

State of Maine
Knox, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-10-002

PETITIONER'S BRIEF

RONALD HUBER, PETITIONER

V.

BUREAU OF PARKS AND LANDS
MAINE DEPARTMENT OF CONSERVATION

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Fitzgerald v. Baxter State Park Authority, 385 A.2d 189, 196-97 (Me. 1978) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972))

Save Our Sebasticook, 2007 ME 102, ¶ 15, 928 A.2d at 741

"we proceed to review the findings of the Board to determine their sufficiency."

Int'l Paper Co. v. Bd. of Env'tl. Prot., 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054 "Upon review of an agency's findings of fact we must examine the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did."

S.D. Warren Co. v. Bd. of Env'tl. Prot., 2005 ME 27, ¶ 22 n.10, 868 A.2d 210, 218. "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".

Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bridgton, 2009 ME 64, ¶ 11, 974 A.2d 893, 896; "Administrative agency

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findings of fact will be vacated only if there is no competent evidence in the record to support a decision."

Anderson v. Me. Pub. Employees Ret. Sys., 2009 ME 134, ¶ 3, 985 A.2d 501, 503 the party seeking to vacate the agency decision, bears the burden of persuasion on appeal.

Kelley v. Me. Pub. Employees Ret. Sys., 2009 ME 27, ¶ 27, 967 A.2d 676, 685. FOLL has not demonstrated that there is no competent evidence to support the Board's findings.

Town of Frye Island v. State, 2008 ME 27, ¶ 13, 940 A.2d 1065, 1069. "A facial challenge to the constitutionality of a statute is

a question of law subject to de novo review, and the party challenging the statute bears the burden of showing constitutional infirmity by strong and convincing reasons."

Aseptic Packaging Council v. State, 637 A.2d 457, 459-60 (Me. 1994) Plaintiff failed to show that no "conceivable state of facts either known, or which can reasonably be assumed, supports the legislative action,"

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MRSA 12 1868 "Identification of offshore wind energy test areas"

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MRSA 35-A, Section 3451 Chapter 34-A: "Expedited permitting of grid-scale wind-energy development"

MRSA 35-A, Section 3404(2)(B) Maine Wind Energy Act,

MRSA 38 480-B, subsection 8,

MRSA 38 480-HH. "General permit for offshore wind energy demonstration projects."

Maine Constitution. Article 1 Section 3

Executive Order Establishing the Ocean Energy Task Force EO 20 FY08

Designation of Offshore Wind Energy Test Areas, Bureau of Parks and
Lands, Maine Dept of Conservation, December 14, 2009

Land Use Regulatory Commission Comprehensive Land Use Plan, Section
5.10 Scenic Resources 11/16/07 version

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STANDING

The standing test for a case concerning public lands uses requires
Petitioner to establish: an "injury in fact" which is (1)
concrete and particularized, (2) actual or imminent"., and (3)
redressable

A. Petitioner asks this Court to find he has standing to bring his
petition before Maine Superior Court, based on

1. His right to practice a marine nature-based religion without unreasonable interference, per precedent set by *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) and by the Maine Constitution's Article 1, Section 3. "Religious freedom; sects equal; religious tests prohibited; religious teachers."

2. His history of successful Penobscot Bay marine activism before Maine state agencies, carried out in pursuit of his religious/conservation mandate.

3. The redressability by the Court of the issues raised by Petitioner

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1. RIGHTS. Petitioner's right of freedom to practice his religion is threatened by the ill-planned and imminent invasion of the waters south of Monhegan, the western reaches of his pastoral ministry, with prototype wind mills and other technology.

Maine Constitution, Article 1, Section 3. "Religious freedom; sects equal; religious tests prohibited; religious teachers" protects

Petitioner's "natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person's liberty or estate for worshipping God in the manner and season most agreeable to the dictates of that person's own conscience, nor for that person's religious professions or sentiments, provided that that person does not disturb the public peace, nor obstruct others in their religious worship;"

Petitioner also notes that the comparative popularity of or number of human adherents within his or other religious denomination is irrelevant in determining whether Article 1 religious freedom protections apply. As Article 1, Section 3 continues:

"[A]ll persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws,

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and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test be required as a qualification for any office or trust, under this State; and all religious societies in this State,

whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance."

In *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) the Law Court found that plaintiffs had standing because they hiked, camped, otherwise made use of Baxter State Park on a regular basis.

Petitioner's religious practice is a Constitutionally protected "regular" use of Monhegan and these waters.

The 24/7 appearance and operation of these industrial operations would take place solely during summer and fall. This is the most biologically active and ecologically important time for the birds, fish, marine mammals, invertebrates and other wild organisms making up Petitioner's congregation to inhabit these waters.

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The adverse impact of operating on Petitioner's freedom of practice his religion would be comparable to the impact to Maine Catholics of siting a similar large mechanical operation within the nave of

the Cathedral of the Immaculate Conception during Easter services. The fact of the forced desacralization of either place of worship at a religiously significant time would be unacceptable to members of either faith. This is so regardless of how regularly they take part in religious activities there.

2. PETITIONER'S HISTORY OF PENOBSCOT BAY ADVOCACY While carrying out his religious duty since 1993 of protecting the wild inhabitants of Penobscot Bay, the Petitioner was awarded standing on his own and as executive director of two successive non-government organizations in the 1994-1996 review by Maine Department of Environmental Protection of a woodchip port proposed for Sears Island in Penobscot by then Governor Angus King and in 1996 by the Maine Board of Environmental Protection when Petitioner appealed state decisions to allowing the MBNA Credit Card Company to build a conference center and then guest cottages and additional buildings on coastal Ducktrap Mountain in Northport,

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In 196 and 1997 Petitioner took part in Maine DEP's oil tanker and oil port rules task force and helped develop rules to protect

marine life of Penobscot Bay and other Maine coastal waters' marine life from oil spills.

In 1998 and in 2006 Petitioner was involved in successful community opposition to a plan by the owners of the Samoset Resort to build a marina alongside the Rockland **Breakwater that** was being reviewed by Maine Department of Environmental Protection. The marina would have harmed a unique kelp forest ecosystem, related lobster fisheries, and scenic resources of state or national significance alongside the Rockland **Breakwater.**

In 2005 and 2006 Petitioner was president of Neighbors for a Safe Dragon, a citizens' group that successfully brought pressure on MDEP to require Dragon Cement to cap its clinker and cement kiln dust piles, which were eroding into the region's airshed and into wetlands of the Weskeag River in Thomaston.

Petitioner was similarly involved in successful community opposition to a marina proposed by the Samoset resort being reviewed by Maine Department of environmental Protection, that would have harmed a unique kelp forest ecosystem, related

fisheries, and scenic resources of state or national
significance alongside the Rockland **Breakwater**

3. PETITIONER USE OF THREATENED RESOURCE Petitioner visits and
enjoys the use of Monhegan Island, especially using the pedestrian
trail to arrive at Lobster Cove with its scenic assets of state and
national significance, specifically the complex and unspoiled
vista of the central Gulf of Maine that has inspired generations of
professional and amateur artists, sculptors and photographers.

Included in and integral to the Lobster Cove viewscape and
soundscape Center are the birds, marine mammals, fish and other
organisms that these waters are notable for globally, particularly
among professional and amateur ornithologists. Most of these
species are present off Lobster Cove in their greatest number
during the summer and fall months that the University of Maine
proposes to operate within the site off Monhegan.

4. REDRESSABILITY If the Court compels the Bureau of Parks and Lands
to set aside or suspend its designation of the wind research
center, will the Bureau be able to address the

deficiencies in its review of the location's scenic conservation values of state and national significance?

Yes. The Petitioner is asking that the Bureau's designations of the Monhegan Offshore Wind Research Center and Test Area be revoked and rescinded until such time as the Bureau of Parks and Lands addresses deficiencies in its review of scenic and bird impacts and thus complies with the standards and criteria of established state law governing conservation of scenic and other natural resources of state and national significance, if and when it conducts future reviews of this matter.

It was the failure of the Bureau of Parks and Lands to make an informed decision following the offshore wind test area review process that spurred the Petitioner into action in the first place.

There is sufficient existing freely available information and expertise among state and federal agencies and among marine life, bird life and scenic resource amateurs, professionals and academics to enable the Bureau to gather enough credible information to make an informed decision on whether the resources at risk onshore and

offshore of Lobster Cove are of such state and national significance and value that the likely

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harm to them outweighs the values of locating the Maine Offshore Wind Energy Research Center off Monhegan as opposed to the other candidate and chosen sites.

Compliance with these laws would satisfy the petitioner's ecological and cultural resource concerns and ameliorate his spiritual concerns. If, following application of such review standards as the Court sets, the Lobster Cove viewshed and waters are found to have been lawfully "rendered unto Caesar" for offshore windpower research, then it is justly the law of the land.

Until such finding is made, however, it is the Petitioner's duty as shepherd of a threatened natural pastoral flock to forestall, by all ethical means necessary, what he determines to be an unjust state action that would be destructive in effect to those beings that he shepherds.

STATEMENT OF ISSUES

1. Must the Maine Bureau of Parks and Lands evaluate the scenic resource conservation values attached to Monhegan Island's Lobster Cove and determine whether they meet relevant state scenic resource protection criteria and standards as Scenic Resources of State and National Significance, when determining the suitability of the proposed wind energy test area?

2. Must Maine Bureau of Parks and Lands evaluate the wild bird and fish values of the Lobster Cove area and nearby waters and determine whether those organisms abundance and distribution meet the state fish and wildlife protection criteria and standards to be considered "protected natural resources" for determining the suitability of the proposed Monhegan wind energy test area?

3. Does this court have the power to compel the Bureau of Parks and Lands to set aside or suspend designation of the Maine Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center off Monhegan until deficiencies in the Bureau's review relating to

the location's scenic and conservation values of state and national significance are addressed?

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Statement of Facts

Legal facts

Ocean Wind Energy extraction is a relatively new form of power generation globally, and as yet undeveloped in the coastal waters of the United States.

As a result, applicable American case law specific to ocean windpower generation is limited to the Cape Wind case presently on appeal before the federal court.

There is however, a growing body of case law in American state and federal courts concerning land-based wind power; however the decisions are not uniform across the states and districts.

The nearest legal precedent in landbased windpower is the March 11, 2010 Maine Supreme Judicial Court decision on *Friends of Lincoln Lakes et al v. Board of Environmental Protection et al*, 2010 ME 18.

Procedural Facts:

On November 7, 2008. Governor John Baldacci signed Executive Order 20 FY08 establishing the Ocean Energy Task Force. The State Planning Office's Special Projects Office implemented the executive order.

On June 4, 2009, Governor John Baldacci signed LD1465 "An Act To Facilitate Testing and Demonstration of Renewable Ocean Energy Technology". The bill becomes Title 38 Section 480HH. "General Permit for Offshore Wind Energy Demonstration Projects".

On December 10, 2009, the Ocean Energy Task Force presented Governor Baldacci its 87 page Final Report on meeting the goals established in the Maine Wind Energy Act, Title 35-A, section 3404(2)(B) of extracting at least 3,000 megawatts of electricity from wind by 2020, 300 megawatts of which would be extracted in coastal waters.

The Bureau of Parks and Lands reviewed seven candidate test areas - locations off of Boon Island, Damariscove Island , Monhegan Island, Isle au Haut, Matinicus, Beals Island and off Machias/Cutler. The review included public information meetings in towns near the proposed offshore wind test areas.

On December 14, 2009 Maine Bureau of Parks and Lands Director Willard Harris designated a two square mile area of the Gulf of Maine south of Monhegan , and two other locations, as Maine Offshore Wind Energy Test areas. Harris further designated the two square mile area near Monhegan as the Maine Offshore Wind Energy Research Center.



On December 15, 2009. Maine State Planning Office concurred in the designation of the Maine Offshore Wind Energy Research Center near Monhegan.

This action by the Bureau, assisted by the Maine State Planning Office, was required to be consistent with Executive Order 20 FY08 establishing the Ocean Energy Task Force, signed November 7, 2008 , with MRSA 12 Sec 1868, Part 1."Identification of offshore wind energy test areas", with MRSA 35-A, Section 3451 Chapter 34-A: "Expedited permitting of grid-scale wind-energy development", and with MRSA 38 480-HH. "General permit for offshore wind energy demonstration projects."

On January 8, 2010. The University of Maine received 12.4 million in stimulus money for development of offshore wind technology.

On January 25, 2010 Ronald Huber petitioned Maine Superior Court requesting a review of this final agency action by the Bureau pursuant to Rule 80-C of the Maine Administrative Procedure Act.

The petition seeks protection of scenic resources that are of "state or national significance" on and offshore of Monhegan Island, and protection of birds, fish and other wildlife

resources using the island and the waters to its south, that are of economic, ecological, cultural and religious significance.

Bird Facts

Monhegan Island's Lobster Cove is a well known and popular destination for professional and amateur birdwatchers year round. The Maine Coastal Islands National Wildlife Refuge and Maine Audubon affirm that numerous species of birds migrate through or live within the waters south of Monhegan.

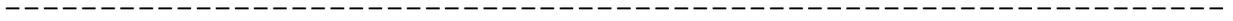
Species documented in the annual Audubon bird counts at Monhegan include the Canada Goose, Wood Duck, American Black Duck, Mallard, Green-winged Teal ,Common Eider, Surf Scoter , White-winged Scoter, Black Scoter,Common Loon, Cory's Shearwater, Greater Shearwater, Leach's Storm-Petrel, Northern Gannet, Great Blue Heron, Black-crowned Night-Heron, Bald Eagle, Osprey , Sharp-shinned Hawk ,Cooper's Hawk , American Kestrel, Merlin, and Peregrine Falcon. Dozens of songbirds and other small birds also frequent the island, according to Maine Audubon.

On August 4, 2008 US Fish & Wildlife Service's Maine Field office for Ecological Services submitted comments to the Ocean Energy Task Force following review of maps depicting the seven potential ocean energy demonstration areas. **RECORD Pp 58-69]**

In addition to a generalized review of the advanced in monitoring nesting success of Maine coastal bird and seabirds, the agency also noted a lack of information on coastal bird and seabird overwater migration and foraging behaviors, issues the USFWS considers extremely important. USFWS submitted the following comments specific to Monhegan: **[RECORD PG 65]**

"A significant number of neotropical migrants utilize Monhegan Island as a migratory stop-over location during migration and the island is a world-wide destination for birders during spring and fall migration. Bald eagles nest on the island. Monhegan hosts exceptional numbers of migrating peregrine falcons and other raptors. We are not aware of information about specific migration routes or the elevation of flights of neotropical migrants and raptors. The Service does not have any specific information on the pelagic uses of this region of the coast by seabirds, waterbirds, shorebirds or marine mammals."

On pages 66 and 67 of the Record, the USFWS states "In conclusion, we believe it imperative that agencies and project proponents begin to collect data that will allow us to fully evaluate the potential impact of offshore wind turbines on Maine's coastal wildlife resources. We know that countless birds utilize the waters off the coast of Maine during their breeding, migration and wintering periods."



The USFWS went on to recommend that Maine follow recommendations the agency made during the Cape Wind review in Massachusetts: "3 years of field studies using a combination of radar, (horizontal and vertical), direct field sampling, and visual (boat, barge and aircraft) observation."

"We believe that similar studies would be necessary in Maine to evaluate the potential impact of wind power development on the coastal wildlife resources of Maine. The remote sensing techniques (radar and acoustic) would need to be operated continuously 3565 days per year, using a combination of land based and ocean based facilities to capture all life cycle activities of the avian species at each site."

The USFWS states that its reason for urging such a detailed review prior to ANY ocean windpower development in Maine state waters is "in view of the fact that **no** information on the potential impacts of offshore wind projects on foraging or migrating bird species is available for coastal areas of Maine."

Fish Facts

The Maine Offshore Wind Research Center abuts and includes portions of the Monhegan Inner Sou' Sou'west Ground, a three

square mile historically important fishing ground bearing SSW from Monhegan. The ground's waters are up to 300 feet deep. According to Fishing Grounds of the Gulf of Maine, 1929, reprinted by the Maine Department of Marine Resources, cod and pollock historically are resident from May until July; hake and cusk are in the ground's deep water in the spring months, and halibut in the shoaler parts in the autumn.

Scenic Facts

Lobster Cove is one of Monhegan's most prominent and most popular natural features, with its rocky shore-framed unspoiled vistas of the island-studded Gulf of Maine. For more than a century, Monhegan and particularly, Lobster Cove, has been, and continues to be, a location of choice for fine artists from around the state, the nation and the world, who seek to capture the island's wild vistas of the Gulf of Maine.

The wind energy devices would be fully visible from Lobster Cove and the south-facing elevations of Monhegan Island by day, and would be lighted with blinking safety lights at night.

Summer and fall are the times of heaviest use of Monhegan, and especially Lobster Cove, by artists, beachcombers and other scenic users. A public, pedestrians-only scenic walkway leads

from the Monhegan Ferry landing to Lobster Cove.

Maine State Planning Office, Land Use Regulatory Commission and the Chamber of Commerce have all awarded high values to Monhegan's scenic views and natural sounds

Page 37 of the State Planning office's 2008 Scenic Assessment

Handbook for the Maine Coastal Program uses an image of electricity towers and powerlines as examples of "discordant Land Use", specifically as "incompatible commercial/industrial uses" when emplaced in a natural environment.

On page 38 the same handbook uses an image of the Monhegan waterfront as an example of "Positive Settlement Features" for featuring "**buildings w/harmonious massing/height**".

The Monhegan pedestrian walkway to Lobster Cove was the subject of a Maine Department of Transportation Enhancements Project in 2005.

When selecting these test areas, in addition to considering proximity to transportation and transmission infrastructure, wind character, hydrology, geology, and archaeology, the

Department of Conservation, per **MRSA 38§480-HH "General permit for offshore wind energy demonstration project"**, must

*"consider existing information regarding pertinent ecological, environmental, **social** and development-related factors including but not limited to:*

A. Potential adverse effects on... a scenic resource of state or national significance, as defined by Title 35-A, section 3451, subsection 9; [2009, c. 270, Pt. C, §1 (NEW).]

B. Potential adverse effects on...avian species, including seabirds, passerines, raptors, shorebirds, water birds and waterfowl; bats; and marine mammals; [2009, c. 270, Pt. C, §1 (NEW).]

C. Potential adverse effects on commercial fishing, recreation, navigation, existing public access ways to intertidal and subtidal areas and other existing uses; [2009, c. 270, Pt. C, §1 (NEW).]
and

G. Public support in pertinent coastal communities; [2009, c. 270, Pt. C, §1 (NEW).]

During the review process, the Bureau made little effort to contact and gauge support for the Monhegan ocean energy candidate site of two "pertinent coastal communities" of interest: Maine seabird & island birders and ornithologists, and the artists' communities made up of generations of visiting and resident painters, sculptors, photographers and users of other media, who have visited and used the vistas of Monhegan, including those at Lobster Cove, as an indispensable locations to carrying out their activities.

Additional Legal Facts

MRSA 38 §480 HH directs that the Maine Offshore Wind Energy Research Center be used by *"offshore wind energy demonstration projects conducted by or in cooperation with the University of Maine System and on terms and in a manner that the University of Maine System considers consistent with and in furtherance of its offshore wind energy research and development-related objectives, including but not limited to any such objectives to be supported with state bond revenues."* [2009, c. 270, Pt. C, §1 (NEW).]

MRSA 38 § 480-HH further allows the Bureau to, "following notice and opportunity for public comment, add to, remove or

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other otherwise modify the list of offshore wind energy test area...". [2009, c. 270, Pt. C, §1 (NEW) .]

Through its Submerged Lands Leasing Program, The director may conduct a submerged lands leasing program under which the director may lease, for a term of years not exceeding 30 and with conditions the director considers reasonable, the right to dredge, fill or erect permanent causeways, bridges, marinas, wharves, docks, pilings, moorings or other permanent structures on submerged and intertidal land owned by the State.

Title 12, §1862: "Submerged and intertidal lands owned by State"

states that "The director may refuse to lease submerged lands if the director determines that the lease will unreasonably interfere with customary or traditional public access ways to or public trust rights in, on or over the intertidal or submerged lands and the waters above those lands."

LEGAL ARGUMENTS

SUMMARY

1. Plaintiff asks this Court to find that the Bureau of Parks and Lands abused its discretion and knowingly failed to make an informed decision about determining impacts to scenic resources when designating the Maine Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center, off Monhegan.

2. As a result of those findings, Plaintiff asks the court to revoke, rescind or suspend the Bureau of Parks and Lands' December 19, 2009 designation of waters off Monhegan Island as an offshore wind energy test area and as the Maine Offshore Wind Energy Research Center.

3. Plaintiff ask this court to require the Bureau, following notice and opportunity for public comment, to assess the natural, scenic & cultural assets at risk and determine whether the Monhegan Maine Offshore Wind Energy test area and Research Wind Energy Research Center project can be either modified sufficiently to

minimize its impacts to resources of state and national significance to levels considered acceptable by the state's own scenic and natural resource protection standards, or should be removed from the list of offshore wind test areas.

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GUIDANCE

Judicial decisions at state and federal courts around the country concerning wind farm siting do not offer uniform guidance. For that reason Petitioner looks to the most recent relevant legal decisions in Maine.

According to *Save Our Seabcoast, Inc. v. Bd. of Env'tl. Prot.*, 2007 ME 102, ¶ 13, 928 A.2d 736, 740, the court may "review decisions made by an administrative agency for errors of law, abuse of discretion, or findings of fact not supported by the record." In this review, "[t]he [C]ourt shall not substitute its judgment for that of the agency on questions of fact." 5 M.R.S. § 11007(3) , cited by *Friends of Lincoln Lakes et al v. Board of Environmental Protection et al*, Maine Supreme Judicial Court 2010 ME 18. decided on March 11, 2010.

In *FOLL V BEP* the Law Court found that the decision by the state board was supported by sufficient substantial evidence in the record.

In the present case, Petitioner holds and will detail below how, unlike BEP in *FOLL v BEP*, the record of the Bureau of Parks and Lands' decision to designate waters off Monhegan as a Wind Test

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Area and as a Wind Research Center does *not* substantially support that decision

In Anderson v. Me. Pub. Employees Ret. Sys., 2009 ME 134, ¶ 3, 985 A.2d 501, 503 the court found that the party seeking to vacate the agency decision, bears the burden of persuasion on appeal.

Petitioner will show persuasively below that the Bureau abused its discretion by knowingly excluding information freely available to it but not supportive to designation, when deciding to designate the Monhegan Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center within that area.

ISSUE 1. Is Lobster Cove a Scenic Resource of State and National Significance as defined by Title 35-A, section 3451, subsection 9?

RULE: To meet the definition, Lobster Cove must fit at least one of the eight criteria in MRSA 35-A §3451 Section 9 Definitions.

Petitioner holds that Lobster Cove meets at least two criteria: A and F.

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That statute defines "Scenic resource of state or national significance" in pertinent part as *"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; [2007, c. 661, Pt. A, §7 (NEW).]

or

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; [2007, c. 661, Pt. A, §7 (NEW).]

or

H. Scenic viewpoints located in the coastal area, as defined by Title 38, section 1802, subsection 1: Coastal Area.

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

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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. [2007, c. 661, Pt. A, §7 (NEW).]

Argument: Lobster Cove easily meets the definitional criteria of "A". By the state's own admission, it is an "*outstanding natural and cultural feature*" that is open to the public and is reachable only by pedestrian-only ferry and public footpath. The ocean energy task force itself described Monhegan as "an especially scenic area."

The Land Use Regulatory Commission Comprehensive Land Use Plan, Section 5.10 Scenic Resources 11/16/07 version states...*The village on the coastal island of Monhegan with its working*

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waterfront draws tourists from all over the world to experience its scenic beauty."

The Penobscot Bay Regional Chamber of Commerce calls Monhegan:

"undoubtedly the most famous island in Maine. " It notes a lengthy list of important artists "who have been drawn to paint its dramatic cliffs—the highest on the New England coast. These artists are credited with popularizing the island, whose summer population is tenfold that of the winter.

Superlatives describing Monhegan's vistas abound in literature, in state agency publications, in the products and publications of artists, recreation professionals and academics, worldwide.

On Section F *"A scenic viewpoint located on state public reserved land or on a trail that is used exclusively for pedestrian use"* Monhegan would easily meet the standard, if the Bureau and State Planning office were not dilatory in their rulemaking, and had identified Lobster Cove as a Scenic Viewpoint, and put it into the state's scenic inventory. See Issue 2.

In Section H. *Scenic viewpoints located in the coastal area, as defined by Title 38, section 1802, subsection 1 "Coastal Area* "*

scenic resources are ranked as having state or national significance by being listed in:

"(1) One of the scenic inventories prepared for and published by the Executive Department, State Planning Office..."

or

"(2) A scenic inventory developed by or prepared for the Executive Department, State Planning Office in accordance with section 3457. "

While it is not known if Monhegan is listed in any scenic inventories prepared for and published by or developed by the State Planning Office, pursuant to 1 or 2, none were produced in the Record. Monhegan meets the definition of "coastal area" mentioned in Section H.

* Note: According to M RSA 38 Sec 1802(1) "Coastal Area" encompasses all coastal municipalities and unorganized townships on tidal waters and all coastal islands. The inland boundary of the coastal 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."

Conclusion The bureau and state planning office should have designated Lobster Cove a Scenic Resource of State and National Significance. Having done so it should have carried out a viewshed review, and then weighed Monhegan's scenic qualities against those of the other candidate sites.

ISSUE 2. Are the scenic resources of Lobster Cove "protected natural resources"?

Rule According to Title 38, section 480-B, Subsection 8, "protected natural resources" 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.*"

Argument. Lobster Cove boasts a coastal sand dune system; its waters and the test area waters south of it are known significant wild bird habitats. The Cove's beach is also a coastal wetland.

Conclusion the scenic and wildlife habitat resources of lobster Cove are protected natural resources.

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ISSUE 3. Have the Bureau and the State Planning Office developed rules pursuant to 35-A §3457. Expedited permitting of gridscale wind energy development, Rulemaking; scenic viewpoint; scenic inventory? Rules. According to Section 1 of to 35-A §3457, the Department of Conservation *"shall adopt rules to designate scenic viewpoints located on state public reserved land or on a trail that is used exclusively for pedestrian use, such as the Appalachian Trail, that have state or national significance from a scenic perspective based on criteria modeled after those used in the "Maine Rivers Study" published by the Department of Conservation in 1982 and "Maine Wildlands Lakes Assessment" published by the Maine Land Use Regulation Commission in June 1987 and consideration of the criteria in section 3452, subsection 3."* [2007, c. 661, Pt. A, §7 (NEW)]

In Section 2. "Scenic inventory", the statute directs the State Planning Office to:

" adopt rules regarding the methodology for conducting a scenic inventory of scenic resources of state or national significance that are located in the coastal area, as defined by Title 38, Section 1802, subsection 1, in a manner comparable to that used for an inventory listed in section 3451, subsection 9, paragraph H, subparagraph (1). The office may contract with an outside

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entity for the preparation of a scenic inventory conducted pursuant to the methodology developed pursuant to this subsection."

Argument Without these rules the Bureau cannot make an informed decision as to the scenic impacts that the Monhegan ocean wind rest area could have on Lobster Cove.

The Bureau appears to hold that in the absence of carrying out or completing such rulemaking it cannot evaluate Lobster Cove's scenic resources. Not being on the (to Petitioner's knowledge and belief) nonexistent inventory of scenic areas of state and national significance, the Monhegan viewshed did not need not be evaluated under MRSA 35-A §3457.

In sum, in the absence of criteria developed by rulemaking, the Bureau and SPO appear to believe that highly popular, world

renowned, scenic, biologically abundant Lobster Cove on Monhegan lacks scenic attributes worthy of triggering a viewshed review.

Int'l Paper Co. v. Bd. of Env'tl. Prot., 1999 ME 135, ¶ 29, 737 A.2d 1047, 1054 "Upon review of an agency's findings of fact we must examine the

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entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did."

Conclusion. The Bureau's December 14, 2009 designation should be revoked, rescinded or suspended until such rulemaking is completed and the Bureau is able to make an informed decision

ISSUE 4: Was the Bureau correct assigning the Lobster Cove area of Monhegan Island a "Low Quality" viewshed rating?

Rule: The Bureau produced Planning Area Summaries of the different candidate sites, after gathering information at interagency staff-level meetings and public gatherings held at selected locations

along the Maine coast, and via comments submitted by mail and electronically. Page 80 of the Record)

The summaries adds up impacts and benefits and ranks the candidate planning areas with a number derived from sum of the review of the following: Ecological Concerns, Marine mammals, Avians, Other species, Geology, Obstructions, Infrastructure, Human uses, Viewshed.

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We here consider the final two: human uses and viewshed, in the context of *Aseptic Packaging Council v. State*, 637 A.2d 457, 459-60 (Me. 1994) in which Petitioner had to show that no "conceivable state of facts either known, or which can reasonably be assumed, supports the legislative action".

Petitioner details below how in the present case, because the human uses and scenic resources at risk were so great, the Bureau dared not incorporate them into its review, as the proposed and desired outcome: designation off Monhegan, would not have been possible. Instead the Bureau purposely ignored the data it had at land, and instead focused its viewshed review on purposely

irrelevant criteria, pre-guaranting a "low scenic quality" designation for Monhegan.

"Human Uses" category. The Bureau limits its consideration to fishing, recreational boating and archaeology.

Argument. This unacceptably leaves out the economically lucrative and internationally renowned birding and scenic recreational uses of the island, particularly the visitors to Lobster Cove, which as destination dwarfs other human activities on Monhegan during the spring and summer, the time when the ocean wind energy devices would be deployed.

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Also left out of the "Human Uses" review were the equally important and renowned artists' colony and visiting artists and artisans activity that has characterized Monhegan and especially Lobster Cove for more than a century. These three obviously important human uses of Monhegan Island were left out of the site review.

The Bureau's summary of "Viewshed" is similarly conspicuous in what was not reviewed. Paramount is that despite the interagency

awareness of concerns about potential impacts to Monhegan's scenic resources at the February 11, 2009 meeting of the Ocean Energy Task Force's Subcommittee #1 Environmental and Human Impacts, the Bureau elected to limit its "viewshed" criteria in its planning area summary to two improbable criteria:

- (1) A "Visual Assessment Trigger" of the presence or absence of a National Park in the viewshed at risk,
- (2) a second trigger based on whether the area is itself within the viewshed of, at minimum, 4 National Historic Landmarks.

Unsurprisingly, neither of these types of federally designated lands are within the Lobster Cove viewshed of the Gulf of Maine south of Monhegan, or vice versa with the national historic

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landmarks. The Bureau's thereupon summarily awards the Lobster Cove viewshed a "low" quality rating.

According to the planning area summary, that "low" rating means that the Visual Assessment Trigger is not activated. Therefore a

visual impact assessment "to quantify effect of development" is unnecessary.

Therefore, the Bureau's Monhegan's Planning Area Summary of resources at risk is highly deficient in its "Human Uses" and "Viewshed" categories, leaving out any review of the resources vital to the island's largest user groups of tourists, artists and birders, all of whom spend a considerable amount of their time on-island at Lobster Cove, focusing on the viewshed before them. Their presence during the spring and summer at the times that the wind mill prototypes would appear, is a clearly reasonable issue whose significance as has been noted is one that that the planners at the Bureau and the State Planning Office were well aware of.

Nonetheless, the Bureau announced in its summation of the Monhegan Planning Area Summary

"Area C's ranking based on all issues having equal weight and acknowledging external factors that may or may not affect

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concerns in the future, is approximately 1.321. Primary concerns for this area include whale activity, bird migration, bird

foraging, and fishing activity. Based on all inputs and overlays, Grid Cells 5/7, 6-7,7-7, 6-8, and 7-8 seem to be locations that, with significant pre-construction and post construction monitoring, may be conducive to an ocean energy demonstration area.

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Conclusion. The Bureau's "viewshed" review was unacceptably deficient. *In Lakeside at Pleasant Mountain Condo. Ass'n v. Town of Bridgton, 2009 ME 64, ¶ 11, 974 A.2d 893, 896;* the court held: "Administrative agency findings of fact will be vacated only if there is no competent evidence in the record to support a decision."

Likewise in *S.D. Warren Co. v. Bd. of Env'tl. Prot., 2005 ME 27, ¶ 22 n.10, 868 A.2d 210, 218.* the court found that "[w]e 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 Record in this case is conspicuous in its gaps and holes: the Bureau's December 14, 2009 designation is based in large part on a ranking system that puts considerable weight on scenic assets and

viewshed. Yet the Bureau, which together with its partner agency State Planning office was fully aware of the scenic value and state and national significance of the Lobster Cove viewshed of the Monhegan site, declined to factor such information as the two agencies had about Monhegan's scenic qualities into their "viewshed" ranking review. There was thus no competent information made available to make a competent viewshed determination.

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In addition, the only substantive report on potential impacts to birds and birders during the Bureau's review, the U.S. Fish and Wildlife's written comments of August 4, 2009, calls for three years of extensive field studies prior to deployment of any wind mill structures, using radar and trained visual observation to evaluate the potential impact of wind power generation on birds and other coastal wildlife resources. The agency says that although it has extensive information on nesting areas, "we lack information on migratory pathways and foraging behavior."

The University of Maine should not be allowed to deploy any floating wind turbine technology until it has determined whether

and to what extent it will impinge on bird migratory and foraging pathways.

Until the Bureau and State Planning office develop rules pursuant to *MRSA 35-A Expedited permitting of gridscale wind energy development, Rulemaking; scenic viewpoint, scenic inventory*, it will not be able to make an informed decision as to the scenic impacts that the Monhegan offshore wind energy research center would have. The Bureau and SPO have easy access to high quality wildlife, scenic and viewshed data and need to reopen their review and factor that information into the

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evaluation. Without this information and completion of the aforementioned rulemaking, the Bureau will not be able to make an informed decision on whether Monhegan or another of the candidate sites is the best location.

The designation should be revoked, rescinded or suspended until such rules are developed, such wildlife, scenic and viewshed assessments are completed and the Monhegan candidate site's ranking re-evaluated and found appropriate.

Ronald Huber
148 Broadway #105
Rockland Maine, 04841

August 4, 2010 [DATE STAMPED BY CLERK]

Clerk
Knox County Superior Court
62 Union Street
Rockland, Maine 04841,

Re: Ronald Huber v. Bureau of Parks and Lands **DOCKET # AP-10-002**

Dear Knox County Superior Court Clerk,

Please find enclosed for filing in the above-referenced matter the
Petitioner's Brief.

Sincerely

Ronald Huber

cc
Amy B. Mills
Jeffrey Thaler