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GOVERNOR

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION & FORESTRY
LAND USE PLANNING COMMISSION
22 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0022

WALTER E. WHITCOMB
COMMISSIONER

NICHOLAS D. LIVESAY
EXECUTIVE DIRECTOR

Memorandum

To: Commissioners
From: Stacie R. Beyer, Chief Planner
Date: December 14, 2017
Re: NextEra Petition to Initiate Rulemaking for Expansion of the Expedited Permitting Area
Proposed Changes to Chapter 10, *Land Use Districts and Standards*
Appendix F: Expedited Wind Energy Development Area Designation

This memo notes and attaches submissions the Commission recently received regarding the petition filed by NextEra Energy Resources, LLC (“NextEra”) to expand the expedited permitting area in Skinner Twp., Chain of Ponds Twp., Seven Ponds Twp., and T5 R6 BKP WKR (the “Petition”). The submissions, a letter from NextEra and a letter from environmental organizations, involve discussion related to the Commission’s *Guidelines for the Review of Petitions for the Addition of Lands to the Expedited Permitting Area for Wind Energy Development* (the “Guidelines”) and/or their development. To provide Commissioners with context as they review the recent letters, the role of the Guidelines and the process the Commission followed in developing the Guidelines are discussed below.

I. Role of the Guidelines

As noted in the December 6, 2017 staff memo to the Commission, the immediate task for the Commission upon review of NextEra’s proposed expansion is to determine whether to deny the Petition or initiate rulemaking. In March of 2010, the Commission adopted the Guidelines, which reflect the Commission’s interpretation and application of the relevant statutory section – 35-A M.R.S. § 3453 – at that time. The Commission may find the Guidelines informative when evaluating how to handle the Petition, but the Guidelines are not rule and are not binding. How the Commission interprets and applies Section 3453, particularly the “logical geographic extension” requirement, will be a central topic at the meeting next week.

II. Development of the Guidelines

A. Public Hearing and Public Comment Process

In August of 2009, the Commission initiated rulemaking in response to a petition filed by TransCanada Maine Wind Development, Inc. to expand the expedited permitting area for the Kibby II wind project. For that petition, the Commission scheduled a two-part public hearing. The Guidelines were developed as part of this process.

On December 16, 2009, Part I of the two-part public hearing, the Commission heard testimony on the following:

- What did the Wind Energy Act, which enacted recommendations of the Governor’s Task Force on Wind Power Development (the “Task Force”), do, and what did it not do?
- What do the § 3453 criteria, which the Commission must use when adding specific areas to the expedited permitting area, mean?
- How was the area designated as the windpower expedited permitting area developed?

As the same time, and building on the Part I hearing, a draft of the Guidelines was prepared. As part of the overall rulemaking effort, a public comment period focused solely on the draft Guidelines was held in January and February of 2010.

Part II of the public hearing followed adoption of the Guidelines and addressed the specific expansion petition filed by TransCanada.

After consideration of public comment received during Part I of the public hearing, the Commission adopted the Guidelines at its March 2010 meeting. The Guidelines captured the Commission’s thinking at that time and describe the factors that the Commission expected to consider when reviewing a petition for expansion of the expedited permitting area under Section 3453. Subsequently, in 2011, Commission discussion about wind energy development raised questions that prompted the Commission to seek additional information through public comment, primarily regarding potential cumulative impacts from wind energy development. In that process, the Commission again considered the logical geographic extension criterion. The Commission reviewed the public input and adopted revisions to the Guidelines on April 6, 2011 (the current version), which included a small change to the logical geographic extension requirement.

B. Public Comments by Legislators Submitted by NextEra

During the public comment opportunity on the draft Guidelines two groups of legislators submitted their thoughts on how Section 3453 should be interpreted and applied, and accordingly, how the Guidelines should be drafted. Yesterday, in support of the Petition, counsel for NextEra submitted copies of these 2010 comments and requested that they be provided to the Commission. NextEra’s December 13, 2017 submission is included as Attachment A.

In one of the 2010 letters, commenting on the logical geographic extension requirement of Section 3453, five members of the Energy and Utilities Committee wrote: “We think the legislative intent here is clear and a proponent has met the test for establishing logical geographic extension as long as the proposed area is contiguous to the existing expedited area.” (Fitz et al. Feb. 10, 2010.)

A separate letter, signed by members of the Governor’s Task Force and legislators involved in the passage of the Wind Power Act, offered a different interpretation of the logical geographic extension requirement. This letter said more than contiguity is required. The four legislators who signed this letter, one of whom also signed the other, said “we believe that a proponent has met the test for establishing logical geographic extension if the proposed area to be added to the expedited permitting area is: 1) contiguous to the expedited permitting area in existence as of April 18, 2008, and; 2) represents an extension of a natural geographic feature such as a ridgeline or series of ridgelines that are within the existing expedited permitting area.” (Bartlett et al. Feb. 2, 2010.)

Ultimately, the Commission adopted a different interpretation, an interpretation closer to, but not identical to, the second of the two interpretations offered by the groups of legislators noted above. Complete copies of both letters are included as part of NextEra's submission, included as Attachment A. The Guidelines were attached to the December 6, 2017 memo from staff to the Commission.

C. Public Comments by Others

In preparing the Guidelines, in addition to the two letters from legislators, the Commission received a range of other comments from individuals and entities across the spectrum, with differing levels of support for or opposition to wind power development. Some of the commenters also participated on the Governor's Task Force. Additional comments were received from the Friends of Boundary Mountain, TransCanada, Maine Audubon, Appalachian Mountain Club, Natural Resources Council of Maine, Endless Energy Corporation, and the Public Utilities Commission. With regard to the logical geographic extension requirement, some comments were similar to those provided in the two legislator letters, while others advocated for applying this standard in a more limited manner to capture geographic features currently bisected by the expedited area.

Yesterday, the Commission received a letter from the Appalachian Mountain Club, Maine Audubon, and the Natural Resources Council of Maine. Views expressed in this letter are consistent with comments from these organizations provided during the drafting of the original Guidelines, favoring an application of Section 3453 that limits expansion of the expedited area to geographic features, such as ridgelines, split by the existing boundary. This letter is included as Attachment B.

Attachment A

NextEra Rulemaking Petition
Expansion of the Expedited Permitting Area
Chain of Ponds, Seven Ponds, Skinner, and T5 R6 BKP WKR

*Letter from NextEra Counsel
(December 13, 2017)*

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Admitted in: MA, ME, NH

December 13, 2017

Everett Worcester, Chair
Land Use Planning Commission
22 State House Station
Augusta, ME 04333

Re: NextEra Energy Resources LLC / Moose-Alder Stream Windpower Project
Petition to Initiate Commission Rulemaking to Add to the Windpower Expedited
Permitting Area

Dear Mr. Worcester:

On behalf of NextEra Energy Resources LLC ("NextEra"), I recently obtained copies of two letters submitted to the Commission in 2010 at the time the Commission was considering the draft "Guidelines for the Review of Petitions for the Addition of Lands to the Expedited Permitting Area for Wind Power Development." I wanted to bring these letters to your attention now because I believe they will assist the Commission in considering whether to move forward with rulemaking in response to NextEra's petition filed with the Commission on November 15, 2017.

The first letter, dated February 2, 2010, was submitted by four members of the Maine Legislature who also were members of the Governor's Task Force on Wind Power Development. With respect to the first statutory criterion the Commission must consider when it receives a petition to expand the expedited wind permitting area (logical geographic extension), the legislators wrote as follows:

"With respect to the first criterion, we believe that a proponent has met the test for establishing logical geographic extension if the proposed area to be added to the expedited permitting area is: 1) contiguous to the expedited permitting area in existence as of April 18, 2008, and; 2) represents an extension of a natural geographic feature such as a ridgeline or series of ridgelines that are within the existing expedited permitting area. These are the only relevant criteria and consideration of the number of turbines or percentage of a project that might be located in the area goes beyond the clear language of the statute."

The Moose-Alder Stream Proposed Expansion Area meets both of these prongs. Specifically with respect to the second prong, the Proposed Expansion Area includes a "series of ridgelines" that make up the Boundary Mountains, and a portion of that series of ridgelines is located in the existing expedited permitting area in Kibby and Alder Stream townships.

Everett Worcester, Chair
December 13, 2017
Page 2

The second letter, dated February 10, 2010, was submitted by five members of the Legislature's Energy and Utilities Committee. Again with respect to the "logical geographic extension" criterion, the legislators wrote as follows:

"In its interpretation of the first criterion, LURC staff is requiring a demonstration that a specific percentage of a proposed project be located inside the existing expedited area. We think the legislative intent here is clear and a proponent has met the test for establishing logical geographic extension as long as the proposed area is contiguous to the existing expedited area."

I wanted to provide these letters to the Commission prior to its meeting next Tuesday so the Commission members would have an opportunity to review them prior to that meeting.

Thank you again for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew D. Manahan", is written over a horizontal line.

Matthew D. Manahan

Enclosures

cc: Stacie R. Beyer, Chief Planner

*124th
Maine
Legislature*

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LURC-AUGUSTA

3 State House Station
Augusta, ME 04333-0003
(207) 287-1540

February 2, 2010

Chairman Bart Harvey and Commissioners
c/o Catherine Carroll
Land Use Regulation Commission
22 State House Station
Augusta, ME 04333-0022

Dear Chairman Harvey and LURC Commissioners:

We have reviewed the draft "Guidelines for the Review of Petitions for the Addition of Lands to the Expedited Permitting Area for Wind Power Development" ("draft guidance") (dated January 25, 2010) and are concerned that the guidance (i) is contrary to the express language and legislative intent of An Act to Implement Recommendation of the Governor's Task Force on Wind Power Development (the "Wind Power Act"), and (ii) will impede the State's progress in meeting the important goals set forth in the Act.

The Wind Power Act expressly allows the Commission to consider requests to add a specific location to the expedited area provided the request satisfies the following statutory criteria: 1) the proposed area must involve a logical geographic extension of the currently designated permitting area; 2) the addition of a proposed expansion area to the expedited zone is important to meeting the State's goals for wind energy development set forth in 35-A M.R.S.A. § 3404; and 3) the addition of a proposed expansion area cannot compromise the principal values and goals of the Commission's Comprehensive Land Use Plan ("CLUP").

The draft guidance, however, establishes a balancing test for the second criterion that is at odds with the clear language of the statute. Specifically, as described in the guidance document, "the Commission interprets the phrase 'important to meeting the state goals for wind energy development' to mean that projects that have a limited potential for energy generation and disproportionate impacts on public resources in the state are not important to meeting the state goals for wind energy development." The guidance document then lists four additional criteria that the Commission should balance when considering a request to expand the expedited permitting area, including an assessment of the project's potential for energy generation, the viability of the project (availability of transmission lines, quality of the resource, etc.), and the impact to public resources. There is nothing, however, in the language of section 3404 that requires or allows the Commission to undertake a balancing test or evaluate these factors when assessing

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whether a proposed expansion is “important to meeting the State goals for wind energy development established in section 3404.” Section 3404(2) establishes the wind energy goals of at least 2,000 megawatts of installed wind energy capacity by 2015 and at least 3,000 megawatts by 2020. As of February 1, 2010, Maine had permitted or installed less than 500 megawatts (MW) of commercial wind energy and it is clear that the State is not currently on track to meet the goal of 2,000 MW of installed wind energy capacity by 2015. While the Task Force acknowledged and the Legislature understood that the energy goals set forth in section 3404 were “ambitious,” we also collectively determined that they are “realistic, achievable and necessary” if political subdivisions, agencies and public officials take “every reasonable action to encourage the attraction of appropriately sited development related to wind energy.” 35-A M.R.S.A. § 3404(1). As long as the goals set forth in section 3404 have not been met, which is currently the case, the second criterion has been satisfied and *no further analysis should be undertaken*.

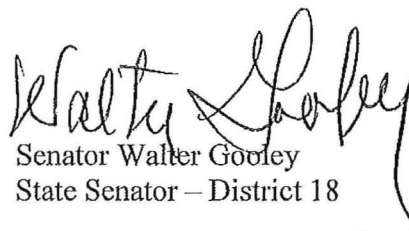
With respect to the first criterion, we believe that a proponent has met the test for establishing logical geographic extension if the proposed area to be added to the expedited permitting area is: 1) contiguous to the expedited permitting area in existence as of April 18, 2008, and; 2) represents an extension of a natural geographic feature such as a ridgeline or series of ridgelines that are within the existing expedited permitting area. These are the only relevant criteria and consideration of the number of turbines or percentage of a project that might be located in the area goes beyond the clear language of the statute.

We appreciate the time and effort the Commission and LURC staff have undertaken in the development of this guidance document; however, as members of the Task Force and legislators involved in passage of the Wind Power Act, we wanted to share our perspective on how these standards should be applied.

Best Regards,



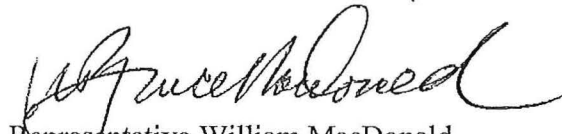
Senator Phil Bartlett
Senate Majority Leader



Senator Walter Gooley
State Senator – District 18



Representative Stacey Fitts
House District - 29



Representative William MacDonald
House District - 61

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February 10, 2010

Chairperson Hilton and Commissioners
c/o Catherine Carroll
Land Use Regulation Commission
22 State House Station
Augusta, ME 04333-0022

Dear Chairperson Hilton and Members of the Commission,

After reviewing the LURC staff recommendation to the Commission regarding appropriate standards for amending the expedited zone¹ we felt it was important to explain the Committee's position with respect to the first two criteria. We hope our explanation will help to simplify the review process for you.

In 2008, our Committee reviewed and the Legislature adopted the Task Force's recommendation on wind power development. Included in this recommendation was a three part test that LURC may apply to future requests to expand the newly created expedited area. In our opinion, the three review criteria proposed by the Task Force and now adopted into law are very straightforward and the development of additional review criteria is not helpful or necessary.

Criterion One

In its interpretation of the first criterion, LURC staff is requiring a demonstration that a specific percentage of a proposed project be located inside the existing expedited area. We think the legislative intent here is clear and a proponent has met the test for establishing logical geographic extension as long as the proposed area is contiguous to the existing expedited area.

Criterion Two

In its effort to interpret the second criterion, LURC staff created what we consider a complicated balancing test.² Our legislative intent here is very straight forward. As stated in 35-A M.R.S.A.

¹ Maine Land Use Regulation Commission Guidelines for the Review of Petitions for the Addition of Lands to the Expedited Permitting Area for Wind Energy Development, Draft January 25, 2010

² The progress the state has made in achieving the goals set forth in § 3404;

- The project's potential for energy generation;
- The viability of the proposed project, including the availability of transmission lines to transfer the generated electricity, the quality of the wind resource, and other relevant information; and
- The impact to public resources and, if applicable, public infrastructure vs. the energy likely to be generated by the proposed project and the associated public benefits. Evaluation of the impact to public resources will include, in part, an identification of important natural, recreational, scenic, archaeological and historic resources in the area.

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§ 3404, it is the policy of the State of Maine that political subdivisions and agencies do everything they can to approve appropriately located wind power development in the state in order to meet the goal of 2000 megawatts of installed capacity by 2015 and 3000 megawatts by 2020. It is our position that *every turbine proposed that leads the state towards the goal of 2000 megawatts of installed capacity by 2015 and towards 3000 megawatts of installed capacity by 2020 meets the state's public policy goal.* We suggest that every proposal that comes to you until we reach that threshold of installed capacity should immediately pass this part of the test.

That said, LURC possesses a number of tools to protect Maine's valuable natural resources and determine if a wind power development request is appropriately sited. We appreciate that in other stages of permitting the *entire project* LURC will weigh the natural resource impacts, site lines and other issues carefully. It is during that permitting of the entire project that those site specific issues are best considered.

The Legislature appreciates the role and challenge LURC faces in applying the statutory and regulatory criteria and in no way intends to interfere with that process. Instead, to the extent the Legislature may have unintentionally created ambiguity or suggested a more complicated process, we wanted to clarify our intent, specifically with respect to the second criterion. We urge the LURC to remove the specific percentage requirement in criterion one and reconsider their pending balancing test. These two changes should simplify your regulatory review. If it is helpful, please let us know and we can provide further statutory clarification in testimony.

Thank you for your attention to this matter, and thank you for your service to the People of Maine.

Sincerely,

Stacy A. Feltz
Kenneth Feltz
Richard Blanchard
Michael Feltz
Bryan Hobbin

Attachment B

NextEra Rulemaking Petition
Expansion of the Expedited Permitting Area
Chain of Ponds, Seven Ponds, Skinner, and T5 R6 BKP WKR

*Letter from AMC et al.
(December 13, 2017)*

Appalachian Mountain Club, Maine Audubon, Natural Resources Council of Maine

December 13, 2018

Re: NextEra petition to expand expedited wind power permitting area

Dear Ms. Beyer:

The organizations listed below are writing to express our assessment of the petition submitted by NextEra to expand the expedited wind power permitting area in the northern Boundary Mountains (Kibby/Alder Stream region). We believe that this request is contrary to the intent of the expansion petition process and LUPC's guidance for consideration of these petitions and does not constitute a logical geographic extension to the existing expedited permitting area.

When the Governor's Task Force developed its proposal for the Expedited Permitting Area (EPA) (subsequently adopted by the Legislature) it was not feasible to conduct a detailed evaluation of the development potential and resource conflicts of all potential development sites. The EPA was delineated primarily by township following general guidelines¹. The petition process was established to fine-tune these boundaries where a potential development site was split by the expedited/non-expedited boundary. The law governing additions to the EPA (35-A MRSA §3453) states that they are for the purpose of adding "a specified place". It was never intended to allow the addition of large areas encompassing multiple potential development sites spanning multiple townships to the EPA.

LUPC's *Guidelines for the Review of Petitions for the Addition of Lands to the Expedited Permitting Area for Wind Energy Development* (April 2011 revision) states, "It is not the Commission's intent to use the rulemaking process to add broad areas, such as entire ridgelines, to the expedited area as changes on this scale are properly referred to the legislature for consideration...Portions of the expedited area were designated using township or other political boundaries, which may cut across ridgelines or other naturally occurring geographic features relevant in the siting of wind power. Some adjustment to the expedited area boundary may be needed in instances where a potential project falls partially within the expedited area and partially outside of it." The proposed expansion clearly constitutes a "broad area" that goes far beyond an "adjustment" to the existing EPA boundary.

We urge the Commission to reject this petition without proceeding to rulemaking.

Respectfully submitted,

¹ Governor's Task Force Final Report, page 18, footnote 2.

Kaitlyn Bernard
Maine Policy Manager
Appalachian Mountain Club

Eliza Donoghue
Senior Policy & Advocacy Specialist
Maine Audubon

Dylan Voorhees
Clean Energy Director
Natural Resources Council of Maine