

Ronald Huber4148 Broadway

Rockland Maine

STATE OF MAINE SUPERIOR COURT

KNOX,

Ronald C. Huber

Petitioner

v.

MAINE Department of Conservation

Bureau of Parks and Lands.

Defendant

Civil Action Docket AP-10-002

Reply to Bureau's Brief

**REPLY OF RONALD C. HUBER TO BRIEF IN OPPOSITION
BRIEF BY STATE OF MAINE**

NOW COMES the Petitioner, Ronald Huber (hereinafter "the Petitioner"), and submits his reply brief in opposition to State of Maine brief in Opposition to Petitioner's Rule 80C Petition for Review of Final Agency Action by the Maine Department of Conservation, and states as follows:

Introduction

The Petitioner submits this brief in opposition to Bureau of Parks and Lands' (hereafter Bureau) Rule 80C Brief Opposing Petition for Review of September 7, 2010. The Bureau's brief asks the Court to deny Petitioner's Rule 80C Petition for Review of Final Agency Action and affirm the Defendant's decision.

Petitioner rejects the Bureau's reasoning and conclusions as outlined within its September 7, 2010 brief, as determinedly over selective, continuing the state's irrational effort to arrive at conclusions about the Monhegan deepwater test site that are not supported by the available facts in the record and in subsequent filings of this case.

The Petitioner directs the Court to the detailed factual and procedural background set forth in his petition, brief and motions, and those within the State's brief, and incorporates those facts herein.

Petitioner considers the agency's scope of review as willfully insufficient to satisfy the question of whether unreasonable harm would happen to protected natural resources and state and federal significance on and around Monhegan Island.

The Petitioner also rejects the request for dismissal of his case by Intervenor's brief filed September 3, 2010 and has responded to that brief's assertions separately.

I. STATUTORY AUTHORITY In its review of the Monhegan candidate deepwater wind test area, the bureau was required to meet standards in the following statutes

Public Law 2009, chapter 270, An Act to Facilitate Testing and Demonstration of Renewable Ocean Energy Technology.

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

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."

Petitioner focuses here on MRSA 12 1868 "Identification of offshore

wind energy test areas" as most appropriate in this present circumstance.

MRSA 12 1868 states that "In identifying each such [*deepwater ocean wind test*] area, 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.

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;.

FACTUAL AND PROCEDURAL BACKGROUND

The Petitioner illustrated in his petition and his brief that the state purposely excluded information from its review that was inconsistent with its pre-determined outcome of locating off Monhegan Island.

Petitioner showed how the highly popular scenic views of state and national significance along the south coast of Monhegan that are reached solely by pedestrian footpath meet the standards of "Scenic Resources of State and National Significance. Petitioner showed how this was well known to the Bureau and its partner agency State Planning Office, which termed Monhegan "a problem" because of its

extraordinary scenic beauty.

Petitioner showed how substantial information on the heavy usage of the island by birds and by birdwatchers was well known to the Bureau of Parks and Lands and State Planning Office during their deliberations.

Petitioner showed in his petition and brief that significant impacts to ocean currents are likely from operation of even a prototype windmill, and that this needed to be factored into its deliberations.

Instead, the Bureau cherry-picked selected data from the woefully limited State Planning office data base. the Bureau has access to a great deal of information outside of the limited State Planning office data base yet chose not to review them.

Because the state failed to factor in key scenic and natural resources of state and national significance into its decisionmaking it did not meet the standards of MRSA 12 1868.

For that reason 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.

STANDARD OF REVIEW

The Bureau claims that because Petitioner did not take part in all outreach events held by the Defendant and Intervenor, and does not appear in the administrative record, he therefore lacks standing to appeal the decision by the Bureau.

But Petitioner does not need to be a party in the administrative proceeding to bring this case. The plain language of the Administrative Procedures Act in *5 MRSA 11001 Right to review*, clearly shows this.

5 MRSA 11001 Right to review, states: "Except where a statute provides for direct review or review of a pro forma judicial decree by the Supreme Judicial Court or where judicial review is specifically precluded or the issues therein limited by statute, 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."

ARGUMENT

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

There is sufficient existing freely available information and expertise, both within the Record and within the Bureau of Parks and Lands and other state and federal agencies, not to mention among marine life, bird life and scenic resource amateurs, professionals and academics who were NOT consulted by the Bureau,

to have enable the Bureau to gather enough credible factual 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 decision of the Bureau should have been to reject the Monhegan Deewater Wind Candidate test site location as inappropriate.

The Bureau did not do so and instead used absurd and irrelevant metrics to define viewshed quality and natural resources at risk.

CONCLUSION

As set forth above and in separate response to Intervenor, Petitioner's appeal has standing to bring this appeal of final agency action pursuant to Rule 80C of the Maine Rules of Civil Procedure and 5 M.R.S.A. § 11001(1). In the presence of standing, Petitioner's appeal is justiciable and must be considered on its merits. The merits clearly show that the Bureau erred in approving the Monhegan Deepwater Wind test area and the associated University of Maine deepwater test center

Petitioner asks the state Court reject the Bureau's petition to deny this appeal and rescind the Bureau's designation of the Monhegan Deepwater Wind test area and the associated University of Maine deepwater test center.

Respectfully submitted

Dated September 21, 2010

Ron Huber
Petitioner
148 Broadway Rockland Maine 04841