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LAND USE PLANNING COMMISSION
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AUGUSTA, MAINE 04333-0022

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COMMISSIONER

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EXECUTIVE DIRECTOR

Third Procedural Order

In the Matter of

Zoning Petition ZP 779A

Wolfden Mt. Chase, LLC.

Application for Zone Change, Picket Mountain Mine

T6 R6 WELS, Penobscot County, Maine

Commissioner Everett Worcester, Chair and Presiding Officer

This Third Procedural Order sets forth the Presiding Officer's decisions with respect to remote testimony by expert witnesses, the filing of paper copies of hearing materials, evidence about tribal impacts, and rebuttal witnesses for the public hearing on Wolfden Mt. Chase, LLC's (Wolfden or Applicant) Application for Zone Change (Application). It also includes an updated Summary of Schedule.

I. BACKGROUND

- A.** On February 24, 2023, the Maine Land Use Planning Commission (Commission or LUPC) accepted as complete for processing Wolfden's application to rezone 374 acres in T6 R6 WELS from a General Management to a Planned Development (D-PD) subdistrict. The proposed D-PD subdistrict would allow for the development and operation of the Pickett Mountain metallic mineral mine.
- B.** The application is subject to and will be reviewed under the Commission's Chapter 12 rules (Mining and Level C Mineral Exploration Activities). 06-672 C.M.R. Chapter 12,

effective May 27, 2013. Chapter 12 requires a public hearing to be held by the Commission prior to a final decision on the application.

C. The Second Procedural Order set October 16 through 18, 2023, as the dates for the hearing and the location as Stearns Jr./Sr. High School in Millinocket, ME. Section V(B). The Second Procedural Order included the following, which are the subject of this Third Procedural Order:

1. A requirement that “all persons providing sworn, written, Pre-filed testimony must be made available in person at the hearing for questioning by the Commission, staff/consultants, and appropriate parties.” Section VII(B).;
2. Directions for the filing of witness lists and pre-filed testimony. Sections VII(A and B).;
3. A list of hearing topics, including “historical and cultural resources/relevant tribal impacts.” Section IV.; and
4. A requirement that “no person will be allowed to testify at the hearing for the Applicant or Intervenors unless that person has submitted Pre-filed testimony, and no testimony will be allowed into the record if the witness does not participate in the hearing. All direct testimony delivered at the hearing must be consistent with the witnesses’ Pre-filed testimony.” Section VII(B).

D. **Requests by Intervenor 2.** On August 30, 2023, Intervenor 2 (Tribal Nations and NGOs) submitted two requests to the Commission:

1. To allow remote testimony by Dr. Ann Maest, an aqueous geochemistry expert, due to a conflicting medical situation involving immediate family; and
2. To clarify the directions for submitting paper copies of witness lists and pre-filed testimony and to allow filing deadlines to apply only to electronic/digital submissions with paper copies due the following day.

Intervenor 2 stated that Dr. Maest needs to remain in Colorado during the scheduled dates of the public hearing to provide care for an immediate family member following a surgical procedure on October 9, 2023. Intervenor 2 explained that Dr. Maest would provide “vital expert testimony at the hearing regarding the impacts of Wolfden’s proposed project on water quality, including with respect to the treatment of contaminated water, the creation of acid mine drainage, the fate and transport of contaminants and acidity through ground and surface waters, and water balance.” According to Intervenor 2, Dr. Maest’s testimony would be relevant to the hearing topics (set forth in the Second Procedural Order, Section IV), including ‘water and fish resources/aquatic habitats,’ ‘wildlife resources/habitats,’ and ‘natural character’ as related to a number of Commission review criteria in Chapter 12, Section 4(B). Intervenor 2 provided evidence of Dr. Maest’s education, experience, and expertise, especially

regarding the transport and fate of contaminants in ground and surface waters and mining.

Intervenor 2 also requested clarification on whether paper copies of the witness list, pre-filed testimony, and exhibits must be filed with the LUPC. If so, Intervenor 2 asked that paper copies be due to the LUPC at least one business day after deadlines for electronic filing to enable the parties to send the hard copies by overnight delivery or arrange for hand delivery to the LUPC during business hours.

E. Response by Applicant and additional requests. On August 31, 2023, Wolfden responded to Intervenor 2's requests and stated that Wolfden has no objection to allowing remote testimony in general for extenuating circumstances and for good cause shown, and that it has no objection to the specific request by Intervenor 2 that Dr. Ann Maest be allowed to testify remotely. Wolfden asserted that in general, relief from the requirement that a witness be present to testify should be granted sparingly. In addition, Wolfden raised several concerns about the proposed remote testimony:

1. Whether it will be possible for the parties and the Commission to hear and see the witness as this is important for assessing credibility;
2. Whether there will be an opportunity to conduct meaningful cross-examination of the witness, including presenting documents to the witness during cross-examination; and
3. Whether there is the potential for technological failure that may prevent the parties from cross-examining the witness.

Wolfden stated that if it is not possible to hear or see a remote witness for any reason or if there is not an appropriate opportunity to cross-examine a remote witness due to their remote participation, the appropriate relief would be to strike the testimony.

Wolfden also stated that it has no objection to allowing paper copies of required filings to be due one business day after the deadline for electronic filings.

In addition, in its August 31 response to Intervenor 2's request, Wolfden submitted two requests for clarification of the Second Procedural Order:

1. To clarify the relationship between the public hearing topic 'historical and cultural resources/relevant tribal impacts' and the applicable rezoning review criteria; and
2. To allow certain witnesses, upon a showing of good cause, to testify at the public hearing without submitting pre-filed testimony.

Wolfden seeks confirmation that 'relevant tribal impacts' addressed at the public hearing must be tied to the topics identified in the Second Procedural Order and the underlying regulatory standards on which those topics are based. In their request,

Wolfden stated that “we do not believe there is a separate regulatory standard related to tribal impacts nor has Intervenor Group 2 identified any such standard.”

Wolfden also requested that the Commission allow it to identify witnesses that may testify at the hearing without having submitted pre-filed testimony. The basis for this request is that while Wolfden’s Application for Zone Change provides information on which intervenors can rely in preparing pre-filed testimony, Intervenor 2 has not provided a similar body of information on which Wolfden can rely in preparing its pre-filed testimony. Wolfden stated that it would not “be efficient for the applicant to identify witnesses and pre-file testimony based on its best guess of what Intervenor Group Two will allege in its pre-filed testimony.” Wolfden proposed that it be allowed to present rebuttal witnesses who have not submitted pre-filed testimony upon a showing of good cause, so long as they are limited to rebutting specific issues raised in the pre-filed testimony of another party and be identified within a week after submission of pre-filed testimony.

F. Response by Intervenor 1. On September 1, 2023, Intervenor 1 (HC Haynes, Inc.) responded that they had no objections to either of Intervenor 2’s requests but that they join the Applicant in requesting that due process rights, especially cross-examination and rebuttal, be protected.

G. Intervenor 2’s response to the Applicant. On September 1, 2023, Intervenor 2 responded to Wolfden’s concerns about remote testimony and objected to Wolfden’s proposal that testimony of remote witnesses be entirely struck from the record in the event of technical difficulties, stating that this remedy is overly broad. Intervenor 2 argued that “if any technical difficulties do arise, the LUPC can exercise its judgment under the particular circumstances to appropriately resolve the issue. There is no reason to circumscribe the LUPC’s discretion and pre-ordain a harsh remedy.” Intervenor 2 further argued that technology is available to present documents to remote witnesses during cross-examination, such as emailing documents in portable document format (PDF) to witnesses or using the screen-sharing feature in a virtual/hybrid meeting application. Intervenor 2 stated that neither Wolfden nor Intervenor 1 objected to remote testimony at the hearing and that the request for remote testimony should be granted without the conditions proposed by Wolfden.

Intervenor 2 also objected to Wolfden’s request that the topic of ‘relevant tribal impacts’ be clarified, stating that the LUPC has identified the topics for the hearing and can weigh for itself how any testimony relates to the standards. Intervenor 2 argued that this approach is consistent with the LUPC’s Rules for the Conduct of Public Hearings, which provide that “‘the experience, technical competence and specialized knowledge of the Commission or Presiding Officer may be utilized in the evaluation of all evidence submitted.’ Rule 5.07(A).”

Intervenor 2 also objected to Wolfden’s request to present rebuttal witnesses that have not submitted pre-filed testimony. Intervenor 2 argued that under LUPC rules, the Applicant bears the burden of proof (4.05(A)(6)), that Wolfden has had years to

prepare an application and prepare for the hearing, and that, therefore, Wolfden will have ample opportunity to select witnesses able to meet that burden. Intervenor 2 also stated that this request does not appear to be a clarification of the Second Procedural Order but rather an attempt to create an exemption for Wolfden to the Second Procedural Order's requirement regarding witnesses and pre-filed testimony. Intervenor 2 noted that LUPC rules provide that "the Presiding Officer may require that all or part of the testimony to be offered at such a hearing be submitted in written form." (5.09(D)). Intervenor 2 stated that it does not oppose listed witnesses who have pre-filed testimony from providing rebuttal testimony that may be outside the scope of their pre-filed testimony if in response to testimony produced at the hearing.

H. Applicant's response to Intervenor 2's response. On September 5, 2023, Wolfden responded to Intervenor 2's objection regarding testimony by rebuttal witnesses, stating that the request was upon a showing of good cause and not as a matter of course. Wolfden pointed out that the Second Procedural Order recognizes there may be a need for a pre-hearing conference for supplementing witness lists and argued that a request to allow rebuttal witnesses who have not pre-filed testimony could be addressed at that time, including consideration of changing the deadline or requirement for submitting pre-filed testimony.

II. REMOTE TESTIMONY

A. Testimony and cross-examination of remote witnesses allowed. The Presiding Officer has decided that remote testimony by expert witnesses at the public hearing may be allowed only under extenuating circumstances and after a showing of good cause. Accordingly, and seeing no objections from the parties, the Presiding Officer grants Intervenor 2's request to allow Dr. Ann Maest to testify and be cross-examined remotely at the hearing. The Presiding Officer finds that Intervenor 2 has demonstrated extenuating circumstances and shown good cause in their request for remote participation of this witness, specifically, the nature of the circumstances, the recently identified conflict with the dates of the hearing, and Dr. Maest's relevant qualifications as a witness.

B. Technical issues during remote testimony and cross-examination. The Presiding Officer has considered the Applicant's and Intervenor 1's concerns regarding remote testimony and cross-examination and directs LUPC staff to take those concerns into account when choosing the vendor that will provide digital technology for the hearing. If technical issues impede any aspect of remote testimony or meaningful cross-examination, the Presiding Officer has the authority to determine the admissibility of evidence under the particular circumstances presented. (Chapter 5, Section 5.02,D). The Presiding Officer declines to adopt a broad rule that any technical difficulties during a remote witness's testimony will result in such testimony being automatically stricken and will address any concerns that arise regarding the effectiveness of cross-examination due to technical difficulties to the extent necessary during the hearing.

III. FILING OF PAPER COPIES OF HEARING MATERIALS

The Presiding Officer has considered the burden on the parties of requiring electronic and paper copies of hearing materials to be due the same day. Accordingly, paper copies of hearing materials, including witness lists and pre-filed testimony, are now due at the Commission's Augusta office by 4 p.m. of the first business day following the due date of electronic copies. This determination modifies the due date requirement for paper copies of Section IV(E)(4) of the First Procedural Order, but the formatting requirements of that section remain in effect. This determination also modifies Sections VII(A and B) of the Second Procedural Order as follows:

1. Electronic copies of witness lists must be submitted to the service list by **4:00 PM** on Monday, **September 11**. Paper copies of witness lists must arrive at the Commission's Augusta office by **4:00 PM** on Tuesday, **September 12**.
2. Electronic copies of pre-filed testimony must be submitted to the service list by **4:00 PM** on Monday, **September 25**. Paper copies of witness lists must arrive at the Commission's Augusta office by **4:00 PM** on Tuesday, **September 26**.

Receipt of paper copies by staff of the front desk of the Harlow Building in Augusta by the deadline fulfills the requirement of delivering paper copies to the Commission's Augusta office. The other filing and formatting requirements of the First Procedural Order remain in effect.

IV. HISTORICAL AND CULTURAL RESOURCES/ RELEVANT TRIBAL IMPACTS

The Presiding Officer agrees with Intervenor 2 that the LUPC has identified the topics for the hearing and can weigh how any testimony relates to the relevant standards. According to the Commission's rules, Chapter 5, §5.07(A), "evidence will be admissible if it is relevant and material to the subject matter of the hearing..." and "the experience, technical competence and specialized knowledge of the Commission or Presiding Officer may be utilized in the evaluation of all evidence submitted."

The Commission will only accept testimony and evidence relevant to the identified topics *and* the applicable statutory decision-making criteria for rezoning, 12 M.R.S. § 685(A)(8-A). Pursuant to this statutory standard, the Commission must consider whether a proposed change will be "consistent with the standards for district boundaries in effect at the time, the comprehensive land use plan and the purpose, intent and provisions of this chapter," and have "no undue adverse impact on existing uses or resources." 12 M.R.S. § 685(A)(8-A)(A),(B). The Commission's Comprehensive Land Use Plan notes that the "Native American tribes — including the Aroostook band of Micmacs, Houlton band of Maliseets, Passamaquoddy Tribe of Indian Township, Passamaquoddy Tribe at Pleasant Point, and the Penobscot Nation — continue to contribute to the cultural resources of the jurisdiction and the state." Comprehensive Plan, 5.4(C), Cultural Resources. The Second Procedural Order identifies "Historical and cultural resources/relevant tribal impacts" as a topic for the hearing. Accordingly, during the hearing, the parties may present evidence related to potential impacts to tribal resources and practices as a result of the proposed zone change.

The Presiding Officer has the authority to rule on the admissibility of evidence during and after the hearing. If questions do arise about the applicability of evidence to the decision-making criteria, the Presiding Officer will rule on those at the time.

V. REBUTTAL WITNESSES AND PRE-FILED TESTIMONY

The Second Procedural Order required written pre-filed direct testimony but not written pre-filed rebuttal testimony. After consideration of the Applicant's arguments regarding rebuttal witnesses, the Presiding Officer has found those arguments compelling. Rebuttal witnesses will be allowed upon a showing of good cause, provided they are identified by October 2, and their testimony is limited to rebutting specific issues raised in the pre-filed testimony of another party. If the need arises for a second pre-hearing conference to discuss the modification of witness lists, the Presiding Officer may also hear requests at the time for changing the deadline or requirement for submitting additional pre-filed testimony.

VI. UPDATED SUMMARY OF SCHEDULE AND HEARING PRESENTATIONS

The Summary of Schedule from the Second Procedural Order is updated below according to the decisions made in this procedural order and to add deadlines for the submission of graphics and presentations the parties intend to use as visual aids during the public hearing. Electronic copies of graphics and presentations must be either PDF or PowerPoint files.

A. Pre-filed witness lists (electronic)-	September 11, 2023
B. Pre-filed witness lists (paper)-	September 12, 2023
C. Pre-filed testimony (electronic)-	September 25, 2023
D. Pre-filed testimony (paper)-	September 26, 2023
E. Rebuttal witness list (electronic)-	October 2, 2023
F. Rebuttal witness list (paper)-	October 3, 2023
G. Graphics and presentations (electronic)-	October 9, 2023
H. Graphics and presentations (paper)-	October 10, 2023
I. Second pre-hearing conference-	October 10, 2023
J. Public hearing-	October 16, 17, and 18, 2023

VII. AUTHORITY AND RESERVATIONS

This Procedural Order is issued by the Presiding Officer pursuant to the Commission's Chapter 5, *Rules for the Conduct of Public Hearings*. All objections to matters contained herein should be timely filed in writing with the Commission according to the service list but are not to be further argued except by leave of the Presiding Officer. All rulings and

objections will be noted in the record. The Presiding Officer may amend this Order at any time.

DONE AND DATED AT AUGUSTA, MAINE THIS 11th DAY OF SEPTEMBER 2023



Everett Worcester, Chair and Presiding Officer