

STATE OF MAINE
COURT

Knox ss.

SUPERIOR

Civil Action

Docket No.

Ronald Huber FILED 1/25/10

Petitioner,

v.

Bureau of Parks and Lands, of
Maine Department of Conservation

Respondent,

**PETITION FOR REVIEW OF FINAL AGENCY ACTION
BY THE MAINE DEPARTMENT OF CONSERVATION**

For his Petition for review of final agency action by the Maine Department of Conservation acting through its Bureau of Parks and Lands, Petitioner states:

Person seeking Review.

1. Plaintiff Ronald Huber resides at 148 Broadway, Rockland Maine, 04841.

Manner in which Person is Aggrieved.

2. Mr. Huber is a user of the island's well known and heavily used public walkways, which circles much of Monhegan's natural shores, and which he, like others of the approximately 6,000 people who visit Monhegan each year, enjoys use of as a pedestrian-only path. To the extent Mr. Huber's standing in this case is construed as being limited to any person

who can demonstrate a particular interest that is harmed, it is settled that harm to aesthetic, environmental or recreational interests confers standing. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (Me. 1978) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972) (plaintiffs who were users of State park and who intended to use it in the future had standing to enjoin Park Authority from clearing timber blowdowns)).

2. Since 1992, Mr. Huber (hereafter Plaintiff) has exercised a faith-based stewardship over the wild places and wild marine life of Penobscot Bay, from the upper estuary to the waters surrounding Monhegan, where Gulf of Maine coastal currents intermix with the freshwater plume of Penobscot River, guiding the diadromous fishes into and out of Penobscot Bay in their seasonal wanderings. The waters and submerged lands of these two ends of Penobscot Bay have always defined the inner and outer limits of his pastoral stewardship of Penobscot Bay for Mr. Huber.

3. The final agency action he seeks to be reviewed, if not modified or withdrawn, will significantly and irrevocably degrade scenic and other landscape level conservation assets of state and national significance along the southern face of Monhegan.

4. If not set aside or modified by this Court, the final agency action will egregiously harm Mr. Huber's wild marine congregation of Penobscot Bay organisms, by inciting the diversion of hundreds of kilowatts of wind energy from traditional natural uses in the outer bay marine ecosystem to electricity generation. This will harm many members of his flock's ability to carry out essential sea surface processes necessary to their survival at certain life stages and violates Plaintiff's freedom to carry out the will of Almighty God, protected under Article 1 Section 3 of the Maine Constitution.

Final agency action to be reviewed.

5. The final agency action Plaintiff wishes reviewed is the decision, signed and executed December 14, 2009 by the Director of the Maine Bureau of Parks and Lands, designating a site near Monhegan Island as one of three Offshore Wind Energy Test Areas in Maine state waters. The decision also declares the test area near Monhegan Island to be host of the Maine Offshore Wind Research Center, to be managed by the University of Maine.

Concise Statement of Facts

6. Ron Huber exercises a faith-based stewardship over the wild places and wild marine life and seabirds of Penobscot Bay, from the upper estuary to the outer Bay off Monhegan.

7. The Department of Conservation, through its Bureau of Parks and Lands, administers submerged lands use in Maine's territorial sea, including those submerged lands near Monhegan recently selected and designated by the Bureau as a Maine Offshore Wind Energy Test Area and as the Maine Offshore Wind Research Center .

8. Monhegan Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center fill significant portions of the viewshed and soundscape of Monhegan Island's pedestrians-only scenic public walkway.

9. Monhegan Offshore Wind Energy Test Area and the Maine Offshore Wind Research Center abuts and includes portions of the Monhegan Inner Sou' Sou'west Ground, a three square mile 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, 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.

10. The Bureau's management decisions off offshore energy are guided by to 12 MRSA 1868 "Identification of offshore wind energy test areas", by MRSA 35-A, Section 3451 Chapter 34-A: "Expedited permitting of grid-scale wind-energy development" and by MRSA 38 480-HH. "General permit for offshore wind energy demonstration projects."

11. 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.

12. 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".

13. 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.

14. 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.

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

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

17. The Bureau of Parks and Lands' management decisions on offshore energy siting are guided by 12 MRSA 1868 "Identification of offshore wind energy test areas" and by MRSA 35-A, Section 3451 Chapter 34-A: "Expedited permitting of grid-scale wind-energy development"

18. Title 12 Section 1868, Part 1. "Identification of offshore wind energy test areas; Site identification process" directs the Bureau to consider "existing information regarding pertinent ecological, environmental, social and development-related factors" when considering designation of an Offshore Wind Energy Test Area and an Offshore Wind Energy Research Center.

This includes but is not limited to :

"(1)A. Potential adverse effects on a protected natural resource, as defined by Title 38, sec 480-B, subsection 8, or a scenic resource of state or national significance, as defined by Title 35-A, section 3451, subsection 9." and (1) G. "Public support in pertinent coastal communities"

19. 35-A MRSA Section 3451 et seq "Expedited Permitting of Gridscale Wind Energy Development: Rulemaking; scenic viewpoint; scenic inventory" directs the Department of Conservation " to 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". (my emphasis)

20. Maine Coastal Program, Land Use Regulatory Commission, the Chamber of Commerce have all awarded high values to the Monhegan scenic views and natural sounds both those experienced in person by Plaintiff, by the Monhegan island community and by the thousands of tourists that visit Monhegan each year and those who have hedonic enjoyment of Monhegan from a distance. The rugged scenic area facing the proposed wind energy facility is an easy walk on a pedestrians-only path from the ferry dock and other harbor facilities.

21. The Land Use Regulatory Commission Comprehensive Land Use Plan, Section 5.10 Scenic Resources 11/16/07 version states : "*Research shows that there is no greater positive influence on people's perceptions of the quality of the landscape than the presence of water. The scenic beauty of Maine lakes and rivers is invaluable to the quality of life and economy of this state.*"... "*The village on the coastal island of Monhegan with its working waterfront draws tourists from all over the world to experience its scenic beauty.*" The hedonic attractiveness of Monhegan to the world as the essence of coastal Maine cannot be overemphasized.

22. 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.*"

23. On 2/11/09, the Ocean Energy Task Force's Subcommittee #1 "Environmental and Human Impacts, found, concerning viewsheds, that "*It will be problematic regarding how we deal with ocean views. i.e. Monhegan – an especially scenic area, but we don't have an inventory for it.*"

Further, the subcommittee states , *"The big issue in land-based wind projects was and for many continues to be impact on viewshed. When the [Ocean Energy] Task Force gets to the point of identifying that certain areas are more amenable to wind power development, imperative to work with the people who are going to see it."*

24. There is overwhelming evidence from entirely credible sources including The Maine Coastal Islands National Wildlife Refuge and Maine Audubon that numerous species of birds migrate through or live within the waters south of Monhegan. There is at the same time, little understanding of the actual routes taken by species recorded around Mohegan. 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..

Grounds For Relief being Sought.

25. The south end of Monhegan clearly possesses scenic resources of state and national significance. The Bureau of Parks and Lands and Coastal Program conclude that this is so, yet profess themselves still grappling with how to evaluate and protect those resources consistent with statutory requirements.

26. The waters off Monhegan are clearly heavily used by a large variety of migratory raptors geese, ducks and other birds. the Bureau has failed to accurately factor in possible likely impacts to these species before designating the Offshore Wind Energy Test Area off Monhegan, as well as the Maine Offshore Wind Research Center

27. Plaintiff seeks relief from the Bureau of Parks and Lands' decision to go ahead anyway and designate certain waters south of Monhegan as an Offshore Wind Energy Test Area and as the Maine Offshore Wind Research Center, prior to and without developing and implementing adequate social and scenic conservation rules pursuant to 35-A MRSA Section 3451 et seq "Expedited Permitting of Gridscale Wind Energy development: Rulemaking; scenic viewpoint; scenic inventory".

28. Plaintiff seeks relief from the Bureau's failure to consider "existing information regarding pertinent ecological, environmental, social and development-related factors" when considering designation of an Offshore Wind Energy Test Area, as required under Title 12 Section 1868, Part 1. "Identification of offshore wind energy test areas; Site identification process"

This includes but is not limited to

"(1)A. Potential adverse effects on a protected natural resource, as defined by Title 38, sec 480-B, subsection 8, or a scenic resource of state or national significance, as defined by Title 35-A, section 3451, subsection 9." and (1)G. "Public support in pertinent coastal communities."

29. The Bureau has done neither to any meaningful degree. It held no meeting with the Monhegan Community. More than 70 individuals and families own property and live part and full time on Monhegan. No meeting was hosted for them in their town. Less than 5 individuals from Monhegan were informally polled by the Bureau; none of them were queried on potential impacts to Monhegan scenery of state and national significance.

This is not a credible effort. The Bureau should have consulted with Monhegan's larger community, holding a meeting on-island during summer when most homeowners are available, to elicit their views and gather their information on the above potential impacts, before deciding whether to designate certain waters two miles south of Monhegan as one of three Maine Offshore Wind Energy Test Areas, and then to further designate the Monhegan Test Area as the Maine Offshore Wind Research Center for use by and in conjunction with the University of Maine

30. The Department of Conservation, acting through its Bureau of Parks and Lands, did not make an informed decision on December 14, 2009.

Demand for Relief

31. Plaintiff asks this Court to find that designation by the Bureau of Parks and Lands of the Maine Offshore Wind Research Center is in violation of MRSA 12 section 1868's requirement that potential adverse impacts to scenic and conservation resources of "*state or national significance*" be reasonably evaluated by the Bureau of Parks and Lands as part of its review, prior to decision making, and that "*Public support in pertinent coastal communities*" e.g. Monhegan, likewise be evaluated through proactive consultation with the greater Monhegan community, not only a small number of individuals not necessarily representative of the greater island community.

32. Plaintiff asks this Court to find that the Bureau has failed to meet the requirements of MRSA 35-A Section 3451 et seq "Expedited Permitting of Gridscale Wind Energy Development" requiring it to determine and quantify in detail whether Monhegan and its nearby waters have scenic and marine fishery conservation resources of state or national significance that could be adversely affected by construction and operation of the Maine Offshore Wind Research Center, by the bureau's designation of submerged lands south of Monhegan as an Offshore Wind Energy Test Area and as the Maine Offshore Wind Research Center.

33. Plaintiff asks this Court to find that designation by the Bureau of Parks and Lands of the Maine Offshore Wind Research Center violates Plaintiff's Constitutional rights to practice his religious stewardship of Penobscot Bay

34. Plaintiff asks this Court to set aside the December 14, 2009 designation of the Maine Offshore Wind Research Center, until the Maine Department of Conservation, acting through its Bureau of Parks and Lands, has fully complied with the aforementioned state laws, and the Plaintiff constitutional rights are protected.

Certificate of Service

I, Ron Huber, have served this complaint upon Respondent Maine Department of Conservation by certified mail and upon the Maine Office of the Attorney General.

Name

Date