



STATE OF MAINE
DEPARTMENT OF CONSERVATION
MAINE LAND USE REGULATION COMMISSION
22 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0022

ELIZA TOWNSEND
COMMISSIONER

MEMORANDUM

July 28, 2010

To: Commissioners

From: Samantha Horn Olsen, Planning Division Manager

Re: *Commission Deliberations on Proposed Rule to Expand the Expedited Area in Chain of Ponds Township (Kibby III rulemaking)*

Introduction

On August 5, 2009 the Commission initiated rulemaking in response to a petition submitted by TransCanada Maine Wind Development, Inc. (hereinafter "the petitioner") that proposed an approximately 630 acre addition to the Expedited Area for Wind Power in Chain of Ponds Township. The rulemaking process led first to the drafting and approval of a guidance document regarding the Commission's interpretation of the statutory criteria for considering such a petition. After a public hearing was noticed but before the public hearing took place, the petitioner submitted information to the record that suggested a revised rule, which was a smaller area, approximately 156 acres, wholly contained within the area described in the original proposed rule. On March 17th, 2010, the Commission held a public hearing to gather information about the area proposed for expansion, and whether the statutory criteria are met in this case. In addition, individuals and organizations submitted written comments and rebuttal during the comment period. Staff requests that at the August meeting Commissioners discuss the proposed rule and provide guidance to staff in drafting the appropriate documents for consideration at the September regular business meeting.

In considering what action to take on the proposed rule, the Commission may:

- 1) decline to adopt the rule, in which case staff may draft a letter memorializing the decision or you may simply put your reasons in a motion;
- 2) adopt the originally proposed rule, in which case the staff will draft adoption paperwork, including a basis statement and summary and response to comments; or
- 3) adopt a modified rule, in which case the staff would prepare the paperwork as above. In this instance the Commission would also need to determine whether a further public comment opportunity is required – in other words, is the modified rule "substantially different" from the original rule.

Certain portions of the rulemaking record were also filed in the Development Permit DP 4860 record, which is the development permit application for the adjacent area. Since the Commission's action on DP 4860 may have a bearing on this rulemaking, staff has analyzed the impact of that matter on this rulemaking, and you will find a discussion at the end of the memo. It is discussed at the end of the memo because it is related to all of the criteria, and it seems logical to discuss it in the context of what the record tells us about the petition area.

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Because you are familiar with the rulemaking record in this case, staff did not summarize it, but rather at this point in the rulemaking process staff has sent to you certain elements of the record in electronic format. In the following sections, staff will analyze the major issues raised in this rulemaking. But first, in order to review the applicable statutory criteria in this matter, staff will make a presentation at the August 4th meeting summarizing the contents of the guidance document that the Commission approved March third. The guidance document is attached to this memo.

Staff analysis: Criterion One

Excerpt from the guidance document approved March 3, 2010:

Criterion 1. Geographic extension. *Involves a logical geographic extension of the currently designated expedited permitting area;*

It is not the Commission's intent to use the rulemaking process to add broad areas, such as entire ridgelines, to the expedited area as changes on this scale are properly referred to the legislature for consideration. In addition, the Commission is unlikely to grant petitions that propose a further expansion tacked on to an earlier expansion (a "leapfrog" effect), farther from the original expedited area boundary set by the legislature.

Portions of the expedited area were designated using township or other political boundaries, which may cut across ridgelines or other naturally occurring geographic features relevant in the siting of wind power. Some adjustment to the expedited area boundary may be needed in instances where a potential project falls partially within the expedited area and partially outside of it. The Commission will evaluate the proportion of the project that will fall within the expedited area and any other relevant information. In general, the Commission will expect that a substantial portion of a proposed project will lie within the area originally designated as expedited by the Maine Legislature.

Regarding criterion one, the record indicates that the proposed addition is:

- contiguous with the original expedited area;
- one portion of a geographic feature (a ridgeline) that crosses a township boundary; and
- part of a larger proposed project, namely DP 4860 and/or an anticipated project that would be constructed in the existing expedited area and expand into the petition area, as set forth in the rulemaking petition. All of DP 4860 is within the existing expedited area except for a portion of the ridgeline/turbine road, and the majority of the project anticipated in the rulemaking petition would be located in the original expedited area.

Staff recommends that the first criterion, geographic extension, has been met. Staff, however, addresses below what impact if any the outcome of DP 4860 may have on this criterion and the rulemaking petition, and whether the issue of cumulative impacts, taking into consideration the adjacent original Kibby project, is relevant in this rulemaking petition.

Staff analysis: Criterion Two

Excerpt from the guidance document approved March 3, 2010:

Criterion 2. Meets state goals. Is important to meeting the state goals for wind energy development established in §3404; and

The Commission interprets the phrase “important to meeting the state goals for wind energy development” to mean that projects that have a limited potential for energy generation and disproportionate impacts on public resources in the state are not important to meeting the state goals for wind energy development. In contrast, projects that have the potential for exceptional power generation may be “important” even though they may have disproportionate impacts on public resources. In evaluating whether a proposed expansion is important to meeting the state goals for wind energy development, the Commission will consider the following factors:

- The primary factor will be the progress the state has made in achieving the goals set forth in § 3404; also
- The project’s potential for energy generation; and
- The viability of the proposed project, including the availability of transmission lines to transfer the generated electricity, the quality of the wind resource, and other relevant information; and
- The impact to public resources and, if applicable, public infrastructure vs. the energy likely to be generated by the proposed project and the associated public benefits. Evaluation of the impact to public resources will include, in part, an identification, at a landscape level, of important natural, recreational, scenic, archaeological and historic resources in the area. Detailed assessments of specific resources are more appropriate at the Development Permit Application stage of review.

The Commission intends to request the expert opinion of the Public Utilities Commission in evaluating this criterion.

We will now look at each of the above factors:

Progress toward state energy goals

The Public Utilities Commission (PUC), in their April 16, 2010 written comments provided the Commission with an update on progress toward state energy goals:

“Title 35-A, section 3404(2) establishes the following goals for wind energy development in the State:

- *At least 2000 MW of installed capacity by 2015; and*
- *At least 3000 MW of installed capacity by 2020.*

At the current time, the amount of installed and planned wind power capacity in the State is substantially below the Legislatively-established goals.

When TransCanada’s Kibby Wind Power Project (“Kibby Project”) is in full operation, Maine will have in the range of 238 MW of wind power in commercial operation. In addition, there are projects representing approximately 227 MW of wind power that have either been permitted or are in the permitting process. Clearly, Maine is far short from reaching its statutory wind power goals.”

Staff recommends that the primary factor, progress toward state energy goals, has been met, in that insufficient progress has been made statewide, and therefore more wind energy generation is indicated.

Potential for energy generation

On April 16, 2010, the PUC further commented that:

“TransCanada has proposed a rule change to expand to the expedited permitting area to facilitate the development of approximately 45 MW of additional wind power in a location near its Kibby Project. Forty-five megawatts of wind power alone may not have a huge impact on the State meeting its wind power goals. However, if the State is to meet its goals, it will have to permit a relatively large number of projects of varying sizes throughout the State.

Thus, in the MPUC’s view, the expansion of the expedited permitting area to accommodate 45 MW of wind power should be considered as important for meeting the State’s goals for wind power development.”

The MPUC goes on to indicate that a 45 MW wind power project is generally considered to provide electricity equivalent to the needs of 20,000 residential households, and from a renewable source.

However, because the project anticipated in the rulemaking petition would place some turbines in the currently existing expedited area, and the petition area could, according to testimony by TransCanada, host no more than six turbines, the contribution of turbines in the petition area would be less than 45 MW. Friends of Maine’s Mountains characterized it as a “modest” portion of the project. This issue of how to “count” energy generation of a relatively small expansion that enables or enhances a relatively larger project is an important one, and staff requests that the Commissioners pause on this question to give staff some guidance about how to view this factor.

In considering this question, keep in mind that 1) it may not always be clear whether a project *needs* to obtain an expedited area expansion in order to be viable, so distinguishing between an expansion “enabling” or “enhancing” a project may not always be possible and 2) because the Commission generally requires that the majority of a project be located in the existing expedited area, diminishing the importance of the portion located within the expansion area because it a small piece of a larger project is significantly limiting.

In summary, the question for the Commissioners is: “Should the evaluation of the potential for energy generation of an expansion area take into account the energy generation of the larger project that is enabled or enhanced by the expansion?” For these reasons discussed above, the staff recommendation is that the contribution of the expanded area be considered in the context of the energy generation potential of the entire project.

Viability of the proposed project

The record indicates that this area has a strong wind resource and that there are transmission lines in proximity to the site. In addition, TransCanada has indicated sufficient financial resources to construct the project. On April 16, 2010, the Maine PUC commented:

“The MPUC has not conducted an analysis of the viability of TransCanada’s proposed project. However, the proposed project is in a location proximate to TransCanada’s Kibby Project. As such, it will

be able to utilize the transmission line that has been constructed to connect the Kibby Project to the regional grid. Finally, as indicated by TransCanada's financial and technical ability to develop the Kibby Project (as well as thousands of megawatts of generation assets in various locations), it is reasonably likely that the proposed project is viable."

The Maine PUC's comments notwithstanding, a number of commenters raised the issue of the overall viability of wind power and the actual contribution of wind turbines to energy production and greenhouse gas reduction. To the degree that the legislature has instructed the Commission, through PL 2007 Ch. 661, that "...wind energy may be used to displace electrical power that is generated from fossil fuel combustion and thus reduce our citizens' dependence on imported oil and natural gas and improve environmental quality and state and regional energy security", the Commission does not have latitude to reexamine the question of the overall environmental and power generation benefits of wind energy.¹

Staff's recommendation is that the viability factor has been met. Staff, however, addresses below what impact if any the outcome of DP 4860 may have on this factor and the rulemaking petition.

Impact to public resources and infrastructure

Because of the concurrent processing of DP 4860, there is substantial and detailed information in the record regarding public resources in the area. The focus of the information entered into this rulemaking record was primarily in regards to the Fir-heart-leaved birch subalpine forest; scenic and recreational effects on the Chain of Ponds area, including the historic Arnold Trail; Northern bog lemming habitat; and potential habitat for Bicknell's Thrush. There did not appear to be issues raised in the record regarding the overburdening of transportation or other public facilities.

Because of the limited public infrastructure impacts of the project, this question comes down to a balancing of the potential power production (considering staff's question above about how to "count" the production capacity of a partial project) with the specific public resource impacts as considered in criterion 3 below. For that reason, staff needs further input from the Commission before making a recommendation about this factor.

¹ In the context of rulemaking, this does not, however, preclude the Commission from examining, based on data voluntarily reported by the permittees or other sources, the amount of actual power generated from permitted projects and comparing these results to estimates contained within the application materials.

Staff analysis: Criterion Three

Excerpt from the guidance document approved March 3, 2010:

*Criterion 3. Principal values and goals. **Would not compromise the principal values and the goals**[emphasis added] identified in the comprehensive land use plan adopted by the Maine Land Use Regulation Commission pursuant to Title 12, §685-C.*

The principal values and the goals contained within the Comprehensive Land Use Plan, taken together and in balance with one another, provide guidance to the Commission. The Commission will request comments from other government agencies and interested persons with expertise in subject areas referenced in the goals. A rulemaking petitioner must submit adequate information and analysis to allow the Commission to determine how the proposed project would generally affect existing uses and resources in the proposed expansion area, and describe how the proposal would or would not compromise the principal values and the goals contained in the CLUP. The information submitted should address existing uses and resources that are relevant to the principal values and the goals of the CLUP, including but not limited to scenic resources, recreational uses and resources, plant and animal resources, and other natural resources. A detailed scenic review, including visualization of the appearance of a proposed project, and detailed noise and shadow flicker analyses, are more appropriately conducted at the development permit application stage, and are not required for an expansion petition.

The statutory criteria for adding lands to the expedited area for wind energy development are different from the criteria for rezoning pursuant to 12 M.R.S.A. §685-A (8-A) in a number of ways. Specifically with regard to Criterion #3, in the case of the statutory criteria for adding lands to the expedited area, it is the principal values and the goals that are referenced in the statute. In the case of a rezoning petition, the standard is consistency with the entire CLUP. However, as the entire CLUP provides support and explanation for the values and goals contained within it, the entire document may inform the Commission's interpretation of the principal values and the goals when reviewing a petition to expand the expedited area.

Set forth below is text from the 2010 CLUP – Principal Values, Broad Goals, and Specific Goals – with a discussion of issues raised in this rulemaking record that appear important to the Commission's rulemaking decision. A few goals have no discussion associated with them if there was no information in the record, or if in staff's opinion there was not a salient issue to discuss. **Please note that the standard in law is "would not compromise", which appears to be different from the Commission's more typical consistency determination.**

Principal Values

- **The economic value of the jurisdiction derived from working forests and farmlands**, including fiber and food production, largely on private lands. This value is based primarily on maintenance of the forest resource and the economic health of the forest products industry. The maintenance of farmlands and the viability of the region's agricultural economy is also an important component of this value.

Based on the record, it does not appear that there would be a substantial reduction in forestry activity as a result of adding the petition area to the expedited area. There is no indication of agriculture in the immediate vicinity.

- **Diverse and abundant recreational opportunities**, including many types of motorized and non-motorized activities. Unique opportunities exist for recreational activities which require or are significantly enhanced by large stretches of undeveloped land, ranging from primitive recreation in certain locations to extensive motorized trail networks. Recreation is increasingly an economic driver in the jurisdiction and the State.

According to the petition, the Chain of Ponds and the Chain of Ponds public reserved lands provide opportunities for boating and camping, with a mix of somewhat developed to primitive facilities, but all proximate to a public road (rt. 27). Additional recreational uses mentioned in the petition or other portions of the record are hiking, hunting, snowmobiling, ATV-riding, and fishing – particularly in the Chain of Ponds area and in and around Kibby stream. The potential impacts to recreational uses that are discussed in the record are visual in nature, and are likely to be similar to the impacts discussed in the DP 4860 record. (Please see the two maps of the revised petition area attached to this memo, which are part of the rulemaking record)

For the purposes of this rulemaking the Commission may wish to consider that areas added to the expedited permitting area will be subject to a different scenic standard. That is, wind energy development proposed for areas falling generally within the Commission's jurisdiction must satisfy the no undue adverse impact and harmonious fit standard with respect to scenic impacts. Wind energy development proposed for the expedited permitting area need only consider "Scenic Resources of State or National Significance" and whether views from them are significantly compromised such that the impact is unreasonably adverse. There are likely to be visual impacts on some recreational uses in the area, primarily in areas that would be considered "Scenic Resources of State or National Significance", and therefore evaluated in a future development permit application. However, as stated above, the standards used to evaluate those impacts would be different in the rezoning process. In addition, potential impacts to the scenic highway itself or to campsites located on the public reserved lands, that is views from locations that are not Scenic Resources of State or National Significance, would not be considered in an expedited permitting process.

The relative risk to all of these resources should be weighed against the other values and goals in making a final determination.

- **Diverse, abundant and unique high-value natural resources and features**, including lakes, rivers and other water resources, fish and wildlife resources, plants and natural communities, scenic and cultural resources, coastal islands, mountain areas and other geologic resources.

Please see the analysis of each component of this principal value in the specific goals below.

- **Natural character**, which includes the uniqueness of a vast forested area that is largely undeveloped and remote from population centers. Remoteness and the relative absence of development in large parts of the jurisdiction are perhaps the most distinctive of the jurisdiction's principal values, due mainly to their increasing rarity in the Northeastern United States. These

values may be difficult to quantify but they are integral to the jurisdiction's identity and to its overall character.

The Sisk Mountain/ Chain of Ponds area is accessible, yet relatively undeveloped. The area borders the expedited area for wind power permitting. The Commission received several comments about the character of the area, including arguments that the western mountains provide a respite and that wind turbines would change the essential and undeveloped character of the area – including Chain of Ponds, which is a management class 2 lake. The petitioner asserts that the area's accessibility, its location in the "fringe" and the 8-10 mile distance from the project to Eustis, along with other factors means that this area is less remote than many areas of the jurisdiction.

Broad Goals of the Commission

The Commission's policies shall be directed toward the achievement of the vision for the jurisdiction and the following three broad goals:

1. Support and promote the management of all the resources, based on the principles of sound planning and multiple use, to enhance the living and working conditions of the people of Maine and property owners and residents of the unorganized and deorganized townships, to ensure the separation of incompatible uses, and to ensure the continued availability of outstanding quality water, air, forest, wildlife and other natural resource values of the jurisdiction.
2. Conserve, protect and enhance the natural resources of the jurisdiction primarily for fiber and food production, outdoor recreation and plant and animal habitat.
3. Maintain the natural character of certain areas within the jurisdiction having significant natural values and primitive recreational opportunities.

The broad goals of the commission reflect the essential balancing that the Commission engages in routinely. The importance of addressing climate change through renewable energy sources, while still protecting our most fragile and special ecological resources; the need to be supportive of economic development while guiding it to the locations that can best support it in the long run; and the awareness of property owners' connections to their land while also making sure that the special aspects of the jurisdiction are still available for the next generation are all part of the Commission's mission. In making this relatively narrow decision about one part of one ridgeline, digging in to the specific goals and how each one is affected will help answer the overarching question of whether the proposal would "compromise" these broad goals. Please see those discussions below.

I. Development Goals and Policies

A. LOCATION OF DEVELOPMENT

(See Chapter 4)

Goal: Guide the location of new development in order to protect and conserve forest, recreational, plant or animal habitat and other natural resources, to ensure the compatibility of land uses with one another and to allow for a reasonable range of development opportunities important to the people of Maine, including property owners and residents of the unorganized and deorganized townships.

The Commission has limited opportunity to proactively guide windpower development in the largely reactive regulatory framework. However, the option to add lands to the expedited area for wind power permitting is one way to exercise some locational control based on principles expressed in the text of the goal. Of course, windpower development proposed outside of the expedited permitting area that satisfies the applicable statutory, regulatory and CLUP criteria for rezoning and permitting criteria may still occur.

B. ECONOMIC DEVELOPMENT (See Chapter 4)

Goal: Encourage economic development that is connected to local economies, utilizes services and infrastructure efficiently, is compatible with natural resources and surrounding uses, particularly natural resource-based uses, and does not diminish the jurisdiction's principal values.

There was substantial testimony about the value of wind power construction and operation jobs to an area that needs additional employment opportunities. The project appears to utilize existing transmission lines and roads. Whether the economic activity is compatible with natural resources and surrounding uses and does not diminish the jurisdiction's principal values is a question for the Commission to evaluate when considering all of the factors together.

C. SITE REVIEW (See Chapter 4)

Goal: Assure that development fits harmoniously into the existing communities, neighborhoods and the natural environment.

The Commission received conflicting testimony about how well or poorly a development of this type would fit within the existing area. Again, it is a balance of factors including natural resource impacts, economic development, climate change benefits, and historic, recreational and scenic impacts.

D. INFRASTRUCTURE (See Chapter 4)

Goal: Ensure that infrastructure improvements are well planned and do not have an adverse impact on the jurisdiction's principal values.

The primary infrastructure improvements would be a connection to the existing transmission line and road construction for access to the site.

E. DEVELOPMENT RATE, DENSITY AND TYPE (See Chapter 4)

Goal: Ensure that development is of a rate, density and type conducive to maintaining the jurisdiction's principal values.

In the case of wind power, the Commission has little control over the rate of applications for new projects, and in fact the legislature has set ambitious goals for installed capacity. The density of projects is most appropriately discussed in the context of cumulative impacts, below.

F. AFFORDABLE HOUSING (See Chapter 4)

Goal: Facilitate the provision of affordable housing in appropriate locations to households with a full range of incomes.

G. LAND CONSERVATION

(See Chapter 4)

Goal: Encourage the long-term conservation of select areas of the jurisdiction that are particularly representative of its cultural and natural values, including working forests, high-value natural resources and recreational resources.

In the context of expedited wind power applications, while a permit applicant must demonstrate significant tangible benefits, the Commission does not have the option to require conservation of specific areas, but it may have that option in a rezoning proceeding.

II. Natural and Cultural Resources Goals and Policies

A. AGRICULTURAL RESOURCES

(See Section 5.1)

Goal: Conserve and protect working farms, encourage the development of new farming enterprises, and conserve agricultural soil resources.

B. AIR AND CLIMATE RESOURCES

(See Section 5.2)

Goal: Protect and enhance the quality of air and climate resources throughout the jurisdiction.

Expansion of the expedited area to encourage the development of wind energy facilities is assumed, in law, to have a beneficial effect on air and climate resources through reduction in greenhouse gas emissions.

C. COASTAL RESOURCES

(See Section 5.3)

Goal: Protect and conserve the special natural and cultural resources of coastal islands and mainland townships, and help sustain the traditional resource-based economies of these areas.

D. CULTURAL, ARCHAEOLOGICAL AND HISTORICAL RESOURCES

(See Section 5.4)

Goal: Protect and enhance archaeological and historical resources of cultural significance.

Visual impacts to the Arnold Trail are possible, and this rulemaking record indicates the impacts of the contemplated project in the expanded expedited area may be similar to adjacent Southern portions of the proposed Kibby II project.

E. ENERGY RESOURCES

(See Section 5.5)

Goal: Provide for the environmentally sound and socially beneficial utilization of indigenous energy resources where there are not overriding public values that require protection.

Pending the Commission's judgment on the public values that may be affected, encouraging wind energy development through expansion of the expedited area is supportive of this goal.

F. FOREST RESOURCES

(See Section 5.6)

Goal: Conserve, protect and enhance the forest resource in a way that preserves its important values, including timber and fiber production, ecological diversity, recreational opportunities, as well as the relatively undeveloped remote landscape that it creates.

On April 27, 2010 the Maine Natural Areas Program commented that “Approximately ninety-seven (97) acres, or 62%, of the one-hundred fifty-six (156) acres TransCanada has proposed to add to the expedited windpower permitting area is comprised of a Fir – Heart-leaved Birch Sub-alpine Forest natural community mapped by the Maine Natural Areas Program. This Fir – heart-leaved Birch Sub-alpine Forest community consists of 358 acres in total and is the same natural community that is located within the applicant’s proposed windpower site on Sisk Mountain.” A map of the area (attached) from the supplemental petition materials indicates that the Fir – heart-leaved Birch Sub-alpine Forest community occupies the central portion of the revised petition area.

This community is ranked S3 in Maine (20-100 occurrences documented in the state), received a “B-Good” rank and you are familiar with this issue from the parallel DP 4860 process. In this case, the plant community rank is the same as in the contiguous expedited area, however the wildlife issues are somewhat different (see discussion below). The Commission may include this rare community in considering the balance of all of the values and goals, however the community would receive the same level of protection during the development permit review regardless of whether in or out of an expedited area, so it may not be necessary to make the Commission’s rulemaking decision dependant on this one factor, unless the commission feels that no development proposal could meet the applicable criteria when siting turbines in or near this type of S3 community.

The record indicates that the Sisk Mountain and Chain of Ponds areas are accessible and relatively undeveloped. The record also indicates that many people feel that there is a feeling of being in an undeveloped landscape that makes the area special. In this case, these effects may be most appropriately evaluated under the recreational, natural character and scenic principal values and goals.

G. GEOLOGIC RESOURCES

(See Section 5.7)

Goal pertaining to geologic resources: Conserve soil and geological resources by controlling erosion and by protecting areas of significance.

Although issues of erosion and sedimentation were raised on the record, staff suggest that the development permit application (if filed in the future) is the appropriate venue to evaluate specific risks of road-building and excavation, as it relies on specific site plan details and is fully addressed under the Commission’s rules for evaluating development permits.

Goal pertaining to mineral resources: Allow environmentally responsible exploration and mining of metallic and non-metallic mineral resources where there are not overriding, conflicting public values which require protection.

Goal pertaining to mountain resources: Conserve and protect the values of high-mountain areas from undue adverse impacts.

This proposal falls within a high-mountain area. The “natural aesthetic” and the “solace” of high mountain areas have been cited on the record as a reason to reject the proposed rule, and indeed all windpower projects in high mountain areas. It has also been suggested that high-mountain areas serve as refugia in case of future climate change, and are likely to be less affected by temperature change than low areas. The CLUP presumes that not all high mountain areas will be suitable for wind energy generation, and cites scenic and ecological values as prominent in this evaluation. It is also the case that high mountains, especially in the western portion of the state tend to have excellent wind resources

H. PLANT AND ANIMAL HABITAT RESOURCES

(See Section 5.8)

Goal: Conserve and protect the aesthetic, ecological, recreational, scientific, cultural and economic values of wildlife, plant and fisheries resources.

The primary plant issue raised is the rare forest community (addressed above). Two other rare plant species are discussed in the petition materials, but are not raised as an issue by MNAP and are not found in areas where turbines would be placed. There have been no substantial fisheries issues raised, apart from erosion/water quality issues (addressed below).

The primary wildlife issues raised are the Bicknell's thrush and Northern bog lemming. Bicknell's thrush was not found during one season of surveys at the site. AMC/Audubon/NRCM commented on April 28, 2010 “While the supplemental material filed by the applicant indicates that suitable habitat is not currently present in the proposed expansion area, this is likely to be a temporary condition. This community is dynamic, with its structure constantly changing due to the extensive natural disturbance (primarily wind and ice) that characterizes high-elevation ridgelines. The fact that suitable habitat is not currently present (due to the relatively mature condition of the community in this area) does not mean that suitable habitat will not be present in the future. In fact, it is likely that such habitat will be created as areas of mature forest blow down, creating the younger regenerating habitat favored by the thrush.”. If the Commission wishes to reserve areas of potential habitat for future potential occupation, it should take this factor into account in balancing the values and goals. However, the habitat would receive the same level of protection during the development permit review regardless of whether in or out of an expedited area, so it may not be necessary to make the rulemaking decision dependant on this one factor, unless the commission feels that no development proposal could meet the applicable criteria when siting turbines in this area.

Additionally, a potential area of Northern bog lemming habitat was identified. The petitioner states that they could avoid that area with careful turbine siting, but AMC/Audubon/NRCM disagree, stating that locating turbines near, but not in, the wetland habitat may change the hydrology of the area and make the habitat unsuitable. Staff feels this issue could be effectively dealt with at the permitting stage since the criteria are the same in either case.

I. RECREATIONAL RESOURCES (See Section 5.9)

Goal: Conserve the natural resources that are fundamental to maintaining the recreational environment that enhances diverse, abundant recreational opportunities.

See discussion under principal values

J. SCENIC RESOURCES (See Section 5.10)

Goal: Protect the high-value scenic resources of the jurisdiction by fitting proposed land uses harmoniously into the natural environment.

In addition to establishing the three criteria the Commission must use for this proceeding, the Wind Energy Act also replaced the “harmonious fit” criterion for scenic impacts in the expedited area. While projects located within the Commission’s general jurisdiction must pass the no undue adverse impact and harmonious fit criteria with respect to scenic resources, projects in the expedited area are evaluated under the standard of whether they will significantly compromise only certain views such that their impact on scenic character is unreasonably adverse. Windpower development can satisfy the undue adverse impact/harmonious fit criteria, see for example Kibby I and Stetson I, however, this goal does lead the commission to think about the scenic resources which would be excluded from consideration, and the change in standards for those over which you continue to have jurisdiction. Examples would be the change in status of state-owned public lands that are not included in the list of “scenic resources of state or national significance”, such as campsites in the public lands unit, and the change in standards for evaluating scenic impacts on the Chain of Ponds.

If the Commission feels that the protection of scenic resources in the area would be insufficient under the revised eligibility and evaluation criteria, and would rise to the level of “compromise” when taken together with all other values and goals, then that would be a basis to decline to adopt the rule.

K. WATER RESOURCES (See Section 5.11)

Goal: Preserve, protect and enhance the quality and quantity of surface waters and groundwater.

Although issues of erosion and sedimentation (and attendant water quality concerns) were raised on the record, staff suggest that the development permit application (if filed in the future) is the appropriate venue to evaluate specific risks of road-building and excavation, as it relies on specific site plan details and is fully addressed under the Commission’s rules for evaluating development permits.

L. WETLAND RESOURCES (See Section 5.12)

Goal: Conserve and protect the ecological functions and social and economic values of wetland resources.

Wetland issues were raised in the context of the Northern bog lemming – see that discussion.

III. Compliance Goals and Policies

(See Chapter 6)

Goal: Administer an effective education and enforcement program in regard to the laws, regulations and standards of the Commission in order to ensure landowner and public awareness and compliance.

IV. Cooperative Initiatives

(See Chapter 6)

Goal: Encourage landowner initiatives and cooperative efforts which further the Commission's objectives of protecting natural resources and guiding growth through nonregulatory or voluntary actions.

Staff analysis: Overarching issues related to more than one goal

Cumulative Impacts

The issue of cumulative impacts of windpower development was raised in this rulemaking record, and is an important policy issue. There are many lenses through which to view cumulative impacts.

The Commission has done a jurisdiction-level analysis for all types of development during the recent Comprehensive Land Use Plan proceedings. That examination reaffirmed the value of guiding development to appropriate locations so that, among other reasons, there would still be areas of the jurisdiction that retain their remote character. While providing general principles about areas most and least appropriate for development, it did not provide specifics as to where on the map those areas are, as that is an implementation task that will be tackled in the coming years. In designating the expedited permitting area, the legislature has laid out the rough outline of an area that is, subject to permitting requirements, appropriate for wind energy. Given sufficient resources, the Commission may choose to refine those boundaries through proactive rulemaking and/or suggestions to the legislature about areas to remove.

The Commission also recently considered regional cumulative impacts when it approved the Moosehead Region Concept Plan. In that case, the Commission was able to look at an entire landscape and place development zones in places where the development would be compatible. The key there was that the Commission also required portions of the landscape to be protected through easements that significantly restrict development. So the cumulative impact analysis was in the context of *planning* and *zoning* for a large area, and accounted for areas of relatively intense development and areas of conservation.

On the small scale of a development permit application or a petition to add a certain parcel to the expedited area, the Commission's consideration of cumulative impacts analysis is on an incremental basis. On the one hand, Staff's opinion is that it would be counterproductive to decide that once a single discordant or disturbing element (visual or otherwise) is introduced, that any additional impact on public uses or natural resources is automatically allowed because there is already disturbance. However the converse is true as well – it is not consistent with state policy or law that every place that has little or no disturbance is forever off limits. So the Commission is left with the task of identifying the particular setting of each area for which development is proposed, taking into account what is already present, and assessing when the addition of more impacts will change the nature of the public uses and natural resources of an area to such an extent that the applicable decision criteria can not be met. For visual impacts in particular, the development of a rigorous protocol to provide guidance and an analysis methodology would be most helpful in providing regulatory predictability and ensuring an efficient and effective process.

In this particular proceeding, Staff recommends that the Commission consider existing impacts (e.g. permitted or existing development of all kinds) as relevant to the degree that state law allows for the consideration of those particular types of impacts. In this instance, the consideration of existing roads and existing or already permitted wind power for the purposes of evaluating scenic character impacts appear to staff to be relevant.

DP 4860 (“Kibby II”)

There is a real question about the Commission’s action regarding DP 4860 (Kibby II) and what that may mean in this context. Because the developer filed the DP application for the adjacent area during the rulemaking process, the Commission has received into the rulemaking record large volumes of data regarding that particular ridgeline, and has deliberated on the DP 4860 proposal. It is possible that at the time this memo is considered, DP 4860 will have been denied. The Commission will then have to consider whether there is a basis under the first criterion and/or second criterion to consider this expansion. The core issue identified by staff is whether there is a real possibility that the project anticipated by the petitioner in its rulemaking petition could meet the decision criteria in ways that DP 4860 may not have.

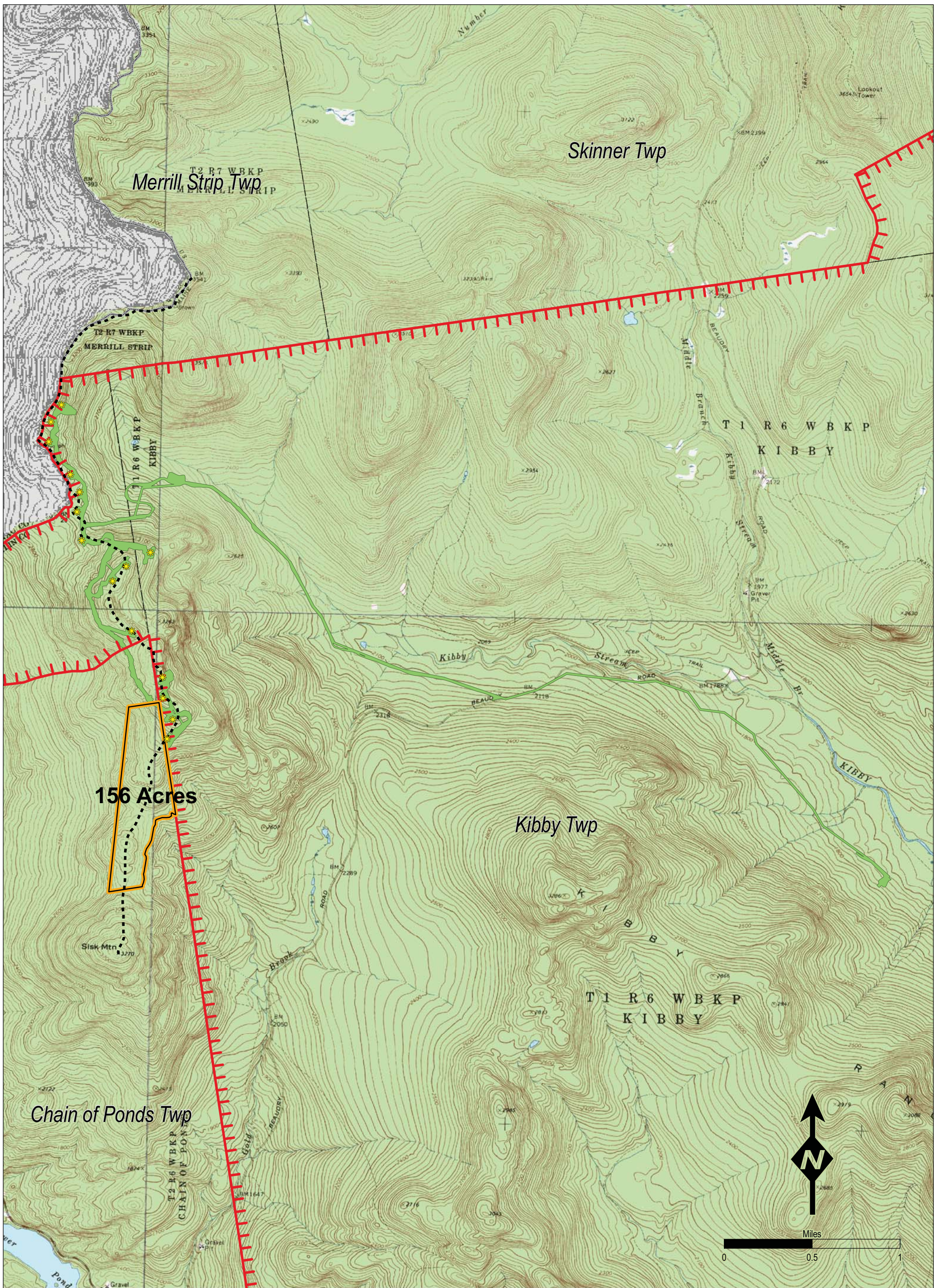
The essential question here is “Given the known limiting factors that were deliberated upon in the DP 4860 application and as set forth in this rulemaking record, does the Commission believe that a revised project that includes the proposed expansion area could meet the applicable approval criteria?” If yes, then the proposed rule still constitutes a logical geographic extension, and may be viable. In that case, adoption of the rule may provide more flexibility to allow the petitioner to propose a redesigned project.

However, if the Commission feels that the likely impacts in the petition area are significant enough to compromise the principal values and the goals of the CLUP, then no efficiency is gained by approving the petition, and the Commission should send a clear signal that this area has significant limitations for the development of wind power by declining to adopt a rule.

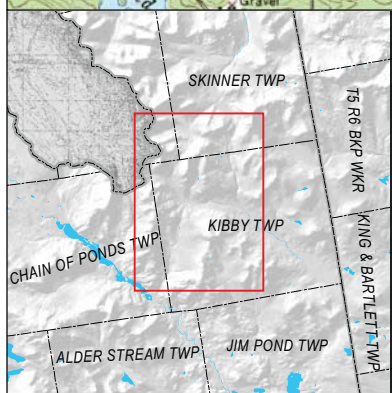
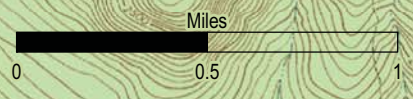
Summary:






The Commission has extensive information about the petition area in order to make what is essentially a landscape-level assessment of the suitability of the area for expedited wind power permitting. Because it appears that criteria 1 and 2 could be met depending on the Commission’s view of the public resource impacts of the project, the decision is essentially a weighing of the public resource impacts and the potential energy generation benefits. Of the public resource impacts, the one for which this decision potentially has the most import is scenic impacts, particularly on recreational and historic resources, because the criteria by which these impacts are judged would change if a rule is adopted. Several natural resource issues may affect the Commission’s overall judgment about whether the principal values and the goals of the CLUP would be compromised, however those impacts would be evaluated under the same standards regardless of whether a rule is adopted or not.

Ultimately, the Commission will have to look at the totality of the circumstances and decide whether the likely impacts are significant enough to outweigh the potential for energy generation.



156 Acres

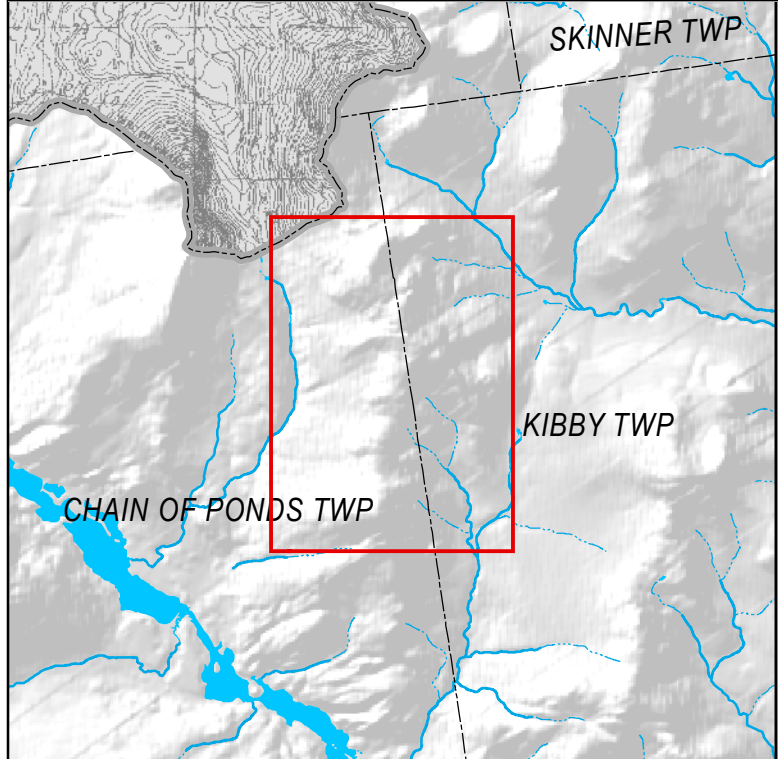
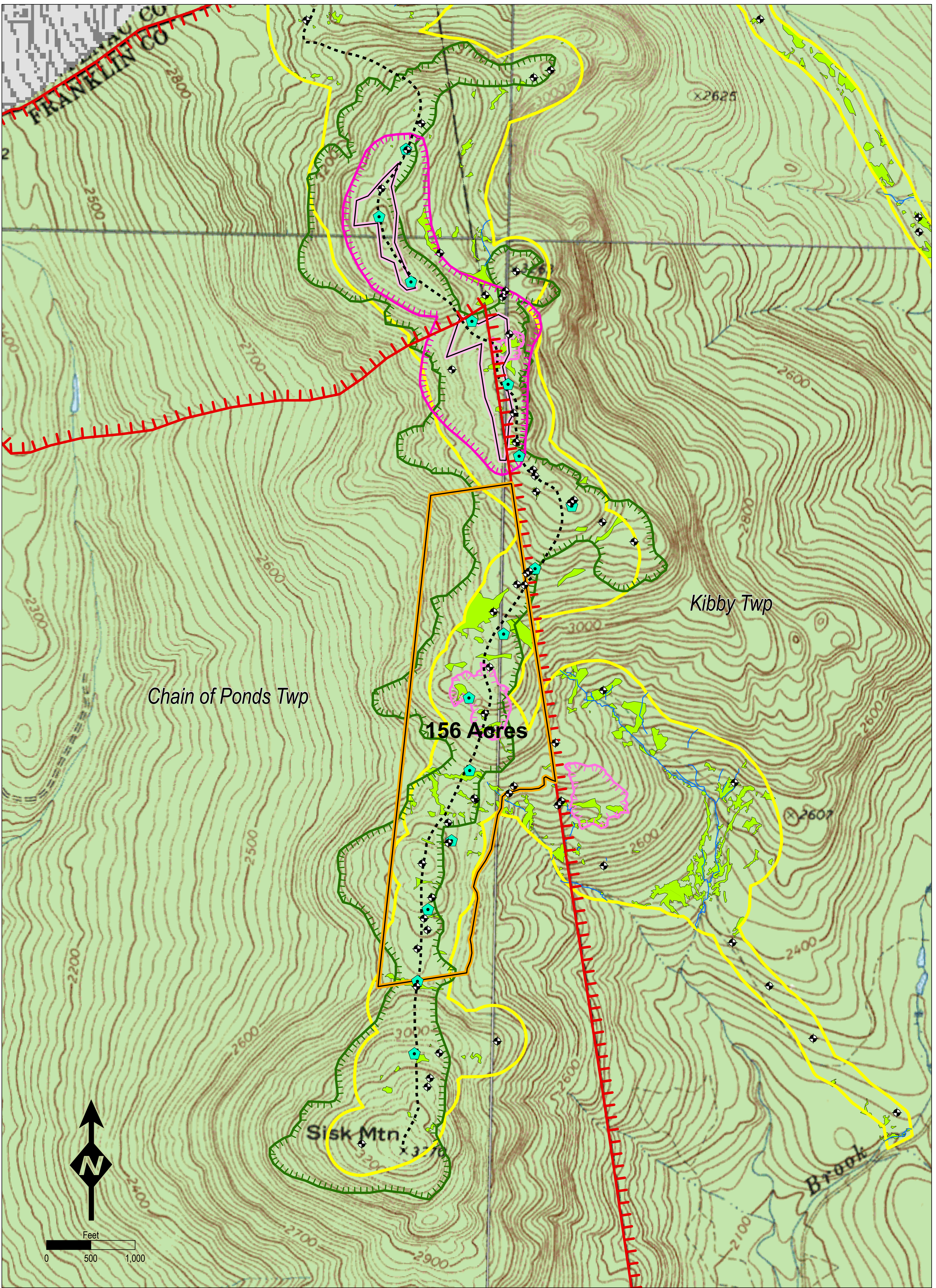




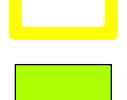


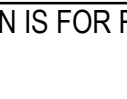





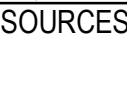
-  Expedited Wind Energy Project Permitting Area
-  Proposed Additional Expedited Wind Energy Project Permitting Area
-  Ridge Center Line
-  Kibby Expansion Project Footprint
-  Turbine Locations




Expedited Wind Energy Project Permitting Area

-

Proposed Additional Expedited Wind Energy Project Permitting Area



-  Expedited Wind Energy Project Permitting Area
-  Proposed Additional Permitting Area
-  Natural Resource Survey Limits
-  Wetland
-  Stream
-  Potential Bog Lemming Habitat
-  Fir-Heart-leaved Birch Subalpine Forest Community
-  Breeding Bird Survey Point
-  Bicknells Thrush Habitat
-  Core Bicknells Thrush Habitat
-  Soil Test Pits
-  Ridge Center Line

-  Expedited Wind Energy Project Permitting Area
-  Proposed Additional Expedited Wind Energy Project Permitting Area
-  Surveved Natural Resources

 14 Gabriel Drive
Augusta, ME 04330

Maine Land Use Regulation Commission
Guidelines for the Review of Petitions for the Addition of Lands to the Expedited
Permitting Area for Wind Energy Development
Adopted March 3, 2010

Background

The 123rd legislature enacted, “An Act to Implement Recommendations of the Governor’s Task Force on Wind Power Development”, Public Law 2007, Ch. 661 that became effective April 18, 2008. The purpose of the statutory changes was to expedite wind energy development in places most compatible with existing patterns of development and resource values. To that end, the Task Force recommended and the Legislature adopted a modified application process and revised certain criteria for evaluating the appropriateness of wind energy developments within specific geographic areas that are identified as the “expedited permitting area”.

The Act established the expedited permitting area for wind energy development, encompassing all of the organized area of the State, and, in part, the jurisdiction of the Land Use Regulation Commission. Subsequently the Commission adopted through rule-making the description and map of the expedited permitting area. The description and map of the expedited permitting area were placed into the Commission’s rules as Appendix F to Ch. 10, Land Use Districts and Standards. 12 M.R.S.A. § 685-A(13) provides for expansion of the expedited permitting area by the Commission in accordance with 35-A M.R.S.A. § 3453, which states:

“The Maine Land Use Regulation Commission may, by rule adopted in accordance with Title 5 Ch. 375, add a specified place in the State’s unorganized or de-organized areas to the expedited permitting area. In order to add a specified place to the expedited permitting area, the Maine Land Use Regulation Commission must determine that the proposed addition to the expedited permitting area:

1. Geographic extension. Involves a logical geographic extension of the currently designated expedited permitting area;
2. Meets state goals. Is important to meeting the state goals for wind energy development established in §3404; and
3. Principal values and goals. Would not compromise the principal values and the goals identified in the comprehensive land use plan adopted by the Maine Land Use Regulation Commission pursuant to Title 12, §685-C.

Rules adopted by the Maine Land Use Regulation Commission pursuant to this section are routine technical rules as defined in Title 5, Ch. 375, subchapter 2-A.”

Expansion of the expedited permitting area does not constitute an approval of a particular project, rather it changes the application review process and certain criteria for any wind energy development projects proposed in that location. A wind energy development may still be proposed even if the expedited area is not expanded, although it will be reviewed under different criteria and processes. The Commission does not have the authority to reduce the expedited area through rulemaking.

This document is intended solely for guidance to Commission staff and the public when interpreting the statutory criteria for expanding the expedited area. The document may not be relied upon to create rights, substantive or procedural. The Commission reserves the right to act in accordance with its statute and regulations, including in a manner that may vary from this document. Nothing in this document shall be construed to supersede or replace the statute, rules and Comprehensive Land Use Plan administered by the Commission. The Commission will review petitions for rulemaking to expand the expedited area in accordance with the legislature's direction in 35-A M.R.S.A. § 3453. In order to clarify the criteria set forth in § 3453, the Commission adopts the following.

Interpreting the Statutory Criteria

The Commission will conduct its analysis of the proposed expansion in the context of the general nature of the proposed project, including consideration of the approximate impact area for turbines and associated facilities. While specific project design and layout is not required for this rulemaking process, generalized information about the impact area of the proposed project will be necessary.

Criterion 1. Geographic extension. Involves a logical geographic extension of the currently designated expedited permitting area;

It is not the Commission's intent to use the rulemaking process to add broad areas, such as entire ridgelines, to the expedited area as changes on this scale are properly referred to the legislature for consideration. In addition, the Commission is unlikely to grant petitions that propose a further expansion tacked on to an earlier expansion (a "leapfrog" effect), farther from the original expedited area boundary set by the legislature.

Portions of the expedited area were designated using township or other political boundaries, which may cut across ridgelines or other naturally occurring geographic features relevant in the siting of wind power. Some adjustment to the expedited area boundary may be needed in instances where a potential project falls partially within the expedited area and partially outside of it. The Commission will evaluate the proportion of the project that will fall within the expedited area and any other relevant information. In general, the Commission will expect that a substantial portion of a proposed project will lie within the area originally designated as expedited by the Maine Legislature.

Criterion 2. Meets state goals. Is important to meeting the state goals for wind energy development established in §3404; and

The Commission interprets the phrase "important to meeting the state goals for wind energy development" to mean that projects that have a limited potential for energy generation and disproportionate impacts on public resources in the state are not important to meeting the state goals for wind energy development. In contrast, projects that have the potential for exceptional power generation may be "important" even though they may have disproportionate impacts on

public resources. In evaluating whether a proposed expansion is important to meeting the state goals for wind energy development, the Commission will consider the following factors:

- The primary factor will be the progress the state has made in achieving the goals set forth in § 3404; also
- The project's potential for energy generation; and
- The viability of the proposed project, including the availability of transmission lines to transfer the generated electricity, the quality of the wind resource, and other relevant information; and
- The impact to public resources and, if applicable, public infrastructure vs. the energy likely to be generated by the proposed project and the associated public benefits. Evaluation of the impact to public resources will include, in part, an identification, at a landscape level, of important natural, recreational, scenic, archaeological and historic resources in the area. Detailed assessments of specific resources are more appropriate at the Development Permit Application stage of review.

The Commission intends to request the expert opinion of the Public Utilities Commission in evaluating this criterion.

Criterion 3. Principal values and goals. Would not compromise the principal values and the goals identified in the comprehensive land use plan adopted by the Maine Land Use Regulation Commission pursuant to Title 12, §685-C.

The principal values and the goals contained within the Comprehensive Land Use Plan, taken together and in balance with one another, provide guidance to the Commission. The Commission will request comments from other government agencies and interested persons with expertise in subject areas referenced in the goals. A rulemaking petitioner must submit adequate information and analysis to allow the Commission to determine how the proposed project would generally affect existing uses and resources in the proposed expansion area, and describe how the proposal would or would not compromise the principal values and the goals contained in the CLUP. The information submitted should address existing uses and resources that are relevant to the principal values and the goals of the CLUP, including but not limited to scenic resources, recreational uses and resources, plant and animal resources, and other natural resources. A detailed scenic review, including visualization of the appearance of a proposed project, and detailed noise and shadow flicker analyses, are more appropriately conducted at the development permit application stage, and are not required for an expansion petition.

The statutory criteria for adding lands to the expedited area for wind energy development are different from the criteria for rezoning pursuant to 12 M.R.S.A. §685-A (8-A) in a number of ways. Specifically with regard to Criterion #3, in the case of the statutory criteria for adding lands to the expedited area, it is the principal values and the goals that are referenced in the statute. In the case of a rezoning petition, the standard is consistency with the entire CLUP. However, as the entire CLUP provides support and explanation for the values and goals contained within it, the entire document may inform the Commission's interpretation of the principal values and the goals when reviewing a petition to expand the expedited area.