide direct services to the growing wind and ocean energy markets in Maine. Those companies reported annual revenues of

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92 January 7, 2013 Intervention Petition by CLF.
93 September 21, 2012 Letter from Edward Miller to Commissioner Aho
94 Tr. at 258 (Test. of Pat DeFilipp); November 20, 2012 Letter from Jackson Parker to Jessica Damon.
95 Tr. at 683-687 (Test. of Scott Cuddy); Undated Letter from Scott Cuddy to Jessica Damon.
96 Tr. at 346 (Test. of Steve Perry).
97 January 8, 2013 Letter from Scott Lever to Jessica Damon.
98 November 21, 2012 Letter from Ryan Beaumont to Jessica Damon.
99 November 20, 2012 e-mail from F. Roderick Stevens to Jessica Damon.
100 November 21, 2012 e-mail from Alison Harris to Jessica Damon.

$279,444,000 derived from wind and ocean energy projects. Of those projects, 47% of the revenues were derived from Maine projects while 45% were derived from projects around the country. This illustrates the value of developing local expertise that can become an exportable commodity that result in creating Maine income and jobs."[101]

Some of the opponents suggested that the construction jobs are not important because they are "temporary." As Jack Parker of Reed & Reed testified: "we've been doing temporary jobs since 1928 when one job follows another and follows another. Whether you're in the guiding business or building ships or working in a paper mill, everything is a temporary job."[102] Scott Cuddy of the International Brotherhood of Electrical Workers echoed the same sentiment when he stated that "when I show up and I strap on my toolbelt and I go to work, I am immediately putting myself out of work. It's what I do, it's what I've always done. So to denigrate the job that gets created by a construction project is to say that it doesn't really create, but it does. It creates a job, it creates a benefit, it creates an economic benefit for the state of Maine."[103]

In addition to the construction related jobs and wages, the Project will result in significant economic benefits that include new income streams to landowners, increased property and other tax revenue, community benefits packages to host communities and other tangible benefits described in the Application and Department Order.

The consensus view from these divergent groups (the host communities of Carroll Plantation and Kossuth Township, large landowners who own the majority of the land surrounding the lakes at issue, the Passamoquoddy Tribe, which also holds substantial land

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[101] Tr. at 272-273 (Test. of Paul Williamson); November 29, 2012 Letter from Paul Williamson to Jessica Damon.

[102] Tr. at 588 (Test. of Jackson Parker).

[103] Tr. at 683-687 (Testimony of Scott Cuddy).

holdings around the Project lakes, the State's leading energy and environmental groups, the many businesses that have experienced tremendous economic opportunities from wind energy developments, and perhaps most importantly, Maine's most significant recreational and sportsmen groups, which have experience recreating in and around existing wind projects) is countered by the divergent view of two groups. First, camp owners in Lakeville who have a fear that when they visit in the summer, they will see turbines, or lights of turbines, and will not like that view. Second, guides and sporting camp owners in Grand Lake Stream, eighteen miles from the Project, who have a fear that when their sports visit, they will not like seeing the turbines, and will refuse to return, regardless of the quality of the fishing.

The Applicant is sensitive to these concerns and respects the fear of change from these two groups. The Applicant addressed these concerns by minimizing the size of the Project and by agreeing to install radar-assisted lighting, which eliminates the adverse impact of the required nighttime lighting.[104] As reflected in the Department's Order, the radar-assisted lighting would be in place prior to commencement of construction, thereby eliminating even temporary impacts of night lighting, which have been the principal adverse scenic impact of wind projects. At the same time, a decision to site a $100-million dollar project that brings economic development to communities cannot turn on the fear and emotion of these two groups. The reason these lakes are the focus of this discussion is not that they are the private domain of the camp owners in Lakeville, or that they are the private domain of the guides. Rather, these lakes are publicly-

[104] The Applicant initially proposed a 27-turbine project that was reviewed and ultimately denied by the former Land Use Regulation Commission. This project was modified to respond to concerns voiced by opponents and the Commissioners in that proceeding. First, the number of turbines was reduced by 40% and turbines on the southern ridge were removed thereby increasing the distance from the most sensitive lakes. Champlain Direct Test. at 12-13. Second, the Applicant undertook comprehensive intercept surveys and additional boat counts to obtain more objective data on level of use and the potential impact of turbine visibility on such uses, something that was lacking in the initial proceeding. Dr. Palmer reviewed the larger project and concluded its impacts were reasonable. He acknowledged that the revised project reduces overall visibility and benefits from additional information that would have been helpful had it been available to the Commissioners. Tr. at 250-251.

owned great ponds. When it evaluated whether the potential (but unsubstantiated) impacts to camp owners and guides was reasonable, the Department should have balanced but did not balance those impacts against the rights of landowners to use their property for lawful purposes, the ability of communities to allow much needed economic development to occur within their boundaries, and finally, testimony from groups that have actual experience recreating in and around turbines in a wide variety of settings in Maine, that seeing wind turbines in the distance is not incompatible with the outdoor use and recreation that occurs on these lakes.

As Senator Bartlett stated in his testimony describing passage of the Wind Energy Act:

> We wanted energy production to be in those communities that wanted it and we wanted to make sure that there was an opportunity for very significant benefits here in the State of Maine. . . . What we are talking about is having Maine-based production with all the tax benefits and community benefits that come from that.[105]

The Bowers Project is exactly what the Wind Energy Act contemplated and sought to encourage: The Project is embraced by its host communities and its significant energy, environmental and economic benefits are irrefutable.

IV. THE DEPARTMENT IS NOT PERMITTED TO AGGREGATE SCENIC IMPACTS, WHICH WAS THE SOLE BASIS FOR ITS DENIAL OF THE BOWERS PROJECT

The Department found that Project visibility on individual lakes meets the scenic standard, but nonetheless denied the Application based on a new standard – aggregated impacts – which the Department articulated and applied for the first time in this Project. In essence, the Department combined the impacts on the nine lakes and, on the basis of these aggregated or cumulative impacts, concluded that the Project did not meet the scenic standard. Not surprisingly, the Department does not articulate any basis for considering such impacts nor does it identify any metrics for determining how to apply this new standard.

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[105] Tr. at 543.

The Act, however, does not allow for consideration of aggregated or cumulative impacts and therefore it was error to deny the Project on that basis. Additionally, the Department's introduction and application of this new standard, which was not adopted in accordance with the rulemaking provisions of the Administrative Procedures Act, violates both L.D. 1, as well as constitutionally-required safeguards to protect against arbitrary decisionmaking.

A. The Wind Energy Act Does Not Permit Aggregation Of Scenic Impacts

The Wind Energy Act is clear that in evaluating scenic impacts the Department must consider the impact on a single resource, not a collection of resources. Specifically, the scenic standard requires the Department to determine:

> ...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 (emphasis added).[106]

The scenic standard uses the singular form of "resource."[107] This means that the Department must evaluate the impact of the Project on each individual resource, not a collection of resources within a three or eight mile radius of the Project. As the Act's requirements are unambiguous, the Department "must interpret the statute to mean exactly what it says."[108]

Nor does the collection of nine lakes within the eight-mile radius of the Project constitute a scenic resource. The Act lists seven categories of scenic resources and it does not include any collection of lakes or other resources and certainly does not include this particular collection of

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[106] 35-A M.R.S.A. § 3452.1.

[107] The use of the singular "resource" is also found in 35-A M.R.S.A. § 3402.2.C, discussing the need to modify the prior regulatory process (to deny a permit a project must "significantly compromise views from a scenic resource...such that the development has an unreasonable adverse effect...to the scenic character of that resource), as well as in the specific evaluation criteria (Department must consider the significance of the resource, the extent, nature and duration of affected public uses of the scenic resource, the potential effect of the generating facilities' presence on the public continued use and enjoyment of the scenic resource, and the scope and scale of the potential effect of the generating facilities on the scenic resource). 35-A M.R.S.A. § 3452.3.A-F (emphasis added).

[108] Kimball v. Land Use Regulation Comm'n, 2000 ME 20, ¶ 18, 745 A.2d 387, 392.

lakes.[109] Nor does the Act authorize the Department to consider resources beyond those specified in the statute.[110] When it enacted the Act, the Legislature could have allowed lakes to be considered collectively or could have included, as one of the evaluation criteria in 35-A M.R.S.A. § 3452.3, the number of resources within the 8-mile area, but it did not do so. Simply put, none of the evaluation criteria set forth in the statute allow the Department to consider the number of affected resources, nor has the Department undertaken an analysis of aggregated impacts on other projects, including most recently on the Passadumkeag project.[111]

Yet, that is exactly what the Department has done here. The Department has combined the impacts on the nine lakes and concluded that, in the aggregate, the impacts are unreasonable—even thought the impact on each individual lake is acceptable. By grouping together the impacts to nine lakes the Department has, in effect, treated the collection of lakes as an additional resource of state or national significance, and has concluded the impact to this "10th" resource is unreasonable.[112] The Act does not permit the Department to do so.[113] The

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[109] 35-A M.R.S.A. § 3451.9. In contrast, there are systems of lakes, such as Chain of Ponds in Franklin County, that constitute a resource of state or national significance because they are treated as a single resource in Maine's Finest Lakes or the Maine Wildlands Lake Assessment. See Maine Wildlands Lake Assessment at 14 (Chain of Ponds, which consists of Long, Bag, Natanis, Round and Lower ponds, all of which are connected, is treated as a single resource). As a result, in the Sisk Project, the Land Use Regulation Commission evaluated the impact of project visibility on Chain of Ponds. See DP 4860 at 61-62. The lakes considered by the Department here, however, are not listed as a single lake and do not meet any of the other criteria for designation as a SRSNS.

[110] Friends of Maine's Mountains v. BEP, 2013 ME 25, ¶¶ 19,20, __ A.2d __.

[111] See Findings of Fact and Order on Oakfield Project, L-24572-24-C-N (January 17, 2012) at 16-22 (visual impacts on each of Pleasant and Mattawamkeag lakes considered individually and Department's conclusions are in accord with its expert, Dr. Palmer); Findings of Fact and Order on Appeal on Passadumkeag Project, L-25597-24-C-N (August 1, 2013) (analysis of scenic impacts on individual resources).

[112] Indeed, the Act prohibits the Department from denying a permit for a wind energy project based on the aggregated assessment of impacts to any region or the overall landscape. Specifically, Subsection 3 of the evaluation criteria expressly provides that the fact that a wind power project is a highly visible feature on the landscape is not sufficient, alone, to find an unreasonable adverse effect. 35-A M.R.S.A. § 3452(3). As the term "landscape" is not defined in the Act, its meaning is based on its dictionary definition. See Bangs v. Town of Wells, 2000 ME 186, ¶ 19, 760 A.2d 632, 637 n. 9. "Landscape" is defined as "the landforms of a region *in the aggregate*." http://www.merriam-webster.com/dictionary/landscape (emphasis added). Thus, the fact that the Project is a highly visible feature in the Grand Lakes Stream region (i.e., potentially visible from multiple resources within the 8-mile radius) is not only irrelevant, but the Act expressly prohibits the Department from considering such a "regional" impact.

Department's interpretation must, therefore, be overruled as it is contradicted by the plain language of the Act.

Statement not admitted.

B. The Department's Aggregation Standard Is Not Judicially Enforceable Under The Maine Administrative Procedures Act

Even if it were not contrary to the Wind Energy Act, the Department's use of a new standard that has not been adopted in accordance with the rulemaking provisions of the Maine Administrative Procedures Act (APA) runs afoul of Public Law Chapter 304 (2011) (also known as L.D. 1) and is impermissible on that independent basis. As part of a comprehensive effort intended to "ensure regulatory fairness, improve the business climate of the State, encourage job creation and retention, and expand opportunities for Maine people," the Legislature enacted and the Governor signed into law An Act To Ensure Regulatory Fairness And Reform which took

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113 The Department appears to rely in part on the fact that some of the lakes are interconnected. Order at 24. The Department acknowledges, however, that the evidence indicates that there is "little actual multi-day use of the connected lakes." Id. Somewhat inexplicably, the Department nonetheless "gives consideration" to this interconnection, presumably to support its aggregation of impacts analysis.

[redacted]

effect in 2011 as emergency legislation.[115] Among its provisions is a prohibition on the enforceability of rules that have not been adopted in accordance with the formal rulemaking provisions of the APA (which includes public notice and comment). The Department's new aggregation standard (or new interpretation or guidance on how to interpret the Act) has not been subject to agency rulemaking and is not, therefore, judicially enforceable.[116]

If the Department had gone through a rulemaking process prior to implementing its aggregation standard it would have had the benefit of input from experts and other stakeholders on appropriate metrics for applying such a standard. Importantly, the rulemaking process would be conducted in accordance with the Administrative Procedures Act, which allows for public comment, and if the standard were adopted, applicants would have notice of its applicability prior to and not at the end of the review process. None of that occurred here, leading to the arbitrary application of new standards that L.D. 1 sought to prevent.

C. The Department's Application Of The Aggregation Standard Violates Established Constitutional Safeguards To Protect Against Arbitrary Decisionmaking

Finally, the Courts have long recognized that legislative enactments delegating discretionary authority to an administrative agency are unconstitutional if they fail to contain standards sufficient to guide administrative action and limit the exercise of discretion. The risk inherent in overly vague legislative enactments is two-fold. First, people of common intelligence are forced to guess at its meaning. Second, it authorizes or encourages arbitrary and discriminatory enforcement.[117]

Further, the Maine Supreme Court has grappled with the particular challenges presented by visual impact standards, which it has determined are inherently "non-quantifiable and difficult

[115] P.L. 2011, Ch. 304.
[116] 5 M.R.S.A. § 8002(9).
[117] Uliano v. BEP, 2009 ME 89, ¶ 15, 977 A.2d 400, 408 (citing Town of Baldwin v. Carter).

to apply."[118] In its analysis of the constitutionality of visual impact standards, including the one in the Wind Energy Act, the Court has identified key factors that guard against arbitrary decisionmaking, including the following: (1) most importantly, the existence of "standards sufficient to guide administrative action;" (2) the use of expert opinion to determine what constitutes an "unreasonable" impact; and (3) the fact that the agency is subject to the "procedural protections of the Maine Administrative Procedures Act."[119] The Department's use of a new aggregation standard was not subject to these safeguards and therefore in addition to violating the Wind Energy Act and L.D. 1, the Department's introduction and application of a new aggregation standard is impermissibly vague and unconstitutional.

1. There Is No Guidance On How To Apply The Department's New Standard

The Department has introduced a standard-less standard. By diverging from the language of the Act, and without any regulations or guidance on the issue of "aggregate" impacts, there are simply no standards or policies to guide the Department's exercise of its discretion. This is evident in the divergent approaches taken by the State's expert in his evaluation of aggregate impacts, and the Department in its consideration of aggregate impacts.

Dr. Palmer proposed a method for measuring and determining whether aggregate impacts were unreasonable. Specifically, he proposed that if scenic resources with ratings of Medium or higher comprise 10% of the area within three or eight miles (the 10% rule), then the overall scenic impact is Unreasonably Adverse. He did not tie his test to anything in the Wind Energy Act and admitted that "the explicit procedures to make this determination have not been proposed, and no attempt at consensus has been attempted."[120]

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118 Friends of Maine's Mountains v. BEP, 2013 ME 25, ¶ 22, __ A.2d __, __.

119 Uliano v. BEP, 2009 ME 89, ¶¶ 15, 22, 27, 977 A.2d 400, 408.

120 March, 2012 Palmer Part 2 Review of VIA at 41, 44.

The Department rejected Dr. Palmer's test, but does not articulate a substitute test.[121] Instead, the Department merely lists evidence it considered in determining whether the scenic impact standard was met. The evidence cited by the Department, however, is the same evidence that was the basis for assessing impacts on individual lakes, which the Department concluded were no higher than "Medium," and met the scenic standard of the Act.[122] There is simply no guidance, policy, standard or other information that informs how the Department's new standard is to be applied (except we now know that it is not the 10% rule articulated by Dr. Palmer).

For example, if eight "Mediums" constitutes an unreasonable adverse impact, as the Department appears to have concluded here, how many "Lows" would it take? Ten? Fifteen? Would four "Mediums" and eight "Lows" be enough? People of common intelligence are left to guess at the test and, as a result, the agency has unfettered discretion to determine whether it is met in a particular case. This is exactly what the Courts have said is not permissible.[123] A standard "must provide meaningful guidance to both permit applicants and those who are duty bound to apply it."[124] No such guidance exists here.

Moreover, the lack of guidance is compounded by the Department's finding that in its analysis of scenic impacts it "gave no weight" to the applicant's evidence on the Department's application of the scenic impact standard to other projects.[125] Prior precedent is an important tool for increasing regulatory clarity and ensuring that standards are fairly and uniformly applied. An agency charged with applying what is undeniably an inherently subjective standard may not do so in a discriminatory fashion and therefore the Department's application of the standard to

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121 Order at 22-23 (rejecting Dr. Palmer's 10% rule).

122 Order at 23-26.

123 Uliano v. BEP, 2009 ME 89, ¶ 15, 977 A.2d 400, 408; Town of Baldwin v. Carter, 2002 ME 52 ¶ 10, 794 A.2d 62, 67; City of Portland v Jacobsky, 496 A.2d 646, 649 (Me. 1985).

124 Uliano v. BEP, 2009 ME 89, ¶15, 977 A.2d 400, 413.

125 Order at 25.

this Project must be consistent with its application to past (and future) projects. Accordingly, the Department erred in its dismissal of such evidence.

2. There Is No Expert Testimony To Guide The Department

Second, the Department has ignored its expert with respect to assessment of aggregated impacts. Dr. Palmer has been the State's scenic expert on eight prior expedited wind energy developments. Dr. Palmer specifically considered the Project's overall impacts, articulated a metric for determining whether they passed the threshold from reasonable to unreasonable, and based on application of that test concluded that the overall or cumulative impacts of the Bowers Project were reasonable. The Department, however, has ignored its expert's conclusions and all other expert testimony in the record and, instead, has relied on its subjective assessment in evaluating cumulative impacts.

3. Critical Procedural Protections Of The APA Were Not Present Here

Finally, the Maine Supreme Court has identified two sets of "procedural protections" that ensure that application of visual impact standards are not arbitrary or unclear and are constitutionally applied. Unfortunately, in this proceeding neither set of protections were utilized by the Department.

First, the Department may promulgate rules that are "necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering."[126] A rulemaking proceeding, with its provisions including public notice, comment, and judicial review, provides "significant protection against abuses of discretion by the [Department]" and "compensates substantially for the want of precise [legislative] guidelines."[127] Had the Department done so here, the legality, scope and adequacy of its

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126 Uliano, 2009 ME 89, ¶ 28, 977 A.2d at 411.

127 Uliano, 2009 ME 89, ¶ 28, 977 A.2d at 411.

aggregation standard would have been subject to public comment and judicial review. No such rulemaking took place and therefore application of the new standard not only violates the requirements of L.D. 1, but it is contrary to a core procedural safeguard to protect against arbitrary decisionmaking.

Second, the APA requires that all information the Department wishes to "avail itself as evidence in making a decision, shall be offered and made a part of the record and no other factual information or evidence shall be considered in rendering a decision."[128] This requirement ensures that parties have an opportunity to comment on, correct, and discuss the evidence that forms the basis for a permitting decision, and also provides clarity, after the decision has been made, as to the basis of the decision, and minimizes the risk a decisions being made on subjective assessments or evidence that is not part of the record.

In this proceeding the Department diverged from customary administrative practices with respect to developing the factual record in two important ways. First, the Commissioner, who was the decisionmaker, did not attend the public hearing, and her designee, the Presiding Officer, did not prepare any written findings or recommendations following the public hearing to inform the Commissioner's decision.[129] The Maine Supreme Court has held that findings and permitting decisions must be made only by individuals "who have heard the evidence."[130] This is because when conflicting testimony is offered at an evidentiary hearing it is of critical importance that the decisionmaker be present in order to assess the credibility of the witnesses.[131] As the Court has

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128 5 M.R.S.A. ¶ 9059(4).

129 An adjudicatory hearing at the former-LURC and at the BEP was and is always conducted with the members and decision-makers present to hear the testimony. This is only the second time that the Department has held an adjudicatory public hearing so, unfortunately, there is no established practice for such hearings.

130 Fitanides v. City of Saco, 684 A.2d 421, 423 (Me. 1996).

131 Fitanides v. City of Saco, 684 A.2d 421, 423 (Me. 1996).

stated, "the one that decides must hear."[132]

Although the Commissioner may designate a hearing officer, "[t]ypically" the hearing officer will issue a report, including "findings of fact, conclusions of law and discretionary determinations,"[133] which provides the decisionmaker with the hearing officer's assessment of the evidence and the credibility of the witnesses and allows the decisionmaker, as required by the Constitution, to render a final decision having "heard" the evidence.[134] While the failure of the hearing office to prepare such a report is not, by itself, fatal, it exacerbates the problems presented by the Department's use of a new standard for the first time in this proceeding. The parties (and the Board) are left to assume that the Commissioner's decision was based solely on the evidence developed in the public hearing, but as the Commissioner did not attend the hearing, and as the Presiding Officer produced no summary of his findings and evidentiary conclusions, we are left to guess at what evidence, if any, from the public hearing was relevant to the Department's determination that, in the aggregate, the Project's visual impacts were unreasonable.

Second, although the Commissioner went on a site visit following the public hearing, in a departure from prior practice, neither the parties nor the Department's expert attended that visit, and the Department did not issue any summary of conditions or observations from that visit. The Department then relies on observations made during its site visit that are directly at odds with the conclusions of its expert, Dr. Palmer. Specifically, the Department, based solely on its site visit and personal observation, concluded the Project area lakes have "unique character and

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132 Pelkey v. City of Presque Isle, 577 A.2d 341, 343 (Me. 1990).

133 Green v. Commissioner of Dept. of Mental Health, 2001 ME 86, ¶ 4, 776 A.2d 612; Turner v. Appolonio, 441 A.2d 679, 682 (Me. 1982).

134 Green v. Commissioner of Dept. of Mental Health Green, 2001 ME 86 at ¶ 14, 776 A.2d at 616-17.

topography" and stated the lakes provide a sense of "remoteness."[135] Both Dr. Palmer and Mr. Raphael, however, concluded that the area does not have unique character or topography associated with high scenic quality.[136] Dr. Palmer specifically stated that there was no data to support the opponents assertion that the lakes have a "sense of remoteness."[137]

The Department's written decision and, in particular, the analysis of why the scenic standard is not met, exacerbates the procedural shortcomings identified above and leaves the parties and this Board to speculate as to the "evidence" in support of the Department's decision. Specifically, the Department identifies 10 "pieces of evidence" related to its ultimate conclusion that the scenic standard was not met.[138] None of these "pieces of evidence," however, with the exception of item #6 supports the Department's finding on aggregated impacts.

The only piece of evidence cited by the Department that even arguably relates to its aggregation standard is the claim that the lakes are interconnected (item # 6). As discussed above, the interconnectedness of the lakes is not legally relevant as they do not collectively constitute a scenic resource. Moreover, Dr. Palmer stated that it is "misleading" to refer to the nine lakes as a networked system as they are not all linked together.[139] Finally, even if it were relevant and accurate, the Department concludes that there was little evidence of multi-day use

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135 Order at 21. The Department does not cite to any evidence to support these assertions, which it relies on for its overall conclusion that the Project does not meet the Act's scenic standard. City of Biddeford v. Adams, 1999 ME 49, ¶ 10, 727 A.2d 346, 349. "It is not proper for an administrative authority to base a decision of adjudicatory nature, or findings in support thereof, upon evidence or information outside the record, and in particular upon evidence obtained without the presence of and notice to the interested parties, and not made known to them prior to the decision." Public Utilities Comm'n v. Cole's Express, 138 A.2d 466, 499 (Me. 1958).

136 See Section II. A above.

137 April 12, 2013 Palmer Review of Lawrence Report at 11.

138 Order at 23-26.

139 April 12, 2013 Palmer Review of Lawrence Report.

of the connected lakes.[140] It is therefore particularly puzzling that the Department nonetheless states it "gives consideration to the fact that this interconnection exists."[141]

There is nothing in the Department's recitation of the evidence that supports its conclusion that the impact to an individual lake is reasonable, but the impact to the collection of lakes is unreasonable, leaving the parties to speculate as to the basis for the Department's ultimate conclusion. Under the Maine Supreme Court's decision in Uliano and as considered in the Court's review of the Act's visual standards in Friends of Maine's Mountains, the risk of arbitrary and subjective application of scenic impact standards is mitigated by the use of specific standards, reliance on the agency's experts for guidance, and the procedural protections of the APA. Here, the Department's use of a new standard and its application in this proceeding runs afoul of those protections and therefore cannot stand.

In summary, the Department used a new standard that (i) is not permitted under the Wind Energy Act, (ii) is not judicially enforceable pursuant to L.D. 1, and (iii) contravenes established constitutionally-required safeguards to protect against arbitrary decisionmaking. This new "standard" was the sole basis for the Department's denial of the Project. Because the Department agreed with Dr. Palmer and found that the impact of Project visibility on individual lakes was reasonable, the record and Department's Order establishes that the Bowers Project meets the Act's scenic standard.

CONCLUSION

For the foregoing reasons, Champlain Wind, LLC respectfully requests that the Board grant the appeal, reverse the Department's Order denying the Project, find that the Project meets the scenic impact standard of the Wind Energy Act, and approve the Bowers Project.

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140 Order at 24.
141 Order at 24.

Dated: September 4, 2013

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Table 27. Summary of Evaluation Criteria Ratings for the Oakfield Wind Project

Scenic Resources of State or National Significance	Scenic Impact Evaluation Criteria							Overall Scenic Impact
	A	B	C	D	E.1	E.2	F	
Historic Sites								
Springfield Congregational Church	Low	Medium	Low	Low	--	None	None	None
Great Ponds								
Bottle Lake	Low	Medium	Medium	Low	Med-High	Medium	Low	Medium
Duck Lake	Low	Medium	Medium	Low	Medium	Medium	Medium	Medium
Horseshoe Lake	Low	Medium	Medium	Low	Medium	None	None	None
Junior Lake	Low-Med	Medium	Med-High	Low	Medium	Medium	Medium	Medium
Keg Lake	Low	Medium	Medium	Low	Medium	Medium	Low-Med.	Medium
Lombard Lake	Low-Med	Medium	Medium	Low	Medium	None	None	None
Norway Lake	Low-Med	Medium	Medium	Low	Medium	None	None	None
Pleasant Lake	Low-Med	Medium	Med-High	Low	Medium	Medium	High-Med.	Medium
Pug Lake/Junior Bay	Medium	Medium	Medium	Low	Medium	Low	Low	Low +
Scraggly Lake	Low-Med	Medium	Med-High	Low	Medium	Medium	Medium	Medium
Shaw Lake	Low-Med	Medium	Medium	Low	Medium	Medium	Medium	Medium
Sysladobsis Lake	Low-Med	Medium	Medium	Low	Medium	Medium	Low-Med.	Medium
Upper Sysladobsis Lake	Low-Med	Medium	Medium	Low	Medium	None	None	None
West Musquash Lake	Low-Med	Medium	Medium	Low	Medium	None	None	None

Notes: The Evaluation Criteria are: (A) Significance of resource, (B) Character of surrounding area, (C) Typical viewer expectation, (D) Development's purpose and context, (E.1) Extent, nature and duration of uses, (E.2) Effect on continued use and enjoyment, and (F) Scope and scale of project views.

* This historic site is not listed on the National Register of Historic Places, and is therefore not a scenic resource of state or national significance as defined by the Wind Energy Act (§ 3451 (9)).

† The public does not have a legal right of access to these sites listed on the national Register of Historic Places, and therefore they are not scenic resources of state or national significance as defined by the Wind Energy Act (§ 3451 (9)).

Table 3. Summary of Statutory Criteria's Effect on Scenic Impact

NA = the Project is not visible from the resource or there are no turbines within 8 miles that are visible, therefore the criteria is not evaluated for its effect on scenic impact
Low = the criteria's effect on scenic impact is low
Med = the criteria's effect on scenic impact is medium
High = the criteria's effect on scenic impact is high

SCENIC RESOURCE OF STATE OR NATIONAL SIGNIFICANCE	[2]STATUTORY EVALUATION CRITERIA							OVERALL SCENIC IMPACT
	A.	B.	C.	D.	E.1[1]	E.2	F.	
Bottle Lake	Low	Low	Low	Low	High[3]	Low	Low	**Low**
Duck Lake	Low	Low	Low	Low	Low	Low	Low	**Low**
Horseshoe Lake	NA	NA	NA	NA	NA	NA	NA	**NA**
Junior Lake	Med	Med	Med	Low	Med	Low	Med	**Med**
Keg Lake	Low	Low-Med	Low-Med	Low	Low	Low	Med	**Low-Med**
Lombard Lake	NA	NA	NA	NA	NA	NA	NA	**NA**
Norway Lake	NA	NA	NA	NA	NA	NA	NA	**NA**
Pleasant Lake	Med	Med	Med-High	Low	Med	Low	Med	**Med**
Pug Lake (West Grand Lake)	Low	Low	Low	Low	Low	Low	Low	**Low**
Scraggly Lake	Med	Med	Med-High	Low	Low	Low	Med	**Med**
Shaw Lake	Med	Med	Low-Med	Low	Low	Low	Med	**Low-Med**
Sysladobsis Lake	Low-Med	Low	Low	Low	Low	Low	Low	**Low**
Upper Sysladobsis Lake	NA	NA	NA	NA	NA	NA	NA	**NA**
West Musquash Lake	NA	NA	NA	NA	NA	NA	NA	**NA**
Springfield Congregational Church	NA	NA	NA	NA	NA	NA	NA	**NA**

[1]Note that this criterion does not assess impact to scenic quality. A resource that receives low use (and subsequently a low rating for E1) but has high scenic quality, such as a remote pond, could still receive a high overall scenic impact rating based on contributions from other criteria. Likewise, a resource that has a high use (and subsequently a high rating for E1) but has low scenic quality due to shoreline development or other considerations could still receive a low overall scenic impact rating based on contributions from other criteria.

[2]Statutory Criteria

A. Significance of the Scenic Resource
B. Existing Character of the Surrounding Area
C. Typical Viewer Expectations
D. Purpose and Context of the Proposed Activity
E.1 Extent, Nature and Duration of Public Use of the Scenic Resource
E.2 The Project's Effect on Continued Use and Enjoyment of the Scenic Resource
F. Scope and Scale of Visibility from the Scenic Resource

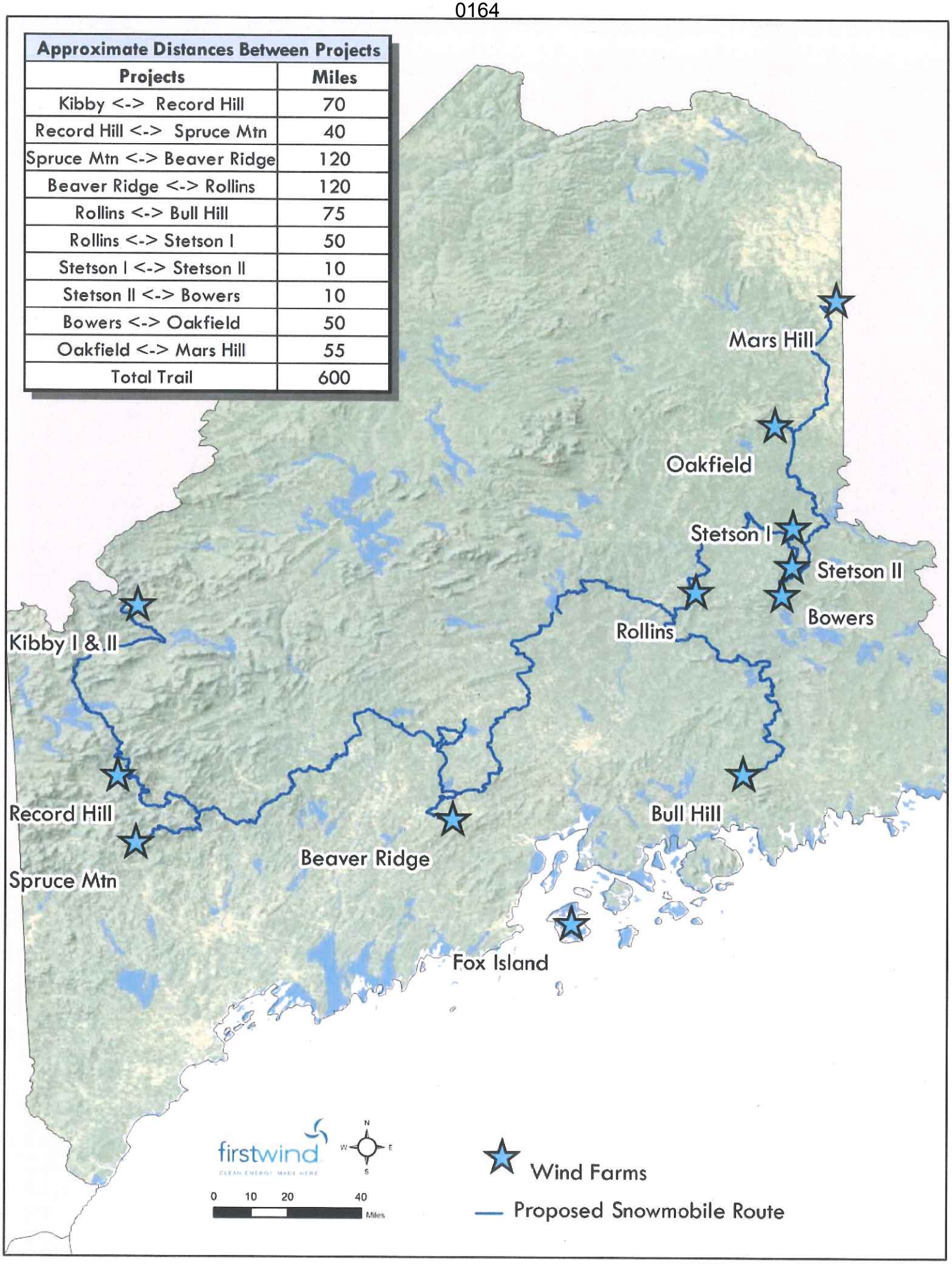
[3]It is high in the sense of density of use, but it does not attract users from outside the area so is not something we would necessarily consider to be a highly used lake.

Table 4. Comparison of Results of User Surveys at Proposed Wind Projects in Maine

		Passadumkeag			Oakfield II						
	Bowers	Saponac Pond	Nicatous Lake	Lower Pistol Lake	Mattawamkeag Lake	Pleasant Lake	Bull Hill	Highland Wind	Highland Wind	Saddleback Ridge	Spruce Mountain
Date	Summer 2012	August/ Sept. 2011	August/ Sept. 2011	August/ Sept. 2011	August/ Sept. 2011	August/ Sept. 2011	October 2010	Summer/Fall 2010	August 2010	Sept. 2010	May 2010
Method	Intercept	Intercept	Intercept	Intercept	Intercept	Intercept	Intercept	Intercept	Web	Intercept	Intercept
Sample Size	70	29			20	40	81	58	304	22	15
Impact of seeing wind farms on enjoyment											
Positive	19%	0%	20%	0%	23%	20%	9%	8%	21%	23%	20%
Neutral	36%	59%	48%	62%	43%	42%	45%	73%	61%	45%	47%
Negative	44%	41%	31%	37%	34%	37%	47%	19%	18%	32%	27%
Refused	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	7%
Likelihood of returning if respondent saw wind farms											
		Boating			*Boating*						
Likely	61%	0%	7%	0%	13%	13%	6%	14%	15%	27%	13%
No Change	19%	73%	81%	78%	58%	60%	75%	73%	68%	50%	73%
Unlikely	21%	28%	11%	22%	28%	27%	20%	14%	17%	23%	7%
Refused	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	7%

Source: With the exception of data collected by Bowers (Kleinschmidt, 2012b), Passadumkeag (Robertson and MacBride, 2011a) and Oakfield II (Robertson and MacBride, 2011b), all data presented is from the May 23, 2011 response by Portland Research Group to the "review of the Bowers Wind Project Visual Impact Assessment" by James F. Palmer, dated April 28, 2011. Note, the Passadumkeag and Oakfield II reports present results by activity for likelihood of return and I replicate the recreational boating results here, and results were quite similar across activities.

Approximate Distances Between Projects	
Projects	**Miles**
Kibby <-> Record Hill	70
Record Hill <-> Spruce Mtn	40
Spruce Mtn <-> Beaver Ridge	120
Beaver Ridge <-> Rollins	120
Rollins <-> Bull Hill	75
Rollins <-> Stetson I	50
Stetson I <-> Stetson II	10
Stetson II <-> Bowers	10
Bowers <-> Oakfield	50
Oakfield <-> Mars Hill	55
Total Trail	600



Champlain Wind, LLC's Appeal of Department Order

Exhibit E: Not admitted to the record.

Appeal filed by Douglas E. Humphrey and Bowers Mountain, LLC

Beaupain, Harman & Nessmann, LLC

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September 4, 2013

Chair of the Board of Environmental Protection
c/o Cynthia Bertocci, Executive Analyst
17 State House Station
Augusta, Maine 04333-0017
Electronically and by US Mail

Re: Appeal of Denial of Applications of Champlain Wind, LLC

L-25800-24-A-N (denial)
L-25800-TE-B-N (denial)
L-25800-IW-C-N (denial)
Our File No.: 6043/1 00021527.DOCX

Please enter my appearance in this proceeding on behalf of Douglas E. Humprhey and Bowers Mountain, LLC.

Enclosed please find my clients' appeal of the Order denying the Bowers Mountain Wind Project applications.

Cordially,

Dean A. Beaupain
Encl.
Cc: Patricia Aho, Commissioner w/encl. electronically and by US Mail
Juliet Browne, Esq., w/encl. electronically and by US Mail

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CHAMPLAIN WIND, LLC	)
KOSSUTH TOWNSHIP, WASHINGTON	)
COUNTY, CARROLL PLANTATION,	)
PENOBSCOT COUNTY,	)
BOWERS WIND PROJECT	)
L-25800-24-A-N (denial)	)
L-25800-TE-B-N (denial)	)
L-25800-IW-C-N (denial)	)

HUMPRHEY/BOWERS MOUNTAIN, LLC'S
APPEAL OF DEPARTMENT ORDER

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EXHIBITS

Exhibit A	Diagram 1 and 2 pages 24 and 25 from Visual Impact Assessment of James F. Palmer dated March 8, 2013
Exhibit B	Exhibit 2A from Pre-filed Direct Testimony of David Raphael from LandWorks dated March 14, 2013

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CHAMPLAIN WIND, LLC KOSSUTH TOWNSHIP, WASHINGTON COUNTY, CARROLL PLANTATION, PENOBSCOT COUNTY, BOWERS WIND PROJECT L-25800-24-A-N (denial) L-25800-TE-B-N (denial) L-25800-IW-C-N (denial)	))))))))	APPEAL OF DEPARTMENT ORDER BY DOUGLAS E. HUMPHREY AND BOWERS MOUNTAIN, LLC

As the owner of a portion of the land upon which Champlain Wind has proposed to construct the Bowers Wind Project (the "Project"), Douglas E. Humphrey and Bowers Mountain, LLC hereby appeal the Order of the Department of Environmental Protection (the "DEP" or "Department") denying the Bowers Wind Project.

STANDING

Douglas E. Humphrey is Manager of Bowers Mountain, LLC, which owns Bowers Mountain. The majority of the Project, including 14 out of the 16 turbines, is located on land owned by Bowers Mountain and leased to the Applicant for this Project. (Application, Section 2.) Mr. Humphrey is well acquainted with the economy of the area, its people, and the compatibility of wind energy development with working forests, recreation, and other uses of Maine's forestlands. The Department's denial of a permit for this Project has adversely impacted the personal and pecuniary interests of Mr. Humphrey and Bowers Mountain, LLC. As a result, both are "aggrieved persons" within the

meaning of Section 24 of Chapter 2 of the Department's rules and have standing to bring this appeal.

ARGUMENT

I. THE PROJECT IS LOCATED WITHIN A WORKING LANDSCAPE AND WILL HELP TO SUSTAIN WORKING FORESTS THAT ARE CRITICAL NOT ONLY TO THE FOREST PRODUCTS INDUSTRY, BUT THE RECREATING PUBLIC

A. Commercial Timber Harvesting Is The Predominant Use Of The Project And Surrounding Lands

The Bowers Project is located within a working forest landscape. This includes not only the lands leased to the Applicant for the Project, but the lands surrounding the lakes within eight miles. These lands have been heavily harvested for timber over the years, and will continue to be in the future. See VIA, Diagrams 1 and 2, attached as Exhibit A. That is not to say that the area is not special or that recreational activities cannot occur within the context of a working landscape. They can and do. But the fact remains that visitors will both see and hear evidence of commercial forestry activity as they approach and recreate on the area lakes. That is not a denigration of the landscape, just reality.

While the Department has adopted the view of opponents and found that the key Project lakes "are undeveloped and provide a sense of remoteness, Order at 21, the facts are to the contrary. For example, almost the entirety of the land surrounding Pleasant Lake is subject to the Sunrise Conservation easement, which is a working forest easement. (Selser Rebuttal Testimony at

2-3 and Exhibit 1; Raphael Direct Testimony, Exhibit 4, lake-by-lake analysis.) Just north of Shaw Lake, between the lake and the Project, is the Vinegar Hill subdivision. This 66 lot subdivision is located on nearly 3,150 acres and includes approximately 40 houses or seasonal camps served by more than 17 miles of interior roads developed to LUPC standards that require 15-foot wide gravel roads. (VIA at 96.) Two of the Project turbines are located on land owned by the Baskahegan Company, which manages 120,000 acres in the region for commercial timber. (January 27, 2013 Letter from Roger Milliken to Commissioner Aho.) Lakeville Shores, Inc., H.C. Haynes Inc., and members of the Haynes family (collectively "Haynes") own significant commercial timber lands in the Carroll and Kossuth area, including in and around the Bowers Project and including the Vinegar Hill subdivision discussed above. (May 7, 2013 Comments on Behalf of Haynes.) Some of the Project lakes, including particularly Bottle and to a lesser degree Keg and Junior, have not insignificant lakefront development. (Raphael Direct Testimony, Exhibit 4, lake-by-lake analysis (showing development around lakes.)

Lodge owners and guides catering to the tourism business may need to create the illusion of wilderness, but this illusion must be tempered with the facts. The area is bounded by Route 6, Route 9, Route 1 and Route 2 and is a huge commercial working forest peppered with conservation easements that exist to preserve the working forest and lakefront development. There are the sounds of diesel generators and harvesters, visual evidence of clearing and roads, and the comforts associated with electricity. The lakes are stocked with

non-native fish and the water levels in Junior, Scraggly, Bottle, Keg, Norway, Horseshoe, Sysladobsis, Pocumcus, West Grand and Pug lakes are artificially controlled by dams. (Hearing Transcript at 151-152.) None of these characteristic evoke a remote wilderness experience. The Department's own expert concluded that the area was not remote (March 8, 2013 Review of the Bowers Wind Project Visual Impact Assessment at 4.4.3), and in response to PPDLW's testimony he stated: "It is obvious that the Downeast Lakes Watershed is not a wilderness area and referring to it as a wilderness shows a disregard for the true value of wilderness areas." (April 19, 2013 Comments of James E. Palmer at 3.)

Simply put, these are working forests. They are special, but they are not remote. They are not wilderness. They are and hopefully will continue to remain open for use by a public that expects and understands it is recreating in a working landscape.

B. Wind Power Is Critical To The Long-Term Sustainability Of Our Working Forests And Their Continued Use By Maine's Recreating Public

Maine's working forests are a critical component of Maine's economy, not only because of the jobs and industries they support (which are significant), but also because of the long-standing tradition large landowners have of allowing public access to their working forests. The continued sustainability of such forests is therefore important not only for the forest products industry, but for Maine's outdoor recreational industry, including the guides and sporting camps in and around Grand Lake Stream.

The undisputed testimony of all large landowners and those associated with the forest products industry is in accord: (i) alternative revenue streams from uses such as wind power are critical to the long-term sustainability of Maine's working forests, and (ii) wind power allows for the continued use of these lands for commercial harvesting and therefore represents a win-win for the landowners, wind developers, and Maine's recreating public.

Timberland ownership in Maine is a challenging economic enterprise subject to cyclical market forces for timber products and severe market disruptions from mill closures such as the Lincoln Pulp and Paper closure in 2002, Great Northern Paper in 2003 and Katahdin paper in 2011. Economic benefits from the Project will not only provide a boost to the local economy as the Project is constructed, but will provide significant lease payments to landowners who are authorizing this type of development on their private lands. This economic return will provide financial stability for them and for their employees and contractors who work their land in harvesting forest products and related activities. (May 7, 2013 Haynes Comments.) Importantly, income will supplement, not displace, what landowners typically earn because wind projects occupy a very small portion of harvestable land. (Application, Section 28.2.2.)

The critical importance of wind power land payments to sustaining our forests is echoed in the comments of Wagner Forest Management ("wind power is not only compatible with our working forests, but provides a critical revenue stream that allows us to maintain such land as a working forest"), Baskahegan

Company ("I can attest to the need for landowners to find dependable revenue streams during periods of low or volatile wood prices like those we have experienced in recent years"), and Haynes (wind lease payments "provide much needed financial stability for [landowners]"), each of whom has experienced first-hand the compatibility of wind power not only with continued forest operations, but the recreational activities that occur on and around their land. (April 22, 1013 Wagner Comments; January 27, 2013 Baskahegan Comments; May 7, 2013 Haynes Comments.) Likewise, Sherry Huber, who has a long history with and cares deeply about Maine's forests, testified in support of the Project and attested to the importance of alternative revenue sources that are compatible with maintaining private lands as working forests and preventing the conversion of such lands to residential or other incompatible forms of development. (May 1, 2013 Huber Comments.)

Roger Milliken summarized it well:

> For more than 100 years, Maine citizens have enjoyed the ability to recreate at little or no cost on private forest lands, a tradition that is unique in the nation. This privilege depends on the ability of landowners to produce income from their lands. Steady payments from a wind lease will smooth out revenue volatility and increase the likelihood that our family will be able to continue to own and manage our land – and continue to keep our lands open for recreation. Indeed, wind farms have become something of a pilgrimage point for snowmobilers, bringing more activity and revenue to our region.

(January 27, 2013 Baskahegan Comments at 3.)

It would be unfortunate if the complaints of a few camp owners, whose development and recreation may be dependent on access granted by large

landowners, led to a reduction in economic opportunities for large landowners that might, as a result, result in less access to working forest land.

II. WIND POWER IS COMPATIBLE WITH OUTDOOR RECREATION

Although it is difficult to discern the basis for the Department's denial of the Bowers Project, it is based on the overall conclusion that visibility of the Project turbines constitutes an unreasonable adverse impact on scenic quality and recreational uses related to scenic quality. (Order at 26.) In fact, visibility of existing wind projects has had not had such an impact, a consideration that the Department appears to ignore.

First, the Department's as well as the Applicant's expert reviewed Project visibility and both concluded, after applying the statutory review criteria, that the Project would not adversely impact scenic quality or recreational uses related to scenic quality on any of the Project lakes. (Raphael Direct Testimony; Order at 18.) Their review specifically addressed the impact that Project visibility would have on existing recreational uses. (Id.) The Department agreed with its expert with respect to the impacts on any individual lake, but disagreed that the overall impact was reasonable. In doing so, the Department introduces a new standard and, importantly, ignores or gives insufficient weight to the following evidence.

Dr. Palmer concluded that the scenic standard was met. (Order at 18.) How can the Department ignore his conclusions?

The Baskahegan post-construction intercept survey demonstrates that visibility of the Stetson project is not adversely impacting either scenic quality

or recreational uses related to scenic quality. Dr. Boyle, the Applicant's survey expert, provides a detailed and professional analysis of those results that are not contradicted by any comparable expert testimony. (Boyle Direct and Rebuttal Testimony.) It is perplexing that the Department gives little weight to the only post-construction study done to date in Maine. (Order at 25.) This is arguably the best evidence that exists on the impact of turbines on outdoor recreation in Maine. Let's rely on the best evidence, not speculative fears of what might occur.

Maine's largest outdoor recreational groups, including snowmobile and ATV riders, have experience recreating in and around existing projects and have said that turbines are an attraction and do not adversely impact their recreational experience. (Hearing Transcript at 277-278 and 627-628.) The Sportsman's Alliance of Maine, the State's largest sportsman's organization, likewise testified in support of the Project. (Tr. at 660; November 8, 2012 SAM Comments.) Shouldn't we rely on the evidence of what is occurring, not what guides fear might occur?

The Applicant's intercept surveys done on the Project lakes also show that the majority of people (55%) do not believe the Project will adversely impact their recreational experience and for the vast majority (80%), the Project will either have no effect on or will increase their likelihood to return. (Boyle Direct Testimony; Power Presentation at Hearing.) As Dr. Boyle explains, the surveys likely overestimate the potential impact of the Project, another factor the Department dismisses. (Boyle Direct Testimony; Order at 25.)

This and the testimony of many Maine citizens makes clear that people, particularly fishermen, will continue to recreate in lakes that have visibility of turbines. Their experience will not be marred, the fish will continue to bite (or not bite as they case may be), and they and others will return to these lakes and enjoy their qualities for years to come.

III. THE SPECULATIVE HARM FEARED BY THE GUDIES AND SPORTING CAMPS IN GRAND LAKE STREAM SHOULD NOT TRUMP THE ABILITY OF A LANDOWNER TO UNDERATKE A FORM OF DEVELOPMENT THAT IS A PERMITTED USE AND ENCOURAGED BY THE WIND ENERGY ACT

The visual impact concerns raised by opponents and, apparently, relied upon by the Department in its denial of a permit for the Project, consist of two types of injury: first, the guides and commercial sporting camp owners who fear their business will be adversely impacted and, second, camp owners and boaters claiming a right to be free of having to look at wind turbines on other landowners' property.

A. The Evidence Demonstrates That There Is No Significant Use Of The Project Lakes By The Guides And Therefore They Will Not Be Harmed By Project Visibility

As a threshold matter, economic injury cannot be the basis for denying a project under the Site Law because the Site Law does not exist to regulate competing economic interests. In re Spring Valley, 300 A.2d 736, 751 (Me. 1973). Therefore even if there were evidence of economic harm to the guides and sporting camp owners, which there is not, these claims cannot form the basis for a denial. Moreover, to the extent that their economic harm was relevant, it must be put into context. The timber industry is what keeps the region going and Haynes alone employs more people than there are guides in

Grand Lake Stream. Full-time, good paying jobs. (Transcript at 645.)

Presumably, the claim of the guides and sporting camps owners in Grand Lake Stream is that there will be an unreasonable adverse impact to their clients. However, it was the guides and sporting camp owners who testified against the Project, not the clients whom they serve, so the Department has only second-hand information on whether the Project would in fact adversely impact that demographic.

More importantly, neither the record evidence nor common sense supports the claim that visibility of turbines on the Project lakes (those identified as scenic resources of state or national significance within eight miles of the Project) will cause the guides and sporting camps in Grand Lake Stream to suffer a significant loss of business. The reason for this is obvious. The hub of activity associated with these two groups occurs in and around Grand Lake Stream, which is 18 miles distant, not the Project lakes. See map depicting Project, area lakes, sporting camps, and Grand Lake Stream, attached as Exhibit B (Exhibit 2A of David Raphael's pre filed direct testimony).

For example, Charles Driza, the owner of Leen's Lodge, testified on behalf of PPDLW against the Project. Leen's Lodge is located on West Grand Lake approximately 16 miles from the Project. Mr. Driza testified that the Project would adversely impact his business, but acknowledged that Big Lake, West Grand and Tomah Stream, and the St. Croix River are the predominant places where his customers fish. (Transcript at 417-421, 454.) None of these are within eight miles of the Bowers Project. Likewise, Dale Tobey, a Maine Guide,

Guide, who testified on behalf of PPDLW against the Project, confirmed that the key lakes he takes customers to are Sysladobsis, Big Lake, Third Machias, Fourth Machias, Wabassus, and Pocumcus. (Transcript at 457-458.) With the exception of Sysladobsis, none are among the Project lakes at issue here.

The intercept surveys and boat counts conducted by the Applicant document not only that overall use of the Project lakes is low, but there is almost no evidence of use by guides. (Bowers Surveys at Tables 2, 4 and 6.) The sporting camp owners and guides opposed to the Project not only failed to provide credible or substantiated evidence that their industries would be harmed, they did not demonstrate that they are significant users of the Project lakes.

Finally, common sense confirms what the surveys and boat counts quantify. There is no significant use of the Project lakes by those operating out of Grand Lake Stream. It takes well over an hour to travel by a typical Grand Laker canoe (12 miles and 10 miles per hour—the maximum safe speed for any motorized canoe with two people in it) from Grand Lakes Stream to the lakes in close proximity to the Project, and an additional ¾ of a hour to travel through Junior Stream to Junior Lake. Travel across Junior Lake to Scraggly Lake would take an additional ¾ hour by motorized canoe. How many guides treat their customers to multi-hour canoe rides to fish while leaving the best fishing in the area—West Grand Lake—behind them? Travel by road is also time consuming as it takes well over an hour to travel by vehicle on the Amazon Road (a private gravel road over which landowners grant access to the public)

to reach either Scraggly Lake or Pleasant Lake. (May 7, 2013 Haynes Comments.)

B. Private Camp Owners Do Not Own The View

Although some camp owners will have a different view when they are on the lakes, they do not own that view.[1] No person has acquired a view easement for Bowers Mountain. Indeed, although the opponents focused on the existence of the Sunrise Conservation easement, that easement also did not include a viewshed easement. (Selser Direct Testimony at 2-8.) There are no easements that protect views of Bowers Mountain and unless and until someone pays for such an easement, they should not be entitled to prevent development on Bowers Mountain that is a permitted use and specifically encouraged under Maine law.

Further, public use of the project lakes is minimal due to lack of public access and low water conditions during late summer. Bottle Lake has a rudimentary boat launch but Bottle Lake Stream (approximately two miles long) must be navigated to reach Junior Lake and is too shallow for all but the smallest boats most years after August 1st. Junior Lake has no public boat launch. Scraggly Lake has an extremely rough hand carry boat launch. (May 7, 2013 Haynes Comments.) Access to Junior Lake from West Grand Lake is through Junior Stream which is well over two miles long and through a boulder field which limits its use by all but the bravest boaters. These challenges with public access are reflected in the surveys and use data presented by the

[1] The view from their private camps is not legally relevant. 35-A M.R.S.A. § 3452. (test is of visibility on the scenic resource of state or national significance, which are public resources, not the surrounding private lands).

Applicant, which conclusively demonstrate that Pleasant, Scraggly, Junior and Shaw Lakes receive very low overall use. (Boyle Direct Testimony at 2, 15) Indeed, Dr. Palmer (Transcript at page 220) and PPDLW both agreed with the low use characterization for these lakes.

C. The Wind Energy Act Encourages The Development Proposed Here

Large landowners have long sought to improve the regulatory climate in Maine and have advocated for regularity clarity. The Wind Energy Act is clear. It sought to encourage development of wind energy in the expedited permitting area. The Act included measures intended to streamline permitting for projects located in the expedited area. With respect to scenic impacts, the Act recognized the difficulty and challenges associated with assessing such impacts and therefore included a number of measures aimed at guiding the agency's exercise of discretion in assessing such impacts. The Act specificies that only resources that meet the statutory definition of significant resource of state or national significant may be considered and only if they are located within eight miles of the turbines. The Act specifics that visibility alone is not a basis for determining the impacts are unreasonable. The Act identifies six specific criteria that the agency must consider when assessing whether the scenic standard is met.

In its denial of the Bowers Project, the Department departs from both the spirit and intent of the Act. It introduces a new standard, overall scenic impacts, and on the basis of that standard has denied this Project. The Act is clear, however, that it is the impact on any single resource that is relevant.

The Department concluded that such impacts were reasonable and therefore should have approved the Project.

CONCLUSION

There is no need to pick and choose between these uses. We need to encourage a multiple use forest with room for everyone including landowners, timber harvesters, wind farm operators, guides, commercial sporting camp owners, boaters, fishermen and all other users. This Project is fully compatible with the working forest in which it is located as well as the other uses of this area. For the foregoing reasons, Douglas E. Humphrey and Bowers Mountain, LLC respectfully request that the Board grant the appeal, reverse the Department's Order denying the Project, find that the Project meets the scenic impact standard of the Wind Energy Act, and approve the Bowers Wind Project.

Dated: September 4, 2013

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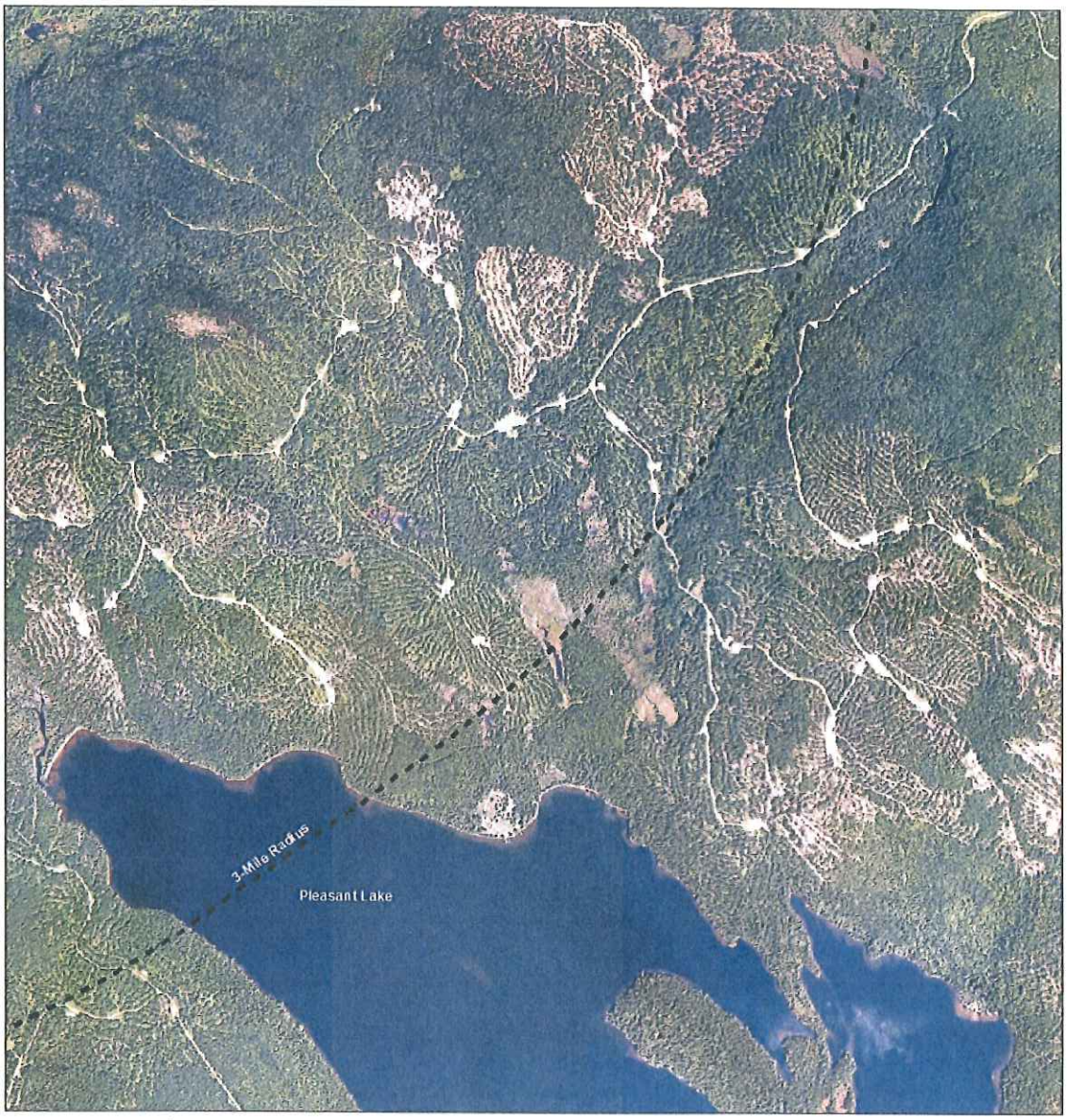
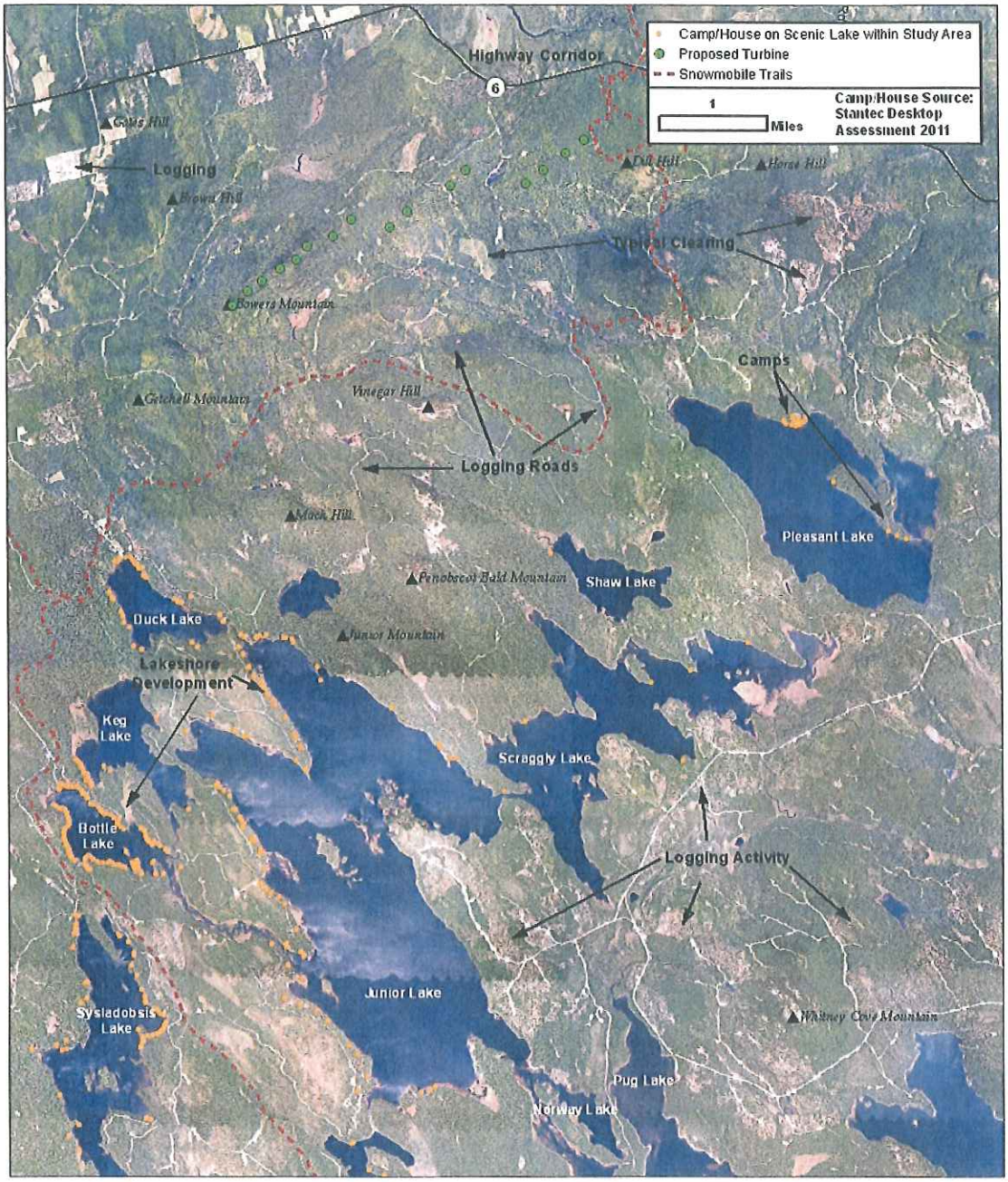
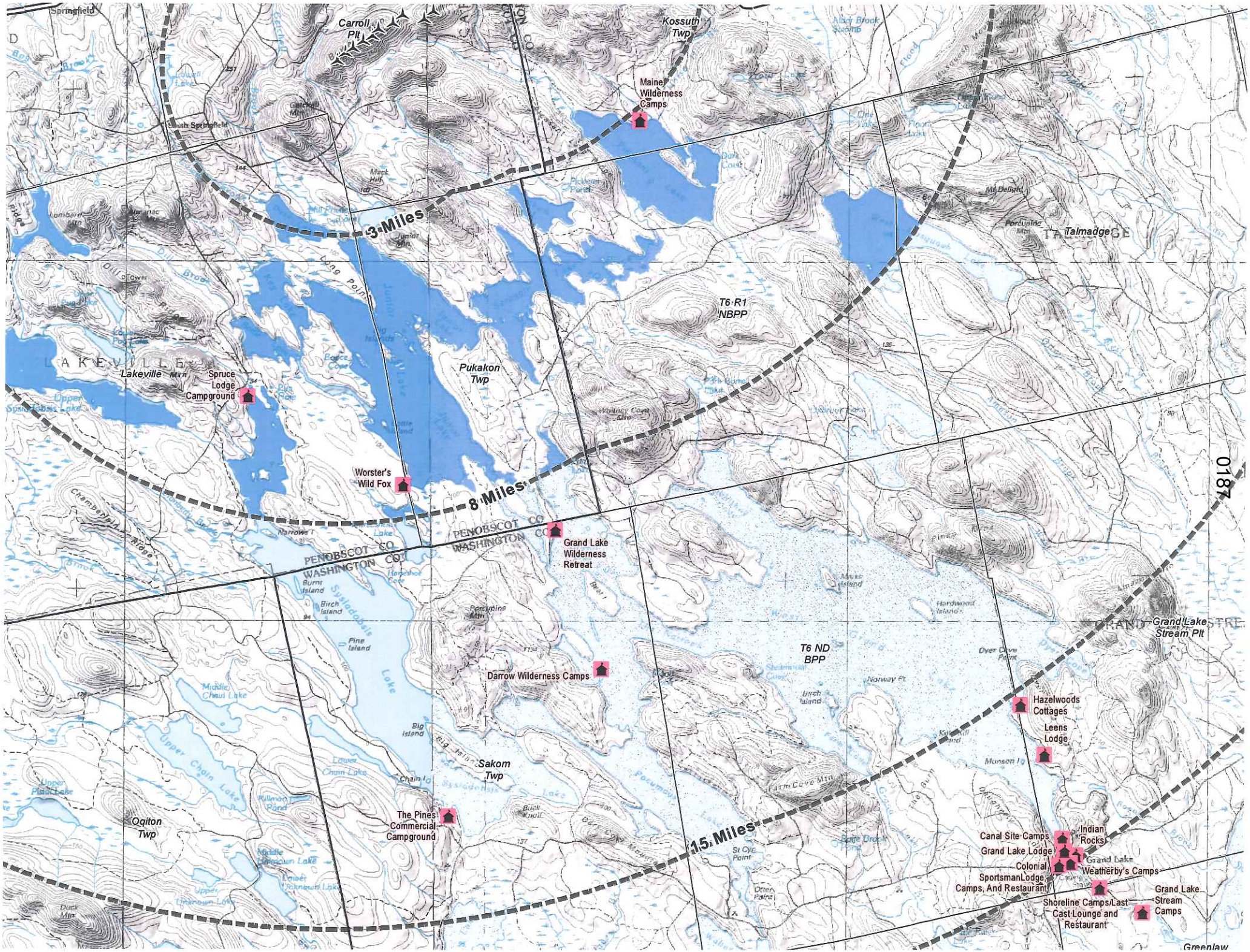
Diagram 1. Logging Activity



This aerial photo illustrates the extensive logging and associated clearing and access roads seen throughout the region. Logging activities are clearly visible from Pleasant Lake and several other lakes in the study area.

Diagram 2. Existing Land Use




Springfield
Carroll Plt
Kossuth Twp
Maine Wilderness Camps
3 Miles
Talmadge
T6 R1 NBPP
Pukakon Twp
Lakeville
Spruce Lodge Campground
Worster's Wild Fox
8 Miles
PENOBSCOT CO
WASHINGTON CO
Grand Lake Wilderness Retreat
Grand Lake Stream Plt
T6 ND BPP
Darrow Wilderness Camps
Hazelwoods Cottages
Leens Lodge
Sakom Twp
The Pines Commercial Campground
Oqiton Twp
15 Miles
Canal Site Camps
Indian Rocks
Grand Lake Lodge
Grand Lake
Colonial
Weatherby's Camps
SportsmanLodge, Camps, And Restaurant
Shoreline Camps/Last Cast Lounge and Restaurant
Grand Lake Stream Camps
Greenlaw

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