

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-

FOX ISLANDS WIND NEIGHBORS, et al.,)

PETITIONERS)

v.)

MAINE DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)

RESPONDENT)

**PETITION FOR REVIEW
OF FINAL AGENCY
ACTION**

INTRODUCTION

1. This is a petition to review final agency action brought by the Fox Islands Wind Neighbors, LLC (“FIWN”) and various individual residents of Vinalhaven (together the “Aggrieved Parties”) who are aggrieved by the Condition Compliance Order of the State of Maine Department of Environmental Protection (“DEP”) issued June 30, 2011, signed on behalf of Acting Commissioner Patricia Aho, which determined that Fox Islands Wind LLC (“FIW”) is in compliance with Condition No. 8 of Certification # L-24564-ES-A-N (the “License”) to operate a small scale wind energy project (the “Project”) located on Vinalhaven, Maine. It is alleged that the Order was politically motivated and issued over the strong objections of the Division of Land Resources of the DEP. It is further alleged that the Order is arbitrary and capricious, contrary to law, not supported by substantial evidence and was the product of abuse of discretion by depriving residents living near the Project of the fair and reasonable benefit of the law and regulations protecting citizens from excessive noise.

JURISDICTION

2. This Court has jurisdiction pursuant to 38 M.R.S.A. § 346.1, 5 M.R.S.A. §§11001-11008, and Rule 80C of the Maine Rules of Civil Procedure.

PARTIES

3. FIWN is an entity organized under the laws of Maine for the purpose of promoting the responsible operation of the Project so as not to produce noise that threatens the health, well-being and property values of neighbors residing near the facility. Its members consist of those residing near the Project who are adversely affected by the noise from the Project. The members of FIWN are aggrieved by the Order because they suffer annoyance, adverse health effects and loss of property value from noise propagated by the Project in excess of the limits established by 06-096 CMR ch. 375 §10 (the “DEP Noise Rule”) and because the Order challenged herein does not require FIW to affirmatively demonstrate that it is in compliance with the Noise Rule, does not require FIW to provide the DEP with relevant sound data to allow for the effective enforcement of the Noise Rule, imposes unreasonable burdens on residents for submitting complaints to the DEP, and fails to require FIW to take effective steps to mitigate excessive noise in response to valid complaints.

4. The individual Petitioners are Barbara Santa Coloma, Alan Farago, Arthur Farnham, William Haible, William Haley, Art Lindgren, and Cheryl Lindgren, all of whom are members of FIWN and reside on property they own near the FIW Project and are adversely affected by excessive noise from the Project and are aggrieved by the Order challenged herein in the manner described in paragraph 3 hereof

5. The DEP is a state agency charged with the responsibility of administering and enforcing the environmental laws of the State of Maine and granting permits for development of wind development projects under the Site Location of Development Act, 38 M.R.S.A. §481, et

seq. (the “Site Law”) and the Natural Resources Protection Act, 38 M.R.S.S. §480-A (the “NRPA”).

REGULATORY BACKGROUND

6. PL 2008, Chapter 661, “An Act to Implement Recommendations of the Governor’s Task Force on Wind Power Development” (the “Wind Power Act”) created two categories of wind turbine projects for regulatory purposes.

7. One category is a “grid-scale wind energy development,” defined by the Wind Power Act, Section A-7 enacting 35-A M.R.S.A. §3451.6 as a wind energy development that is a size that would subject it to the Site Location of Development Act, 38 M.R.S.D.A. §481, et seq. (the “Site Law”).

8. The second category is a “smaller-scale wind energy development” defined by the Wind Power Act, Section A-7 enacting 35-A M.R.S.A. §3456.1 as a wind energy development other than a grid-scale energy development which must obtain a certification by the DEP before construction or operation.

9. The Project at issue in this case is a smaller- scale wind energy development.

10. A smaller-scale wind energy development is required to “meet the requirements of the noise control rules adopted by the Board of Environmental Protection” as 06-096 CMR ch. 375 §10 (the “DEP Noise Rule”). *Id.* at 35-A M.R.S.A. §3456.1.A.

11. The DEP Noise Rule creates Sound Level Limits from the routine operation of developments subject to the Rule depending on the categories defined by the DEP Noise Rule, Chapter 375 §10. C. One category is known as a “quiet area,” where the Sound Level Limits are lower than any other category. *Id.* at §10.C(1)(v). A “quiet area” is a development to be located in an area where the daytime pre-development ambient hourly sound level at a protected location

is equal to or less than 45 dBA and/or the nighttime pre-development ambient hourly sound level at a protected location is equal to or less than 35 dBA.

12. The Sound Level Limit for a “quiet area” is 55 dBA between 7:00 a.m. and 7:00 p.m. (the “daytime hourly limit”) at a protected location and 45 dBA between 7:00 p.m. and 7:00 a.m. (the “nighttime hourly limit”) at a protected location. Id.

13. A “protected location” is defined by the DEP Noise Rule to include a parcel of land containing a residence. Id. at §10.G(16). In all cases, nighttime limits apply to areas within a protected location that is up to 500 feet from a residence or sleeping quarters. Id.

FACTUAL BACKGROUND

14. FIW applied for a smaller scale wind energy development certification on March 24, 2009.

15. It was issued a Siting Certification for a Small-Scale Wind Energy Development (the “License”) pursuant to 35-A M.R.S.A. §3456 on June 5, 2009. *Exhibit A*. The License was for a Project consisting of three 1.5 megawatt GE wind turbines located in the Town of Vinalhaven, Maine. It required the Project to comply with the quiet area Sound Level Limits of the DEP Noise Rule, Section 375.10.C(1)(v) of 45 dBA at night between 7 p.m. and 7 a.m..

A. DEP’s Concerns About the Project’s Compliance with the DEP Noise Rule When Issuing the License.

16. Prior to the issuance of the License, the DEP had serious concerns about whether the Project could comply with the Noise Rule Sound Level Limits.

17. On May 18, 2009, Warren Brown of EnRad Consulting, an acoustical consultant to the DEP, expressed these concerns. He noted that “[s]ignificant vertical and directional wind shear in the Gulf of Maine (islands included) is documented for elevations similar to the proposed turbine project” resulting in “sound levels far in excess (10-12 dBA) of those predicted

using standard methods (divergence, air absorption, ground, etc.) under these wind conditions. “Based on these findings, Warren Brown recommended that the DEP condition a license on the requirement for “compliance requirements [that] specify measurement conditions to adequately evaluate this pulsating phenomena with appropriately specified controls for sound levels in excess of the limits.” In addition, in the e-mail Warren Brown informed the DEP that the “application noise assessment indicates three nearby protected locations with predicted sound levels 44-45 dBA. *There are too many variables to expect these projections [to] provide a sufficient margin.* [Emphasis added.] His recommendation was for a “*modification of development or legal arrangements to provide a reasonable margin.*” [Emphasis added.]

18. On June 1, 2009, Warren Brown issued a report, “Fox Islands Wind Power Project Noise Impact Assessment -- Peer Review”. The Peer Review stated that sound assessment by FIW indicated that noise would reach 43-45 dBA (the maximum permitted) at night at five locations of the proposed Project, that noise reduction operations (“NRO”) would be required for compliance in reference to another protected location, *id.* at 4 and expressed “potential compliance concerns ... for the nearest 6 protected locations....” *Id.* at 5. The Peer Review also repeated his earlier concerns about “[s]ignificant vertical and directional wind shear.” Based on these concerns, Warren Brown recommended in Section 9 of his Review that the license to FIW be issued with special conditions as earlier set forth in his May 18, 2008 e-mail.

19. Based on these concerns, the License issued by the Department on June 5, 2009, *Exhibit A*, recited that FIW was to operate the facility in NRO and that, even with NRO, the Project was expected to generate sound at or near the Noise Rule sound level limits of 45 dBA at night for “quiet areas” at five protected locations. License Finding 3 at 5. The License further

incorporated the concerns of Warren Brown about "significant vertical and directional wind shear" and required compliance measurements assessments to be drafted before operation as recommended in Section 9 of Warren Brown's Peer Review. Id. at 6. It further provided that if the Department determined that the Project was not in compliance with the DEP Noise Rule, FIW would be required to submit a revised operating protocol that demonstrates that the Project will be in compliance "within 60 days of [the] determination." Id.

20. Based on these findings, the License contained two specific conditions at issue in this appeal. Condition No. 7 to the License provides that:

Prior to operation of the facility, the applicant shall submit to the Bureau of Land and Water Quality an operational compliance assessment methodology for review and approval. The plan shall be implemented upon commencement of operations, and shall enable compliance measurements to be determined under the most favorable conditions for sound propagation and maximum amplitude modulation as outlined in Section 9 of a document prepared by EnRad entitled, "Fox Islands Wind Power Project Noise Impact Assessment-Peer Review," dated June 1, 2009.

Condition No. 8 provides that:

‘ If the compliance data indicates that, under most favorable conditions for sound propagation and maximum amplitude modulation, the proposed project is not in compliance with the Department standards as described in Finding 3, within 60 days of a determination of non-compliance by the Department, the applicant shall submit, for review and approval, a revised operation protocol that demonstrates that the project will be in compliance at all protected locations surrounding the development.

21. On November 30, 2009, the Department approved the Operational Sound Measurement Compliance Protocol required by Special Condition No. 7 of the License. The Protocol specified the conditions and the procedures under which FIW would be required to measure sound from the Project between May 1 and August 31 to demonstrate compliance with the DEP Noise Rule before the end of the first year of operations of the Project. In addition, the

Protocol stated that “[c]ompliance testing ... must be submitted to the Department following any noise related complaints after the commencement of operations, with consideration for the required weather, operations and seasonal constraints.”

B. FIW’s Attempts to Increase the Sound Level Limits for the Project.

22. Immediately following the issuance of the License, FIW informed the DEP that it objected to several provisions in the License, especially application of the “quiet area” sound level limits.

23. George Baker, CEO of FIW, wrote to the DEP Commissioner Littell about this issue on June 25, 2009, seeking the Commissioner’s political intervention with DEP staff on the quiet area issue after Baker had contacted Maine Speaker Hannah Pingree. Commissioner Littell wrote back the next day pointing out that the licensing was “done at breakneck speed” and that he had previously been involved to help resolve issues with the DEP’s licensing staff “to get this permit done at the Speaker’s request.” Id. But the Commissioner chided Baker on his claims about the noise limits, stating firmly that the Department was required to “apply[] our laws and rules ... based on the best scientific understanding and evidence.”

24. Thereafter FIW first appealed to the Board of Environmental Protection the requirements in its License that the Project comply with the “quiet area” sound level limits, later withdrawing that appeal when it was clear that the DEP would not be intimidated by the appeal, then filing an application to amend the License to allow the Project to operate with higher sound levels, then withdrawing that appeal when it was clear that the DEP was not going to accept it.

C. Noise Complaints Following the Commencement of Operations.

25. The Project began operations on October 30, 2009.

26. Immediately upon the commencement of operations, many of those living close to the Project, including the Aggrieved Parties, complained to the DEP that they were experiencing excessive noise from the Project, notwithstanding the pre-operational assurances given by George Baker that the nearby residents would not hear noise from the Project during normal operations because of masking from ambient background noise.

27. When FIW failed to take action to quiet the turbines of the Project, FIWN hired an attorney and an acoustical consultant to assist it in bringing the Project into compliance with the DEP Noise Rule.

28. Upon learning of the engagement of an attorney, FIW stated that it would thereafter refuse to cooperate with FIWN on the issue of compliance and would not allow access to sound, operations, or meteorological data related to the Project.

29. With the assistance of its acoustical consultant, FIWN took sound measurements of noise from the Project on its own and at its expense on March 15-19, 2010. On April 2, 2010, FIWN submitted preliminary findings to the DEP on measurements for the evening of March 18-19, 2010, where readings showed noise exceeding the DEP Noise Rule sound level limits. In connection with this filing, FIWN asked the DEP for assistance in getting meteorological and power output information from FIW. The requested information was never received.

30. On April 30, 2010, FIWN submitted formal complaints to the DEP about excessive noise from the Project for the evenings of March 18 (complaint # 1), April 23 (complaint # 2) and April 29, 2010 (complaint # 3) together with a request that the DEP require FIW to submit compliance assessment data for the proxy compliance site as required by Project's Operational Sound Measurement Compliance Protocol.

31. On May 4, 2010, FIWN submitted complaints for the evenings of April 30 (complaint # 4) and May 2, 2010 (complaint # 5), again requesting compliance assessment data from FIW.

32. On May 4, FIWN submitted additional complaints for April 23 (complaint # 6), April 29 (complaint # 7), April 30 (complaint # 8), May 1 (complaint # 9), May 3 at 5 .00 AM (complaint #10), May 3 at 6:00 AM (complaint # 11), May 4 at 8:00 PM (complaint # 12) and another for May 4 at midnight (complaint # 13). On May 6, 2010, FIWN filed a complaint for May 5, 2010 (complaint # 14). At this point, the DEP asked FIWN to refrain from filing additional complaints pending resolution of those submitted and FIWN complied with this request.

33. In the meantime, FIW resisted requests from the DEP for compliance assessment data, claiming it had “no legal obligation to produce” such data. On May 3, 2010, the DEP made a formal demand for the requested data, threatening enforcement action if FIW remained noncompliant.

34. On May 10, 2010, FIW’s attorneys took the position with the DEP that FIW was not required to submit monitoring data outside of the compliance measurements required by its License for the period May 1 to August 31. FIW claimed that it was “confused” by the request which it understood to have been instigated by a complaint about noise and that it was “not familiar with any requirement” that it submit monitoring data except for the four months identified in its License. Nevertheless, FIW promised to comply to the request in the near future.

35. On May 13, 2010, FIW sent the DEP compliance assessment data that was so incomplete as to be useless except for one day, April 29, 2010, which confirmed noise in excess of regulatory limits. FIW claimed that the data sent in was contaminated by ambient noise. It also

was disclosed that George Baker, a business school professor, was overseeing the data collection, rather than a professional acoustical consultant.

36. On May 25, 2010, FIWN submitted two additional complaints, concerning noise levels on May 17, 2010 (complaint # 18) and May 24, 2010 (complaint # 19), which were different from previous complaints because they were taken from different locations and had audio to support them.

37. In late May 2010, the DEP and its consultant determined that new complaint procedures needed to be put in place because the consultant was having difficulty evaluating citizen complaints without data from FIW, which was not providing data that enabled the consultant to assess the validity of the complaints.

38. The proposed Complaint Protocols were issued by the DEP on June 23, 2010 and revised on July 8, 2010 after a meeting on July 1, 2010 with the DEP attended to by representatives of FIWN and FIW and Warren Brown.

39. FIWN objected to the Complaint Protocols to the extent they required FIWN or its members to have an acoustical consultant analyze complaints before being submitted in order to give the complaints weight. FIWN's attorney wrote the DEP stating:

[W]e remain very concerned with the statement that the Department will "discount" (and possibly disregard entirely) complaints by residents impacted by the FIW Project that do not conform to the technical requirements of the "noise complaint protocol" as set forth in the Revised Peer Review. This protocol requires professional, expensive equipment and collection supervision, and contains substantial, detailed and burdensome technical requirements that necessitate the ongoing use of a professional sound engineer. My clients do not have the resources of a utility financed by ratepayers. They are digging into their own pockets to do the best they can to protect their property and their well being. Some are retired living on fixed income. There is nothing in the Noise Rules that justifies such technical and burdensome requirements. More than that, the noise complaint protocols set up a process that is contrary

to the licensing requirements for the FIW project.

40. Nevertheless, FIWN submitted its first complaint under the new Complaint Protocol on July 27, 2010 for the evening of July 17-18, 2010.

41. Under the new Complaint Protocol, FIW was required to submit compliance monitoring data to the DEP within 1 week of the filing of such a complaint, but FIW completely ignored the complaint and the newly formulated Protocols involving complaints and then it disputed the requirements in the Protocols for when FIW was supposed to respond to a complaint under the Protocols, requiring still another clarification of the Protocols of August 11, 2010. It took 3 weeks for FIW to submit *partial* data to the DEP in response to the July 17-18 complaint, instead of 1 week which was the clear requirement of the original Protocols.

42. On August 19, 2010, FIWN wrote to the DEP expressing concern and frustration that, after filing 21 complaints over a five month period, FIW had still not given complete compliance assessment data on a *single complaint*, that the FIW turbines were operating as usual out of compliance with the license conditions and that no enforcement action had been taken by the DEP. FIWN wrote:

If there are to be unlimited delays while FIW refuses or cannot supply information that it is obligated to supply on a timely basis, FIWN asks that the turbines be shut off in the evenings until FIW fulfills its duties. As matters stand, my clients are being asked to suffer complaints, night after night, without any relief and FIW is being allowed to operate outside the law, month after month, with no adverse consequences whatsoever. This is clearly not right or fair to the affected citizens of Vinalhaven.

D. DEP's Attempts to Bring FIW Into Compliance.

43. Finally, on September 8, 2010, six months after FIWN began filing complaints and ten months after FIW began operations with excessive noise, DEP consultant Warren Brown determined that the data from the July 17-18, 2010 complaint demonstrated that FIW was

exceeding the 45 dBA sound level limits in the nighttime of July 17-18. He further determined that the conditions existing on that night “were very similar” with conditions for complaints submitted by FIWN on May 1, 4, 5 and 6. All this information, according to Warren Brown, constituted “a significant body of consistent meteorological and sound data indicating sound levels greater than applicable limits.” He concluded that “[s]ubstantial changes are recommended for FIW nighttime operations, limiting WTG sound levels at ML-A to 45 dBA.”

44. Thereafter, for the rest of September, 2010, and all of October 2010 and most of November, 2010, the DEP worked to bring FIW into compliance with its permit without success.

45. FIW, for its part, refused to accept the DEP’s finding of non-compliance and on October 21, 2010 and November 15, 2010, FIW made submissions to the DEP purporting to demonstrate compliance with its License conditions by submitting for time periods that it claimed showed compliance. Since making these submissions, FIW’s position was that if it can show compliance under the conditions specified in its License, it did not have to respond to any complaints that it is not in compliance during other times or conditions. The DEP has never accepted this argument, taking the position that a licensee must always be in compliance with the Sound Level Limits of the DEP Noise Rule regardless of what the license says about the mechanism for the licensee making submissions to show compliance.

46. During this period FIWN did not submit additional complaints with the DEP because the DEP had indicated that it was working with the July complaint to bring about changes in the operations of FIW that would render it in compliance with the sound level limits at night under all conditions. However, so as not to leave the DEP with the impression that FIW was operating in compliance since the July complaint, it submitted on November 19, 2010 sound readings showing noise levels in excess of regulatory limits for the nights of August 6, August

16, August 27, August 31, September 1, September 2, September 4, September 6, September 20, October 8, October 10, October 18, October 23, October 30, November 6, and November 13, 2010.

47. Because of the inability of the DEP to obtain the information requested from FIW informally, the DEP sent a formal determination of non-compliance to FIW on November 23, 2010 (the “November Determination of Non-Compliance Letter”) based on the July 17-18 complaint, a copy of which is attached hereto as *Exhibit B*. The letter further stated that the DEP’s analysis of operational, sound and meteorological data from the complaint period and other data collected for the period of May 1 to August 31, 2010 indicate that “the facility is likely to exceed the required sound compliance level of 45 dBA [at any time] when there is significant vertical and directional wind shear.” In order to resolve the matter, the DEP demanded that FIW submit within 60 days a revised operation protocol “that demonstrates that the development will be in compliance at all protected locations surrounding the development *at all times*.” [Emphasis added.]

E. FIW’s Refusal to Cooperate

48. On December 3, 2010, FIW responded to the DEP’s demand letter by challenging the DEP’s conclusion that there had been a showing of non-compliance during the night of July 17-18. However, to demonstrate “good faith,” FIW submitted a proposal to address the claimed non-compliance by modifying its nighttime operating protocol + reduce sound levels by 2 dBA at the protected location nearest the Project, but only for the precise meteorological conditions that existed during the night of the July 17-18 complaint and no others. Also, the proposed corrective action was linked to another proposal by FIW to *increase* the sound levels for the Project when wind speeds are above 10 mph.

49. The DEP staff refused to accept a revised operating protocol to address non-compliance conditioned on approval of a license change to allow increased noise under other circumstances. Staff also continued to press FIW between December 2010 and the end of February, 2011, for data that would allow the DEP's consultant to analyze wind shear conditions and identify when the Project would need to revise its operations to remain in compliance with the Noise Rule, regardless of wind direction or time of year.

50. On March 7, 2011, in an internal email DEP regulators concluded it was "fruitless to continue discussions with [FIW] about submitting data to us for further analysis." According to the DEP staff, "they [FIW] have clearly demonstrated a less than cooperative stance and I see nothing further to be gained at this point in trying to convince them to work with us to resolve their compliance issues."

51. On March 9, 2011, the DEP wrote FIW expressing regret about the refusal of FIW to cooperate in supplying data that would allow the DEP to work with FIW to formulate an appropriate revised protocol to address vertical and directional wind shear to bring the Project in compliance with its license. The letter stated that the DEP would allow FIW to submit its proposed revised protocol without the benefit of the DEP input, but warned that the DEP had determined that the reason FIW was out of compliance on July 17-18, 2010 was the presence of vertical and directional wind shear and that data must be produced by FIW to assess how FIW should respond to such conditions to assure compliance. The DEP letter also clearly staked out the position that FIW was required to be in compliance at all times, not just for certain conditions specified in its license as those which the licensee was required to address in a compliance report.

F. Political Interference with the Licensing Staff's Attempts To Assure the Project will be Operated in Compliance

With the DEP Noise Rules.

52. On March 21, 2011, FIWN representatives and their attorney travelled to Augusta for a scheduled meeting with then DEP Commissioner Darryl Brown, recently appointed by the LePage Administration. Commissioner Brown did not appear for the meeting.

53. At this point, FIWN's attorney wrote Commissioner Brown on March 22, 2011 to complain about his absence at the meeting scheduled with him and appealing to his "sense of fairness and principle to resist George Baker's efforts to seek a political override to the clear duty of FIW to comply with its license and the obligation to provide data to the Department when requested for compliance purposes." See *Exhibit C*.

54. Two days later, on March 24, 2011, Commissioner Brown met with FIW and their attorneys. At that meeting, Commissioner Brown overrode for political considerations, the position of the DEP's professional staff and expert consultant and stated that the DEP would accept a revised operating protocol that was limited to the specific conditions giving rise to the July 2010 complaint without addressing non-compliance caused by wind shear in other conditions and on other dates. This position, which was in direct contradiction of the findings of the November Determination of Non-Compliance Letter, was set forth in a letter from the DEP to FIW dated March 25, 2011. In this letter the DEP stated that FIW must submit a revised protocol by April 11, 2011.

55. On April 11, 2011 FIW submitted the same revised protocol that had been rejected by the DEP in December 2010. See *Exhibit D*.

56. In response, the DEP professional staff, with the assistance of its acoustical consultant, prepared and sent FIW a Draft Condition Compliance Order dated April 28, 2011 accepting FIW's proposed revised operating protocol limited to addressing the conditions of the

July 2010 complaint, but attaching its own Appendix A setting forth an “Operational Sound Measurement Compliance Assessment Plan” requiring FIW to comply with the DEP Noise Rules at all times and requiring that it “affirmatively demonstrate during all compliance testing periods that it is operating in compliance at all times.” See *Exhibit E*. The draft Compliance Assessment Plan further required submission of data showing compliance between May 1 and August 31, 2011, again in 2015 and thereafter in five year increments during the license. It further described in detail data that must be submitted to the DEP if compliance was not demonstrated. The draft Plan also required FIW to cease operations if the DEP found that FIW was not in compliance until FIW could identify what conditions led to non-compliance and submitted a plan to address those conditions. The draft Condition Compliance Order also contained a new draft “Complaint Response and Resolution Protocol.” This draft Protocol relieved the burden on citizens to submit technical complaints, allowing a complaint to be made in any manner and setting forth procedures requiring “transparency” in FIW ‘s response to complaints. The core of the Complaint Procedure required FIW to post operational, sound and meteorological data on a website for public review and reporting on progress to resolve complaints. Like the draft Compliance Assessment Plan, the Draft Complaint Protocols required FIW to shut down if the DEP determined from a consistent pattern of complaints that the Project was out of compliance, until FIW identified the cause of the non-compliance and submitted for approval a plan to bring the Project into compliance.

57. In response, FIW informed the DEP that the DEP Draft Order was “unworkable” and it did not intend to agree to it.

58. At this juncture, Commissioner Brown resigned his position at DEP because of Clean Water Act conflict of interest and was replaced by James Brooks as Acting Commissioner.

59. FIWN's counsel met with Acting Commissioner Brooks on May 13, 2011 to review the course of the contentious conduct of FIW in its refusal to cooperate on noise compliance issues and to urge the Acting Commissioner to resist FIW's attempts to seek political interference with DEP's professional staff on compliance issues.

60. On May 23, 2011, FIW informed the DEP that it rejected in its entirety the draft Assessment Plan and the draft Complaint Protocol prepared by DEP staff.

61. Shortly thereafter, Acting Commissioner Brooks met with the Governor's Office to discuss the FIW issue. After doing so, he directed DEP staff to revise the draft Compliance Assessment Plan and the draft Complaint Protocol to remove the shutdown provisions and otherwise make the drafts more palatable to FIW. .

62. These changes led FIWN's attorney to write Acting Commissioner Brooks on June 3, 2011, complaining about these changes and stating that "[i]t appears that changes were made to the Draft Order, including the elimination of the critical shutdown provisions, as a result of FIW's approach to the Governor asking for political intervention, the very risk I anticipated when we met on May 13."

63. FIW still rejected the revised Appendix A prepared by the DEP staff containing the revised draft Assessment Plan and the revised draft Compliance Protocol, notwithstanding DEP's efforts to make the same more palatable to FIW.

64. On or about June 20, 2011, Acting Commissioner Brooks resigned after more than 2 decades of service with the DEP and was replaced by Acting Commissioner Patricia Aho, who had joined the LePage Administration only a few months earlier as Deputy Commissioner after working as a lobbyist for the law firm Pierce Atwood, the same law firm representing FIW.

65. Acting Commissioner Aho, over the objection of DEP professional staff, and in direct contradiction of the findings in the November Determination of Non-Compliance Letter, issued a Compliance Condition Order appealed from herein on June 30, 2011, without Appendix A as drafted by DEP staff, accepting FIW's limited Revised Operating Protocol addressing only the conditions during the evening of July 2010 and accepting FIW's limited modifications to the existing Compliance Assessment Plan and Complaint Protocol twice earlier rejected by the DEP as insufficient to assure compliance in the future. See *Exhibit F*.

66. Prior to issuing the Order complained of herein, James Cassida, Director of the Division of Land Resource Regulation, emailed Acting Commissioner Aho on June 17, 2011 stating:

The [draft] compliance assessment and complaint response procedures outlined in appendix A [prepared by the DEP staff and consultant] are a necessary component of the revised operating protocol submitted by Fox Islands [Wind] in response to the Department's November 23, 2010 letter of non-compliance. In order to determine if the facility is operating in compliance with Chapter 375.10 regulations under the new operations scheme the licensee must be required to document compliance. The protocols outlined in Appendix A document the exact procedures that must be followed by the licensee in order to satisfactorily document facility compliance. Further, given the complaint history of this facility it is absolutely necessary that the Department revise the complaint response protocol originally agreed to by the license. The existing complaint procedure puts all the burden to document potential violation on the neighbors to the project which is patently unfair and inappropriate. The revised Appendix A [draft by DEP staff] simply requires the licensee to receive and resolve complaints, a responsibility that is routinely accepted by EVERY other wind power project in the State of Maine. DLRR staff strongly urges you to authorize the issuance of the attached draft permit [with the DEP drafted Appendix A with the Assessment Plan and Complaint Protocol] in its entirety [Emphasis original.]

COUNT I-REVIEW OF FINAL AGENCY ACTION
(Bias by Political Interference)

67. Paragraphs 1 through 66 are realleged and incorporated herein by reference..

68. On information and belief, the three acts of political intervention overriding the judgment of professional staff and the DEP's expert consultant were driven by the LePage Administration's agenda to grant favorable treatment to business interests at the expense of citizens dependent on state regulators for protection under the laws and regulations of the state designed to afford such protection.

69. The first act of intervention, in March 2011 under Commissioner Brown, in contradiction of the findings in the November Determination of Non-Compliance Letter, was to limit corrective action by FIW to only those specific conditions that existed on the evening of the July 2010 complaint rather than formulating revised protocols for addressing a broad range of complaints that had been submitted to the DEP, as the professional staff felt necessary. But at least at this point, the DEP staff was formulating procedures for the future under revised compliance assessment plan and under a new complaint protocol that could deal with more pervasive compliance problems that were anticipated since the time of the licensing of the Project.

70. The second act of political intervention, occurring in May 2011 under Acting Commissioner Brooks, was to water down the proposed compliance assessment plan and the complaint procedures, inter alia, to remove provisions that would have required FIW to shutdown if it refused to cooperate after determinations of continuing compliance problems. This action removed a key provision that would give FIW an incentive to act promptly to compliance problems, rather than gaming the system and dragging matters out as it had done from November 2009 until May of 2011 without ever lowering the sound levels of the Project or even disclosing relevant sound data with the DEP

71. The third act of political intervention, occurring under Acting Commissioner Aho in June 2011 in the Order appealed from, had the most substantial impact, not only limiting corrective action by FIW to conditions that existed for just one night of the year in contradiction of the November Determination of Non-Compliance Letter, but also removing any requirement that FIW affirmatively prove ongoing compliance and by putting substantial obstacles in the path residents wishing to file noise complaints to the DEP, effectively insulating FIW from any further regulation. FIW received the benefit of this protection from regulation after more than a year and a half of operations generating excess noise causing residents living near the Project to suffer the effects of excessive noise without the means to move away because of the negative effect of the excess noise has had on property values.

72. The Order appealed from amended the License of FIW for the Project, over the strong objections of DEP's professional staff, in a manner that does not require the Licensee to affirmatively demonstrate compliance with the DEP Noise Rule or to revise operating protocols to factor in well established effects of high wind shear conditions affecting sound levels, notwithstanding the fact that the Project has operated out of compliance and is likely to remain out of compliance whenever there is significant directional and vertical wind shear affecting the Project's turbines as anticipated from the time of the licensing of the Project.

73. The Order appealed from amended the License of FIW, over the strong objections of professional staff, which removes requirements that FIW provide data of the kind previously denied by FIW but necessary to formulate proper responses to compliance issues shown to exist in a pervasive manner.

74. The Order appealed from, over the strong objections of professional staff, formalized a complaint procedure that places unreasonable and unfair burdens on residents living

near the Project to document non-compliance and does not require the Licensee of the Project to share necessary sound, operational or meteorological information relating to a complaint or take prompt and responsible action to address and resolved compliance issues when complaints are made.

75. The Order appealed from formalizes procedures and protocols that have proven to be obstacles and to be ineffective for the fair and responsible enforcement of the noise limits on the Project.

76. The Order appealed from rewards the contentious conduct of FIW and its refusal to act in good faith and cooperate with DEP in identifying the causes and the solutions for excessive noise generated by the Project.

77. The Order appealed from will lead to continued suffering by the Aggrieved Parties from serious health affecting annoyance, loss of quality of life and loss property values.

78. For these reasons, the Order of Acting Commissioner Aho is in violation of statutory provisions requiring wind energy projects to be regulated to prevent excessive noise, in excess of statutory authority, affected by political bias and prejudice, unsupported by substantial evidence, and is arbitrary and capricious and characterized by abuse of discretion.

WHEREFORE, in accordance with 5 M.R.S.A. § 11007, Petitioners request this Court vacate the June 30, 2011 Order of the Acting DEP Commissioner Aho, to order that it be replaced by the Order and Appendix A drafted by DEP professional staff and grant such other and further relief that is authorized by law or otherwise is just and equitable.

COUNT II-REVIEW OF FINAL AGENCY ACTION
(Arbitrary and Capricious Action and Abuse of Discretion)

79 Paragraphs 1 through 78 are realleged and incorporated herein by reference.

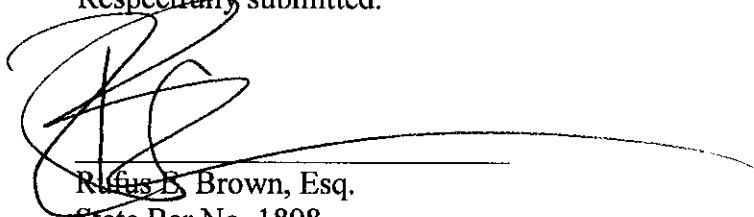
80. Apart from being affected by political bias, the Order challenged herein is in violation of statutory provisions requiring wind energy projects to be regulated to prevent

excessive noise, in excess of statutory authority, affected by political bias, unsupported by substantial evidence, and arbitrary and capricious and characterized by abuse of discretion.

WHEREFORE, in accordance with 5 M.R.S.A. § 11007, Petitioners request this Court vacate the June 30, 2011 Order of the Acting DEP Commissioner Aho, to order that it be replaced by the Order and Appendix A drafted by DEP professional staff and grant such other and further relief that is authorized by law or otherwise is just and equitable.

Dated: July 28, 2011

Respectfully submitted.



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