STATE OF MAINE
KNOX, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-10-2

Ronald C. Huber,
Plaintiff

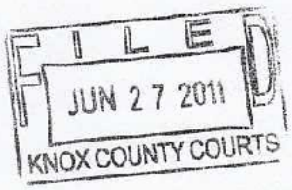
v.

Order on Appeal

Maine Department of Conservation,
Bureau of Parks and Lands,
Defendant

and

University of Maine System,
Intervenor



Pursuant to 5 M.R.S. §§ 11001-11008 and M.R.Civ.P. 80C, plaintiff Ronald C. Huber appeals from a decision issued by the Bureau of Parks and Lands, Department of Conservation (Department), acting under the authority of 12 M.R.S. § 1868 (2010), identifying a site approximately two miles south and seaward of Monhegan Island as one of three offshore wind energy test areas and as the Maine Offshore Wind Energy Research Center. Huber's appeal is opposed by the Department and by The University of Maine System, which appears here as an intervenor based upon its role as the lead member of DeepCWind Consortium. The Consortium, a public-private partnership that has already secured federal funding for the project, intends to apply for a permit in order to develop the Monhegan site.

For the reasons that follow, the court concludes that Huber has standing to appeal the Department's decision, because the statutory characterization of the agency action must be seen to allow him to pursue a challenge even at this early stage of the prospective development. The court concludes, however, that the Department's decision is supported by the evidence and is not otherwise unlawful.

Factual background

Citing the untapped renewable wind and ocean energy resources of the Gulf of Maine, the Legislature enacted "An Act to Facilitate Testing and Demonstration of Renewable Energy

Technology," P.L. 2009, ch. 270 (the "Act"), enacted as 12 M.R.S. § 1868.[1] The Act became law as emergency legislation effective on June 3, 2009. The Act prescribes a trifurcated process to test and demonstrate new offshore wind energy technology in the Gulf of Maine: (1) identifying suitable offshore wind energy test areas, *see* 12 M.R.S. § 1868; (2) reviewing and issuing permits for offshore wind energy demonstration projects in the test areas, *see* 38 M.R.S. § 480-HH; and (3) leasing of the state-owned submerged lands in the test areas, *see* 12 M.R.S. § 1862(2)(F). The agency action at issue in this action involves the first of these steps, namely, the identification by the Department of the offshore wind energy test areas pursuant to 12 M.R.S. § 1868.[2] The Department identified a 2.2 square mile area approximately two miles south and seaward of Monhegan Island as one of the offshore wind energy test areas, and then pursuant to the terms of section 1868(2), it also designated that area as the Offshore Wind Energy Research Center. On this appeal, Huber challenges those determinations.

Under the Act, the Department is charged with the responsibility to "identify and map up to 5 specific offshore wind energy test areas." 12 M.R.S. § 1868(1). Those areas are defined as "geographic area[s] on state-owned submerged lands suitable for offshore wind energy demonstration projects constructed and operated in accordance with Title 38, Section 480-HH."[3] Section 1868(3) also gives the Department authority to modify the original list of identified test areas in response to public comment. In order to identify the offshore wind energy test areas, the statute requires the Department to work in concert with the State Planning Office (SPO) and then

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[1] In discussing the Department's statutory obligations, the court interchangeably refers to the Act (P.L. 2009, ch. 270 (emergency, effective June 3, 2009)) and the statute (12 M.R.S. § 1868), although the Act goes beyond the terms of section 1868 to include requirements regarding subsequent phases of the offshore wind energy test area permitting and development projects.

[2] In fact, of the three steps in the development process noted in the test, the only one that has been accomplished is the first. The Department, as the permitting authority under 38 M.R.S. § 480-HH, has not issued any permits allowing the demonstration projects. Further, in its decision identifying the Monhegan site and two other offshore wind energy test areas, the Department made clear that that the designation of those area was limited to testing and did not extend to an examination of the suitability of those sites to be leased for commercial development. This means that the second and third of the three step development process have not yet occurred and that the only agency action underlying this appeal is the Department's identification of "suitable offshore wind energy test areas."

[3] The provisions of 38 M.R.S. § 480-HH govern standards for and procedures governing the issuance of permits for offshore wind energy demonstration projects.

to consult with the Department of Environmental Protection (DEP), the Public Utilities Commission, the Department of Inland Fisheries and Wildlife (IF&W), the Maine Land Use Regulation Commission (LURC), the Department of Marine Resource, the Maine Historic Preservation Commission, and the University of Maine System in evaluating the potential sites. 12 M.R.S. § 1868(1). Additionally, the Department is required to provide opportunity for public comment. *Id.* In conducting its assessment of the test areas, section 1868 requires the Department to

> consider existing information regarding pertinent ecological, environmental, social and development-related factors, including but not limited to:
>
> > A. Potential adverse effects on a protected natural resource, as defined by Title 38, section 480-B, subsection 8, or a scenic resource of state or national significance, as defined by Title 35-A, section 3451, subsection 9;
> >
> > B. Potential adverse effects on species listed as threatened or endangered under section 6975 or section 12803, subsection 3; avian species, including seabirds, passerines, raptors, shorebirds, water birds and waterfowl; bats; and marine mammals;
> >
> > C. Potential adverse effects on commercial fishing, recreation, navigation, existing public access ways to intertidal and subtidal areas and other existing uses;
> >
> > D. Proximity to deep water port facilities, rail transportation, transmission infrastructure facilities and existing ocean-based environmental monitoring devices;
> >
> > E. Data regarding wind speed, ocean wave height and period, ocean currents and water depth;
> >
> > F. Geology, including substrate type and other seafloor characteristics;
> >
> > G. Public support in pertinent coastal communities; and
> >
> > H. Historic sites and archaeological resources of state or national significance.

12 M.R.S. § 1868(1).

In accordance with the statutory mandates, the Department and SPO first selected seven[4] "large Planning Areas in state waters potentially suitable for testing deep-water wind turbine technology." R. 3, 29, 70-84. Within these large planning areas, the smaller offshore wind energy test areas would be designated. R. 6-8. Accordingly, based upon the information they received, the Department and SPO pared the seven large planning areas into four potential wind energy test areas. These areas were located near Boon Island, Damariscove Island, Monhegan Island and Cutler. These areas carried the lowest averaged level of concern based upon factors such as environmental issues, human uses, and viewshed. R. 30. The agencies then subjected those four draft areas to further public comment and further analysis. R. 3. After they received additional information, the Department and SPO withdrew consideration of the area near Cutler, in part because of concerns regarding potential impacts to nesting, foraging, and migration of avian species. R. 3-4, 329, 348. In December 2009, the Department named the three remaining sites as the finalized offshore wind energy test areas, and it designated the site near Monhegan as the Maine Offshore Wind Energy Research Center pursuant to section 1868(3). The test area near Monhegan Island is located in a 2.2 square mile area approximately two miles south and seaward of the island. R. 2, 8. The agency included the Monhegan site "using the best available information to avoid or minimize potential interference to avian nesting, feeding and migration routes and areas with identified concentrations of marine mammals." R. 4. The Department's decision likewise explained that "the proposed test areas have minimized potential scenic impacts by [being located] at the seaward edge of state waters." R. 4-5.

The record reveals that throughout the process of gathering information, assessing that information and finally identifying the offshore wind energy test areas, the Department followed the procedure prescribed by section 1868. In initially selecting the large planning areas, the Department and SPO used information acquired by SPO and maintained by that agency in a database, and the agencies also gathered information compiled from other state and federal agencies and other sources. That information related to several issues, including ones relating to the environment and natural and scenic resources. R. 29-30; *see generally* R. 85-97(compiling existing data in all of the statutorily required categories for the purposes of siting the offshore

[4] The decision contains an error suggesting that eight planning areas were originally selected. R. 3. The record indicates that there were in fact seven planning areas. *See* R. 29, 70-84.

wind energy demonstration areas). The SPO database includes information about migratory bird flyways, and nesting and wintering areas. R. 89-90, 156. The database also contains information under a "viewshed category" based on specific scenic resource sites within the Gulf of Maine area that are protected by state law. R. 93-94, R. Supp. I 97; R. Supp. II B.

After the Department designated the large planning areas, the Department and SPO reviewed the accumulated information and organized the public comments received by those agencies into datasets, and they then incorporated the information onto a grid system superimposed over a map. R. 29-30, 68-69, 78-84, 165-67, 360. The Department concluded that the areas ultimately identified, including the Monhegan site, "avoid[ed] or minimize[d] potential interference to avian nesting, feeding, and migration routes and concentrations of marine mammals." R. 4; *see also* R. 156. The Department and SPO considered the location of state and national parks, as well as national historic registry sites. R. 40. In fact, Monhegan Island is the subject of several database entries for state-listed scenic resources and national historic registry sites in the vicinity. R. Supp. I 91, 97; R. Supp. II B. Those listed resources on the island that are protected by state law are found on the north and westerly sides of the island, and not on the southerly seaward side, which would face the wind energy test area. R. 93-94, R. Supp. I 91, 97; R. Supp. II A, B. Although the Department recognized that "prototype and full scale test facilities" on the offshore wind energy test area would "likely be visible under clear conditions," R. 5, it concluded that the visual impact of development would be minimized by locating the area more than two miles away from the closest island point and at the seaward edge of state waters, and out of view of the majority of Monhegan Island's residents and visitors. R. 5; *see also* R. 8, 33.

During the course of this process, the Department and SPO sought public comment on the proposed areas to determine the prospective effect of the test areas on existing uses. R. 2-3, 29, 98-101, 261-317. A schedule of meetings and other forms of communication (such as radio call-in programs) shows that the Department held a total of more than forty meetings and other forums both with specific groups of interested persons and with the general public. R. 99-100. These meetings included large-scale regional meetings in communities near the proposed areas and smaller, more focused meetings with "fishermen, community leaders, and environmental

organizations."[5] R. 3. *See also* R. 29, 99-101, 177-80, 262-65, 272-316. At the meetings, attendees "were encouraged to mark up the large-scale maps of each area with their concerns or specific information on intensity of use in a particular area." R. 29; *see also* R. 360. Participants were also provided small-scale maps and score sheets that they could fill out and then return to the Department. R. 165-76, 248-60. The Department used these marked maps as part of its analysis. R. 29. Additionally, the Department posted public notice through its website, and it received written comments about the proposed areas. In assessing whether a particular location was favorable or unfavorable, the Department treated information provided by members of the public to be "[o]ne of, if not the most critical step" in siting the wind energy test areas. R. 106.

In its meetings with fishermen and lobstermen, the Department sought, received, and considered information regarding fisheries and commercial seafood fishermen's concerns. R. 4, 31-34, 36, 44-47, 55-56, 78-84, 87-89, 114, 126, 130-32, 135-37, 178-79. This "outreach" and information exchange between the Department and local lobstermen and fishermen extended specifically to the agency's consideration of the area near Monhegan Island as a test area. R. 141-42, 157, 162-63. That record suggests that the Department held a meeting on the island with fisherman in late August 2009. In the agenda for the meeting, the Department stated that one of the purposes for the meeting was to determine "if and where a wind energy test area could be located in the waters your community uses and relies on." R. 139. Roughly eight fishermen or lobstermen attended the open meeting and provided the Department with their views in written and oral form, including marked-up maps. R. 100, 139-43,168-77.

The Department likewise solicited comment from the general public on the original large planning area and the subsequently narrowed wind energy test area near Monhegan Island. In October 2009, another public meeting was held on the island. R. 100, 144-45. Approximately twenty members of the island community attended the meeting, which included a presentation on the designation process and maps of the area, including topics such as "Avian Concerns and Habitat." R. 100, 144-45, 156-57 (images used during the meeting).

In addition to public comment and as required by statute, the Department and SPO consulted with state and federal agencies and with the University as required by section 1868(1). R. 53-67, 85-97, 317-46, 354-59. During that process, IF&W raised concerns about the effect of

[5] The agency's written decision recites that twenty-five meetings were held with designated groups of people, and there were five public meetings.

the test area on migratory bird passage near Monhegan Island. However, it concluded that "developers would need to work with IF&W to refine any proposal" to address those concerns.[6] R. 319. The Department met and consulted with the United States Department of the Interior Fish & Wildlife Service (USFWS) and solicited comment on the large planning areas and the wind energy test areas. R. 53-67, 321-25, 328-30, 348-51. The USFWS strongly opposed the Cutler wind test area because it concluded that the project located there would create an unacceptable risk to avian species. R. 329. This view influenced the Department's decision not to pursue the potential Cutler site. R. 3-4. On the other hand, USFWS concluded that a test area near Monhegan Island could be acceptable so long as it was located in the southern part of the large planning area. R. 351, 360. The location ultimately chosen by the Department is located in the southern part of the large planning area, more than two miles south of Monhegan Island. R. Supp. II A.

Discussion

Huber argues generally that the Department designated the Monhegan test and research area based upon insufficient review of the location's scenic impact, including the designation's potential impact on visiting artists, and its impact on fish and bird populations. In support of this overarching contention, Huber makes four principal arguments. First, he argues that the scenic resources of Lobster Cove, which is located on the south side of Monhegan Island, constitute "protected natural resources" pursuant to 38 M.R.S. § 480-B(8) and that the test area near Monhegan will have an adverse effect on this resource. Because of this, Huber argues, the Department erred in approving the test area. Second, he contends that Lobster Cove should be considered a "scenic resource of state or national significance" under 35-A M.R.S. § 3451(9), and consequently that the Department and the SPO should have engaged in further assessment based on this factor. Third, he argues that the Department and the SPO could not make an informed decision about the impact of the Ocean Wind Energy Research Center and Test Area on Lobster Cove, because the Department and SPO did not engage in rulemaking pursuant to 35-A M.R.S. § 3457 (2010), which prescribes rulemaking for "scenic viewpoints" and establishes the methodology underlying the creation of a "scenic inventory." Fourth, Huber objects to the

[6] Pursuant to 38 M.R.S. § 480-HH(1)(H), an "offshore wind energy demonstration project" would be limited to 2 wind energy turbines.

Department's assignment of a "low" quality[7] viewshed rating to the Monhegan site, because he contends that the Department deliberately disregarded existing data by limiting the "human uses" it considered to fishing, recreational boating, and archaeology. On this last point, he asserts that the Department's failure to consider birding, tourism, and artistic human uses artificially lowered its assessment of the site's scenic value to the point that it did not require a visual impact assessment, which in turn understates the site's unique characteristics. He further asserts that the particular site chosen is at the confluence of four fresh- and salt-water currents, and that ocean wind farming is known to cause significant and lasting shifts in coastal ocean surface currents, thus risking severely impacting the aquatic life over which the petitioner exercises a faith-based stewardship.

The Department argues that Huber has not preserved his claims for appeal, that the agency's decision conforms to the requirements of section 1868, and that the record contains substantial evidence supporting its decision.

In its intervenor role in this action, the University contends that Huber does not have standing to bring this appeal based because, it argues, he was not a party to the underlying administrative proceedings and because he has not sustained a sufficiently particularized injury from governmental action.

The court will address Huber's standing first because the existence of standing is a threshold issue and a predicate to the consideration of the merits of his appeal.

A. Standing

As applied to state court proceedings in Maine, the notion of standing is prudential and rests on the expectation that the parties who are "best suited to raise a particular claim" are those who should be entitled to promote or oppose that claim in court. *Roop v. Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966, 968 (citation and internal punctuation omitted). Therefore, "Maine courts are only open to those who meet this basic requirement." *Lindemann v. Comm'n on Governmental Ethics and Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, 541 (citation and internal punctuation omitted).

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[7] The petitioner objects to the assignment of a "'Low Quality' viewshed rating" for the Monhegan site. The court construes this as a reference to the Department's assessment of a "low" level of concern about the effect of the test area on the Monhegan viewshed. R. 80.

As a general matter, the determination of standing is not subject to a specific formula. *Roop*, 2007 ME 32, ¶ 7, 915 A.2d at 968. However, in appeals from agency action, the right to seek review is governed by statute. *Lindemann*, 2008 ME 187, ¶ 9, 961 A.2d at 542. The Legislature has characterized an administrative identification of an "offshore wind energy test area" as "final agency action." *See* 12 M.R.S. § 1686(4). The course of Huber's appeal is therefore governed by the provisions of 5 M.R.S. § 11001 *et seq.*, which provides the exclusive method for judicial review of "final agency action." *Lingley v. Maine Workers' Comp. Bd.*, 2003 ME 32, ¶ 8, 819 A.2d 327, 330. Huber's standing to obtain judicial review of the Department's decision therefore depends on whether he has standing under these procedural statutes.

As described in his brief on appeal, Huber's involvement with the Penobscot Bay area, including Monhegan Island, is long-standing. He notes that he has worked since 1993 to protect the environment and the wild inhabitants of Penobscot Bay, motivated by a sense of spiritual obligation. He refers to his involvement in litigation from 1994 through 1996 as head of a non-governmental organization and related to construction on coastal Ducktrap Mountain in Northport. He asserts that in the mid-1990's, he participated in the DEP's oil tanker and oil port rules task force, which was involved in the development of rules to protect marine life from oil spills. Huber states that he was involved in additional DEP proceedings in 1998 and 2006 because of a proposed development's potential harm to aquatic environment, ecology and scenic resources. In 2005 and 2006, he headed a citizens' group that worked with the DEP on matters relating to the environmental effects of cement dust piles.

In addition to his history of environmental advocacy, Huber writes that he has a specific connection to Monhegan Island, which he visits and enjoys while pursuing his faith-based stewardship of the entire Penobscot Bay region. While on Monhegan Island, Huber uses the pedestrian trail to get to Lobster Cove, where he appreciates the "complex and unspoiled vista" of the gulf of Maine. He is one of many ornithologists who travel from all over the world to observe the birds and other wildlife on Monhegan Island. *See also* R. 65.

Pursuant to section 11001(1), "any person who is aggrieved by final agency action shall be entitled to judicial review thereof in the Superior Court in the manner provided by this subchapter." The record must therefore establish that Huber has been "aggrieved" in a way that is sufficient to give him standing to pursue this appeal. Further, Huber also must show that he was a party during the underlying administrative proceeding. *See, e.g., Friends of Lincoln Lakes*

v. Town of Lincoln, 2010 ME 78, ¶ 11, 2 A.3d 284, 288; *Lindemann*, 2008 ME 187, ¶ 17 n. 9, 961 A.2d at 543-44; *Hammond Lumber Co. v. Fin. Auth. of Me.*, 521 A.2d 283, 286 n.5 (Me. 1987). Here, the court first considers whether the record shows that Huber has party status from the agency level, and it next addresses the sufficiency of his alleged injury as an element of standing.

(1) Party status

The Law Court has "interpreted the term *party* broadly so as to mean any participant in the proceedings who is aggrieved by the action or inaction of the zoning board of appeals." *Norris Family Assocs., LLC v. Town of Phippsburg,* 2005 ME 102, ¶ 16, 879 A.2d 1007, 1012 (emphasis in original; citation and internal punctuation omitted).[8] *See also In re Lappie*, 377 A.2d 441, 443 (Me. 1977) (". . .the legislative rationale is that one who is adversely affected by the entry of an administrative order, whether a formal party to the administrative proceeding or not, is more likely to be aware of the details of the administrative proceeding than are members of the public generally. Such persons are more likely to seek judicial review to assure that the administrative body acts consistently with the standards prescribed by the statute."). The Court has recognized that administrative proceedings are conducted less formally than judicial proceedings, and so "an appellant need not have formally appeared as a party as long as it participated throughout the process." *Lincoln Lakes*, 2010 ME 78, ¶ 12, 2 A.3d at 288. Thus, to qualify as a party, the person's participation in the administrative process may be "formal or informal." *Norris Family Assocs.*, 2005 ME 102, ¶ 16, 879 A.2d at 1013 (citation and internal punctuation omitted).

Here, the Department suggests that Huber attended one of its public meetings.[9] (Br. of Resp. at 13.) This is a sufficient acknowledgement to support this element of Huber's standing claim.

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[8] Cases such as *Norris Family Associates* that address appeals from municipal boards include discussions of the concept of "party status." That principle has the same purpose as it carries in the context of appeals pursued under the Administrative Procedure Act, and so the court considers the former cases in analyzing this part of the standing issue in this action.

[9] The University argues that the record does not reveal any participation by Huber in the administrative proceeding. Because the Department takes a contrary position, the court decides the issue favorably to Huber.

Beyond this suggestion that Huber was a participant in the agency's process, the record also reveals that concerns generally echoing those that Huber advances here were raised at the Rockport public meeting held in September 2009. R. 132-37.[10] Several written comments, which are not attributed to named persons, mirror Huber's arguments about the effect of the test area on Monhegan's unique scenic assets. R. 272-73. One letter in particular focuses on the visual impact of wind energy development on the southern end of Monhegan Island, which is the location of Lobster Cove – a prime focus of Huber's claims here. R. 288.

This demonstrates that Huber apparently attended a public meeting and that during the course of the administrative process, the concerns he raises here were brought to the agency's attention. The court finds that this combination of circumstances is a sufficient basis on which to view Huber as a party participant.

(2) Particularized injury

To complete a demonstration that he has standing, Huber must also show that the agency's action has caused him particularized injury -- "that is, if the agency action operated prejudicially and directly upon the party's property, pecuniary or personal rights." *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶10, 953 A.2d 378, 382. *See also* 5 M.R.S. § 8002(4) ("'Final agency action' means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency."). This requires consideration of whether Huber has suffered a legally recognized injury and whether any such injury is a particularized one.

First, Huber contends that he has sustained damage because of the prospects of development to a site that holds particular aesthetic and religious meaning to him.[11] The University argues that Huber has not been injured by the mere designation of a location as an offshore wind energy test area and as the Maine Offshore Wind Energy Research Center. No actual development has occurred yet in the designated offshore wind energy test area and

[10] The record does not reveal who was present at that hearing, R. 130, or at the October 2009 meeting held on Monhegan Island itself, R. 162-64. Huber was not among those who received public notice by mail of the Monhegan Island meeting. R. 266-71.

[11] Huber also claims that his injury encompasses changes to ocean currents and resulting damage to an animal population over which he claims to exercise a faith-based stewardship. The record, however, does not demonstrate a factual basis for this type of alleged injury.

research center, and none will occur absent a permit issued under 38 M.R.S. § 480-HH. Until the Department issues a permit, the locations at issue will not change, and Huber's interests in those locations are unaffected in fact.

But for the provisions of section 1868(4), the University's analysis might well carry the day. An injury sufficient to confer standing on a claimant must be more than abstract. *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382. And the harm claimed by Huber is presently little more than that. However, in section 1868(4), the Legislature has deemed that "[t]he identification of an offshore wind energy test area or areas under subsection 1 or subsection 3 constitutes final agency action." This statute has significance in two ways. First, because the Legislature has established that the type of administrative determination at issue here is "final agency action," it has also established that this type of action "affects the legal rights, duties or privileges of specific persons. . ." because that is the very definition of "final agency action." This syllogism therefore demonstrates that despite the absence of any actual physical development – and even though the state has not even issued a permit that would authorize such development, the Legislature has deemed that the very designation of an offshore wind energy test area results in an injury sufficient to meet the standard that is part of the criterion of "final agency action."[12]

The second consequence of section 1868(4) is that because the type of action taken thus far by Department is deemed to be "final agency action," if Huber or others similarly situated to him were precluded from seeking judicial review, he (and they) would be permanently barred from doing so. Huber is now deemed to have been injured by the mere identification of a location as a test area, because the Legislature has declared that such an identification is "final agency action," meaning that by definition it has affected his rights. If, as the University argues, Huber has no appellate recourse based on that agency action, he would be left without a remedy notwithstanding that legally acknowledged injury.

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[12] One of the University's arguments challenging Huber's standing is that he has not demonstrated that his religious interests would be affected by the Department's actions. The court need not and does not reach this issue for two reasons. First, as is discussed in the text, the statutory characterization of the Department's action as "final agency action" supports the notion that that action causes harm to a claimant. Second, harm to aesthetic interests, if particularized, is a sufficient foundation to establish standing. *Fitzgerald*, 385 A.2d, 189, 196-97 (Me. 1978). Therefore, even without regard to Huber's contention that the state action affects his religious interests, the action's impact on his aesthetic interests is a proper basis to grant him standing.

Thus, because of the effect of section 1868(4), the court concludes that Huber has sustained a legally cognizable injury. The next question is whether that injury is a particularized one.

An injury is "particularized" if it is "distinct from any experienced by the public at large and must be more than an abstract injury." *Id.* This standard applies to claims based on an alleged injury to public rights, including rights associated with public places. *See Friends of Lincoln Lakes*, 2010 ME 78, ¶ 14, 2 A.3d at 289; *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d at 196-97.

In the context of this case, the court draws guidance from the Law Court's analysis of the nature of a "particularized injury" as discussed in *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735. There, the Court rejected a claim of standing by two people who were among more than 1,600 residents who would drive past a challenged development. The Court held that their injury would not be particularized because of the large number of people who would be similarly affected. *Id.*, ¶ 20, 973 A.2d at 741. The *Nergaard* Court distinguished that universe of affected people from the one examined in *Fitzgerald*. In the latter case, standing was conferred on a group of five people who used Baxter State Park and who sought to challenge agency action affecting their aesthetic interests in the park. Because of the small size of that affected group of "actual users," the Court held that they were not members of the "general public" and that the harm they alleged in fact was "particularized." 385 A.2d at 196-97, *discussed in Nergaard*, 2009 ME 56, ¶ 21, 973 A.2d at 741.

Like the *Fitzgerald* plaintiffs, Huber's injury is distinct from that suffered by the public at large because he is an actual user of Monhegan Island, particularly Lobster Cove, which is the area from which the wind energy research test site will be visible and which holds particular aesthetic and spiritual significance for him. The record therefore demonstrates that the agency action at issue here has injured Huber and that his injury is particularized. When those conclusions are combined with his status as a party to the administrative proceedings, his demonstration of standing is complete. The court now addresses the merits of his appeal from that final agency action.

B. Merits of the Huber's claims on appeal

Judicial review of state agency decisions is "deferential and limited." *Friends of Lincoln Lakes v. Bd. of Environmental Protection*, 2010 ME 18, ¶ 12, 989 A.2d 1128, 1133. The court examines the record to determine if the governmental agency abused its discretion, committed an error of law, or made findings not supported by substantial evidence in the record.[13] *Cobb v. Board of Counseling Professionals Licensure*, 2006 ME 48, ¶10, 896 A.2d 271, 275 (citation and internal punctuation omitted); 5 M.R.S. § 11007(4). If the agency "could have fairly and reasonably found the facts as it did" based on competent and substantial evidence in the record, then those factual findings do not provide grounds for appellate relief. *Uliano v. Board of Environmental Protection*, 2009 ME 89, ¶ 12, 977 A.2d 400, 407 (citation and internal punctuation omitted). Further, that a record developed before the agency could have supported a different outcome is not a basis to vacate those findings that the agency did make. *Gulick v Board of Environmental Protection*, 452 A.2d 1202, 1208 (Me. 1982). Rather, in pursuing factual challenges to an administrative decision, an appellant must demonstrate that the record compelled contrary findings. *Uliano*, 2009 ME 89, ¶ 12, 977 A.2d at 407.

Huber challenges Department's decision on four principal grounds. First, he contends that the scenic resources of Lobster Cove constitute "protected natural resources" pursuant to 38 M.R.S. § 480-B(8) and that Department erred in approving the nearby test area because of the potential adverse effect on that resource. Second, Huber argues that Lobster Cove, located on the southern side of Monhegan Island, should be considered a Scenic Resource of State and National Significance under 35-A M.R.S. § 3451(9), and that the Department and the SPO should therefore have required a viewshed review comparing the Monhegan site's scenic qualities to those of the other proposed sites. Third, he argues that the Department and the SPO could not properly assess the impact of the Ocean Wind Energy Research Center and Test Area on Lobster Cove without engaging in rulemaking pursuant to 35-A M.R.S. § 3457. Finally, Huber argues that the Department deliberately disregarded existing data by limiting its consideration of "human uses" to fishing, recreational boating, and archaeology in order to assign the Monhegan site a "Low Quality" or low concern, viewshed rating. He asserts that the agency's failure to consider birding, tourism, and artistic human uses artificially lowered the

[13] In considering the sufficiency of the record to support the Department's findings, the court disregards Huber's several references to factual information and material that is not included in the record on appeal.

Department's estimation of the site's scenic value and again leading to a deficient review of the site's unique characteristics.

(1) Protected natural resource, 38 M.R.S. § 480-B(8)

Title 12 M.R.S. § 1868 provides in part that when the Department engages in the process of identifying offshore wind energy test areas,

> The department must consider existing information regarding pertinent ecological, environmental, social and development-related factors, including but not limited to:
>
> A. Potential adverse effects on a protected natural resource, as defined by Title 38, section 480-B, subsection 8, or a scenic resource of state or national significance, as defined by Title 35-A, section 3451, subsection 9.

12 M.R.S. § 1868(1)(A). In its decision, the Department found "that the three proposed test areas have been located using the best available information to avoid or minimize potential interference to avian nesting, feeding, and migration routes and areas with identified concentrations of marine mammals." Huber argues that the agency erred when it identified the Monhegan Island area as a test site, because of its potential adverse effect on a "protected natural resource."[14] The court first considers the question of whether there is a "protected natural resource" at issue here and then the question of whether the agency erred in its consideration of the potential adverse affects of the test area on that resource.

The legal concept of a "protected natural resource" is defined in 38 M.R.S. § 480-B(8), which is specifically referenced in the statute (section 1868) that governed the Department's analysis:

> 'Protected natural resource' means coastal sand dune systems, coastal wetlands, significant wildlife habitat, fragile mountain areas, freshwater wetlands, community public water system primary protection areas, great ponds or rivers, streams or brooks, as these terms are defined in this article."

The record does not suggest that the Monhegan site is the location of mountains or fresh water or that the test areas would have a potential adverse impact on any such resource. The

[14] The issue addressed by the court in the next section of this order is Huber's related claim that the Department failed to treat the test site or areas affected by it as a "scenic natural resource," which is a claim also based on the provisions of section 1868(1)(A).

remaining types of natural features that may constitute a "protected natural resource" are "coastal sand dune systems," "coastal wetlands," and "significant wildlife habitat."

"'Coastal sand dune systems' means sand and gravel deposits within a marine beach system, including, but not limited to, beach berms, frontal dunes, dune ridges, back dunes and other sand and gravel areas deposited by wave or wind action. Coastal sand dune systems may extend into coastal wetlands." 38 M.R.S. § 480-B(1). Next,

> "[c]oastal wetlands" means all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes.

38 M.R.S. § 480-B(2). The record does not suggest that the Monhegan test area itself or locations affected by it consist of either a "coastal sand dune system" or a "coastal wetland."

The last of the kinds of areas that may be a "protected natural resource" is a "significant wildlife habitat." A "significant wildlife habitat" is defined as:

> A. The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and critical spawning and nursery areas for Atlantic salmon as defined by the Atlantic Salmon Commission; and
>
> B. Except for solely forest management activities, for which "significant wildlife habitat" is as defined and mapped in accordance with section 480-I by the Department of Inland Fisheries and Wildlife, the following areas that are defined by the Department of Inland Fisheries and Wildlife and are in conformance with criteria adopted by the Department of Environmental Protection or are within any other protected natural resource:
>
> 1) Significant vernal pool habitat;
>
> 2) High and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and
>
> 3) Shorebird nesting, feeding and staging areas.

38 M.R.S. § 480-B(10).

The elements of this definition of a "significant wildlife habitat" that may apply here -- and that would mean the area at issue is a "protected natural resource" and thus require the

Department to consider the potential adverse effect of the test area on that resource under section 1868(1)(A) – are the ones relating to bird habitat.

The record demonstrates that the BLP was provided with material information about the effect of the proposed test areas on bird habitats and that, when it issued it decision, it evaluated that information in the way prescribed by section 1868. The Department and SPO placed significant effort on selecting test areas that would minimally affect significant wildlife habitat. They examined the existing data in the SPO's possession, including information about migratory bird flyways, and nesting and wintering areas. R. 89-90, 156. The Department consulted with a number of state and federal agencies about these issues, including the DEP, IF&W, LURC, and USFWS. R. 29-30, 35-37, 58-67, 318-25, 328-30, 348-49, 351-52. IF&W raised the issue of migratory bird passage near Monhegan Island, but observed that "developers would need to work with IF&W to refine any proposal" to address its concerns. R. 319. It bears note that the Department and SPO rejected one of the draft planning areas altogether, in part because of USFWS concerns regarding potential impacts to avian species. In contrast, USFWS concluded that a test area near Monhegan Island could be acceptable so long as it was located in the southern part of the large planning area. R. 329, 348-49, 351, 360. The Monhegan test area conforms to this assessment, because it is located in the southern part of the large planning area, more than two miles south of Monhegan Island. There are no nesting islands with the larger planning area or in the smaller test area near Monhegan Island. R. 45, 156.

The record also includes information raising the prospect that the test area would have a negative impact on bird populations. For example, the Maine Audubon Society opposed the selection of test areas around Monhegan Island. R. 352.[15] Also, the USFWS did not oppose the location of the test area in the southern portion of "Area C," which is the large planning area around Monhegan Island. R. 329. However, when commenting on all four proposed test areas (including the Cutler area, that Department later rejected as a test area), that agency specifically "noted an absence of critical studies needed to make informed decisions related to wildlife

[15] The notes reflecting the Maine Audubon Society's response to the proposed sites include "all bad" and "although originally some consideration on the south." R. 352. The meaning of that latter entry is unclear, although it might suggest that at least at one time the Society might have been less concerned about a test area in a southerly location (which is where the test area was ultimately designated).

resources, particularly migratory birds," R. 330, and that agency strongly advocated further study. R. 66, 330.

Despite the presentation of evidence to the agency that could support a conclusion contrary to the one it ultimately reached, the court examines the record to determine if the agency's decision in fact was supported by substantial evidence presented to it. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 13, 989 A.2d at 1133. ("We must affirm findings of fact if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency."). "The 'substantial evidence' standard does not involve any weighing of the merits of evidence. . . .Administrative agency findings of act will be vacated only if there is no competent evidence in the record to support a decision." *Id.*, ¶ 14, 989 A.2d at 1134. . Section 1868(1)(A) required the Department to consider "existing information regarding pertinent ecological, environmental, social and development-related factors, including . . . [p]otential adverse effects on a protected natural resource." The record reveals that the Department did solicit and consider a great deal of information regarding the protected natural resources, including endangered bald eagles and a broad range of other sea birds, shore birds, and migratory birds. The Department concluded that the areas ultimately identified as offshore wind energy test areas, including the Monhegan site, "avoid[ed] or minimize[d] potential interference to avian nesting, feeding, and migration routes and concentrations of marine mammals." R. 3. *See also* R. 156. There is sufficient evidence in the record to support that finding, even though the record also contains contradictory evidence. Because the record contains competent evidence to support the Department's finding that it chose the site with the least effect on avian migration routes and populations, that finding may not be disturbed on appeal.

(2) Scenic Resource of State and National Significance, 35-A M.R.S. § 3451(9)

Huber argues that the Department did not treat the site near Monhegan Island as a "scenic resource of state or national significance" and that the agency consequently did not take into account that particular inquiry that he claims is prescribed in this case by section 1868(1)(A). This contention requires an examination of whether the site at issue is a "scenic resource of state or national significance" in the first place.

Section 1868(1)(A) specifically references the definition of "scenic resource of state or national significance" as that term is defined in 35-A M.R.S. § 3451(9). Section 3451(9), in turn, establishes the following definition:

> "Scenic resource of state or national significance" means an area or place owned by the public or to which the public has a legal right of access that is:
> A. A national natural landmark, federally designated wilderness area or other comparable outstanding natural and cultural feature, such as the Orono Bog or Meddybemps Heath;
> B. A property listed on the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended, including, but not limited to, the Rockland Breakwater Light and Fort Knox;
> C. A national or state park;
> D. A great pond. . .;
> E. A segment of a scenic river or stream. . .;
> F. A scenic viewpoint located on state public reserved land or on a trail that is used exclusively for pedestrian use, such as the Appalachian Trail, that the Department of Conservation designates by rule adopted in accordance with section 3457;
> G. A scenic turnout constructed by the Department of Transportation. . .;
> H. Scenic viewpoints located in the coastal area, as defined by Title 38, section 1802, subsection 1, that are ranked as having state or national significance in terms of scenic quality in:
>
> 1) One of the scenic inventories prepared for and published by the Executive Department, State Planning Office: "Method for Coastal Scenic Landscape Assessment with Field Results for Kittery to Scarborough and Cape Elizabeth to South Thomaston," Dominie, et al., October 1987; "Scenic Inventory Mainland Sites of Penobscot Bay," Dewan and Associates, et al., August 1990; or "Scenic Inventory: Islesboro, Vinalhaven, North Haven and Associated Offshore Islands," Dewan and Associates, June 1992; or
>
> 2) A scenic inventory developed by or prepared for the Executive Department, State Planning Office in accordance with section 3457.

The record does not demonstrate that the offshore wind energy test area near Monhegan Island would have a potential adverse affect on any resource or feature that meets the statutory definition of a "scenic resource of state or national significance." The court considers each of these components of the statutory definition of that term.

As to section 3451(9)(A), there is no evidence in the record that the test area or areas affected by it have been federally designated as a national natural landmark or a federal wilderness area or some other "outstanding natural or cultural feature" that is comparable to such a nationally or federally designated site. Further, Huber has not offered evidence of such a

designation that was erroneously disallowed from the record. *See* 5 M.R.S. § 11006(1)(B) (2010). Next, as to section 3451(9)(B), there is no evidence that the Monhegan test area is "[a] property listed on the National Register of Historic Places."[16] As to section 3451(9)(C), the record does not suggest that the test area or other locations affected by it are within a national or state park. Rather, Monhegan Island is a settled community with a village and year-round private residents and seasonal visitors. *See* R. 266-71 (Monhegan Island mailing list), R. 267-68 (Monhegan residents). As to sections 3451(9)(D) and (E), neither the test area nor areas that may be affected by it include a great pond or a segment of a scenic river or stream. Next, as to section 3451(9)(F), the record does not show that the Monhegan test area or the southern areas of Monhegan Island facing towards the test area have been designated by the Department of Conservation, pursuant to its rulemaking authority, as "[a] scenic viewpoint located on state public reserved land or on a trail that is used exclusively for pedestrian use." Although, as Huber notes, cars are not permitted on Monhegan Island and the island is largely used by pedestrians, that circumstance falls short of the standard set out in section 3451(9)(F). And as to section 3451(9)(G), the test area and Monhegan Island itself are not scenic turnouts constructed by DOT on a designated scenic highway.

The final issue on this part of Huber's claim implicates section 3451(9)(H), which protects "[s]cenic viewpoints located in the coastal area, as defined by Title 38, section 1802, subsection 1, that are ranked as having scenic quality of state or national significance in" either a list of three specific scenic inventories "prepared for and published by the Executive Department, State Planning Office," or in "[a] scenic inventory developed by or prepared for the Executive Department, State Planning Office in accordance with [title 35-A] section 3457." Huber correctly observes that the Monhegan offshore wind energy test area and the Lobster Cove portion of Monhegan Island, which faces the site, fall within the definition of "coastal area" under 38 M.R.S. § 1802(1) (2010).[17] However, to constitute a "scenic resource of state or

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[16] The Department found that the test site area is within view of four "National Historic Landmarks." R. 80. However, the record does not show that the test area would have a potential adverse effect on any "property listed on the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966," as section 3451(9)(B) would require.

[17] The statute provides, "The 'coastal area' encompasses all coastal municipalities and unorganized townships on tidal waters and all coastal islands. The inland boundary of the coastal

national significance," it is not enough that a scenic viewpoint is located in a "coastal area." Rather, the "scenic viewpoint" must be located in a "coastal area," and the scenic viewpoint must also be ranked in one of the several scenic inventories specified in section 3451(9)(H). The record does not demonstrate that any location relevant to this action is included in any of those inventories. Therefore, this final definition of a "scenic resource of state or national significance" is inapplicable.

All of this demonstrates that the record does not show that the Monhegan site or the Lobster Cove area fell within any of the definitions of "scenic resources of state or national significance" under 35-A M.R.S. 3451(H)(9). Consequently, the Department was not required to engage in any analysis that would have arisen otherwise

(3) Rulemaking for scenic inventories, 35-A M.R.S. § 3457

Huber next contends that the Department and the SPO could not make an informed decision about the prospective impact of the offshore wind energy test area and research center on Lobster Cove without engaging in rulemaking pursuant to 35-A M.R.S. § 3457. Section 3457 requires the Department to adopt rules designating scenic viewpoints in certain areas that meet standards set out in that statute. Section 3457 also requires the SPO to promulgate rules establishing the methodology to create an inventory of certain scenic resources.

Huber's contention is undermined by the express provisions of section 1868, which governs the scope of the analysis required of Department. That statute provides, "In identifying each such area, the department must consider *existing* information regarding pertinent ecological, environmental, social and development-related factors. . . . " 12 M.R.S. § 1868(1) (emphasis added). The governing statute therefore does not obligate the Department to engage in rulemaking on issues concerning the scenic nature of this or any other site, because the agency is required only to consider "existing" information in designated categories. Because section 1868(1) did not require any participating agency to develop rules as part of the process of identifying offshore wind energy test areas, the Department did not err by failing to do so.

(4) Department's consideration of "human uses" and "viewshed"

Huber finally argues that the Department improperly and intentionally disregarded existing information by limiting its consideration of "viewshed" and "human uses" to fishing,

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area is the inland line of coastal town lines and the seaward boundary is the 3-nautical-mile line as shown on the most recently published Federal Government nautical chart."

recreational boating, and archaeology. He contends that the Department improperly failed to consider birding, tourism, and artistic human uses and that these omissions resulted in an incorrectly low assessment of viewshed rating for the Monhegan site. Huber argues that this analysis is affected by an abuse of discretion and arbitrary decision-making.

Agency action is determined to be arbitrary and capricious only when it is "wilful and unreasoning and without consideration of facts or circumstances." *Kroeger v. Dep't of Environmental Protection*, 2005 ME 50, ¶ 8, 870 A.2d 566, 569 (citation and internal punctuation omitted).

In a brief memorandum posted on its website, the Department explained its methodology for taking into account all of the competing concerns regarding the identification of the offshore wind energy test areas. R. 29-30 ("The Maine Offshore Energy Demonstration Area Siting Initiative: Draft Site Selection Methodology"). The methodology was comprised of two phases. In Phase 1, the Department and SPO identified seven large testing areas that were potentially suitable locations to test the technology involved in offshore wind energy generation. Also as part of Phase 1, the agencies solicited responses from members of the public and from other agencies.

Phase 2 consisted of a "map analysis" in which the agency organized information on a gridded map, so that an "activity or concern" associated with a particular location could be shown in a way that corresponded to that area. This information and other data collected during the identification process related to ecological issues, geology, obstructions, infrastructure, human uses of the marine environment and viewshed considerations. Those "human uses" consisted of "fishing activity surveys, fishing complexity, shrimp tows, canneries, lobster pounds, fishing weirs, recreational boating, and archaeology. . . ." Finally under Phase 2, the agency tabulated all information it had received, as a form of "map ranking."

> For each factor, we used our best professional judgment to rank concern as low, medium, or high, and considered qualifiers related to the limitations of available data. Based on the level of concern and qualifiers, we used our best professional judgment to assign a numerical ranking to each factor, from 1 (lowest concern) to 5 (highest concern). We subsequently summed the ranks for each factor, and calculated an average rank for each site by dividing the sum of ranks by the number of factors, giving equal weight to all factors. The scores for all sites ranged from a low (favorable) value of 1.3 to a high (unfavorable) of 2.1. For the purposes of selecting draft demonstration sites, we selected all sites with an average ranking of less than 2.0.

The record includes the resulting "Concern Ranking" table for Planning Area C, which is the large planning area surrounding Monhegan Island. R. 80. The left-hand column of that document lists the categories and sub-categories of issues that the Department considered. The larger categories, which each are broken down into subcategories, are "Ecological Concerns," "Geology," "Obstructions," "Human Uses," and "Viewshed." Next to each of these identified issues are assessments of whether those concerns relate to that particular planning area, the level of concern based on available information, the level of concern when seen in light of limitations on information, any qualifications, and finally a quantitative assessment as outlined above.

As part of its analysis of the possible site's "viewshed,"[18] the Department considered the subcategories of "visual assessment trigger" and "national park." For both of these subcategories within the "viewshed" analysis, the "level of concern based on available knowledge" and the "level of concern when accounting for data limitations" are "low." Although the reported level of concern is low, the Department made the following comments: "Area is within viewshed of 4 National Historic Landmarks;" "Visual Assessment will be triggered to quantify affect of development;" and "Possible pre-construction surveys will determine visual effects of the development." The Department thus considered the viewshed at the Monhegan site but concluded that the present concerns were low in any event and that, prior to any actual development, the pre-construction survey and visual assessment will generate more specific information about the effects of development. Such an assessment will require the participation of the Department of Conservation. *See* 38 M.R.S. § 480-HH(H).

Although Huber largely frames his challenge to the Department's "viewshed" analysis, his argument also spills over into a consideration of the "human uses" analysis, because Huber contends that the Department ignored particular human uses that understated the viewshed consideration. Within the category of "Human Uses," the table reflects a tabulation for each of the criteria noted in the statement of methodology discussed above: fishing activity surveys, fishing complexity, shrimp tows, canneries, lobster pounds, fishing weirs, recreational boating, and archaeology. Huber claims that the universe of "human uses" should have included activities such as birding, tourism, and artistic human uses. Because the Department did not do so, Huber contends that the agency artificially lowered its estimation of the site's scenic value.

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[18] A depiction of Monhegan Island's scenic resources and of the location of Lobster Cove is included in the record at R. Supp II B.

The record does not support Huber's claim that the Department ignored significant forms of human activity and uses. The Department and SPO consulted the latter agency's records, which list scenic resource sites as defined by the Natural Resource Protection Act, sites on the National History Registry in Maine, lakes and rivers identified in the Maine Wind Power Act as scenic assessment criteria, and state parks. R. 93-94, R. Supp. I 91, 97, R. Supp II B. The Department and SPO considered the proximity of state and national parks, as well as national historic registry sites. R. 40. Several state databases identify scenic resources and national historic registry sites that cover Monhegan Island, and the Department considered that information. R. Supp. I 91, 97, R. Supp. II B. All of those resources are on the north and westerly sides of the island, and not on the southerly seaward side, which would face the wind energy test area. R. 93-94, R. Supp. I 91, 97, R. Supp. II A, B. Further, the Department's examination of the effects of the test area on bird habitat is another way of taking into consideration the popular interest in birding. The Department received information about the artistic tradition on the island, R. 31, and recreational sailing activities in the area, R. 45. The Department and SPO solicited and received comments both in favor of and against the Monhegan site, largely due to viewshed concerns. R. 272-73, 275, 279-288. Ultimately, the Department concluded that it had minimized the viewshed impact by locating the test area over two miles away from the closest point on the island, at the seaward edge of state waters, and out of view of the majority of Monhegan Island's residents and visitors. R. 5,[19] 33.

When the Department evaluated and then quantified the information relevant to the wind energy test site identification process, it made factual findings. The present record demonstrates that the agency's factual findings challenged here were supported by substantial and competent evidence and that those findings were not arbitrary or capricious.

The entry shall be:

The decision of the Bureau of Parks and Lands, Department of Conservation is affirmed.

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[19] The Department's decision found that the all three test sites would likely be visible from land in clear conditions, each site was located at least two miles from the nearest point of land and more than four miles from the mainland. As to Monhegan site specifically, it would be "out of view of most residents/visitors." R. 33.

Dated: June 24, 2011

Justice, Maine Superior Court