

Verrill Dana^{LLP}

Attorneys at Law

KELLY B. BODEN
PARTNER
kboden@verrilldana.com
Direct: 207-253-4472

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499
www.verrilldana.com

June 8, 2011

By E-Mail and U.S. Mail

Donald E. Murphy, Project Planner
Maine Land Use Regulation Commission
22 State House Station
Augusta, ME 04333

Re: Blue Sky East, LLC
Bull Hill Wind Project - DP 4886

Dear Don:

In accordance with the Sixth Procedural Order, enclosed please find Blue Sky East's Post Hearing Brief.

Thank you for your attention to this matter.

Sincerely,



Kelly B. Boden

KBB/mtr
Enclosure

cc: Lynne Williams, Esq. (By e-mail)
Cynthia DePrenger (By e-mail)
Amy Mills, Asst. Attorney General (By e-mail)
Samantha Horn-Olsen (By e-mail)
David Fowler
Geoff West

3429468_1.DOC

STATE OF MAINE
LAND USE REGULATION COMMISSION

IN THE MATTER OF DEVELOPMENT)	
APPLICATION DP 4886)	Post-Hearing Brief
BLUE SKY EAST, LLC)	Blue Sky East, LLC
BULL HILL WIND PROJECT)	

INTRODUCTION

The Bull Hill Wind Project (“Project” or “Bull Hill Project”) is proposed for Bull Hill and Heifer Hill ridges in T16 MD, Hancock County, located within the expedited permitting area in LURC’s jurisdiction. The Bull Hill Project builds upon the longstanding track record of First Wind (Blue Sky East’s parent company) in developing responsible, appropriately-sited grid-scale wind energy projects in Maine. These projects include the Stetson I and II projects in LURC jurisdiction and the Rollins and Mars Hill projects in the organized areas. First Wind is currently generating 377,000 MW hours per year. The Rollins Wind Project will be operational during the summer of 2011, adding an additional 60MW.¹ Collectively, these projects provide alternatives to fossil fuel generation and are doing so in a manner that is sensitive to minimizing both environmental and human impacts.

The Comprehensive Land Use Plan’s (the “CLUP”’s) energy resources goal is to provide for “environmentally sound and socially beneficial utilization of indigenous energy resources when there are no overriding public values that require protection.”² While there are inevitably resource and scenic impacts associated with any grid-scale wind energy project, as demonstrated in the application materials, other filings, and at the public hearing, there are no overriding public values that outweigh the determination that the Bull Hill Project is an appropriately sited project.

As an allowed use, the Project is reviewed under the general criteria for approval set forth

¹ Kearns, et. al Pre-Filed Direct Testimony at 3.

² CLUP at 13.

in 12 M.R.S.A. § 685-B (4), the wind energy-specific requirements established under the Wind Energy Act and set forth in 12 M.R.S.A. § 685-B (4-B) and the development standards contained in Commission Rules § 10.25. There is significant evidence in the record to find that the Project complies with these standards. Although not every criterion is addressed herein, the criteria that received heightened attention during the permitting process are addressed below. While it is not possible to avoid all impacts, Blue Sky has avoided and minimized natural resource and visual impacts to the greatest extent practicable and the impacts that remain are not “undue” or “unreasonable.”

DISCUSSION

I. THE PROJECT AREA IS APPROPRIATE FOR WIND ENERGY DEVELOPMENT.

The Maine Legislature concluded that from a landscape and planning perspective, the Bull Hill area is appropriate for wind energy development.³ In doing so, the Legislature identified those areas within LURC’s jurisdiction that were appropriate for wind power development and where, as a result, wind power should be an allowed use pursuant to LURC regulations.⁴ The purpose behind the landscape level siting was to guide grid-scale wind power development away from the locations with the highest identified competing public values.

Further, legislatively establishing where wind power would be an allowed use was intended to have an impact on permitting. The Act to Implement Recommendations of the Governor’s Task Force on Wind Power Development (the “Wind Energy Act”) states that:

The Legislature finds that it is in the public interest to reduce the potential for controversy regarding siting of grid-scale wind energy development by expediting development in places where it is most

³ Report of the Governor’s Task force Report on Wind Power Development (Feb. 14, 2008) at 18-89; Tr. at 223-24.

⁴ 12 M.R.S.A. § 685-B (2-C).

compatible with existing patterns of development and resource values when considered broadly at the landscape level.⁵

The Project is in just such an area. It has an economically viable wind resource but does not have significant resource impacts and is compatible with existing patterns of use and development. The Project is planned to be located on the two lowest elevation ridges of any Project proposed to date. The Project impacts only one resource of state or national significance within three miles and Blue Sky's and the Commission's experts agree that the limited scenic impacts from the Project will not be unreasonably adverse.

Moreover, the Bull Hill Project takes maximum advantage of established infrastructure, such as existing logging roads and an existing, adjacent transmission line, thereby avoiding or greatly minimizing impacts associated with new road construction and eliminating impacts associated with constructing a new generator lead typical of most other wind projects.

In addition, and in order to avoid all wetland and new vernal pool impacts, the Project's 8.2 mile collector line will be located underground. No rare, threatened or endangered species have been observed and there are no mapped or rare habitats located in the Project vicinity. From a visual perspective, the Project impacts a single resource of state or national significance within three miles and the Applicant's and Commission's experts determined that Project impacts are not unreasonably adverse. Finally, the Project is located 3,800 feet from the nearest residence and complies with all DEP sound requirements.

It is also worth noting that the Maine Bureau of Parks and Lands ("BPL"), which manages the Donnell Pond Unit, has concluded that the Bull Hill Project will not adversely impact BPL's Management Plan for the Unit or interfere with BPL's intention of expanding the

⁵ 35-A M.R.S.A. § 3402 (2).

hiking trail network in the Unit.⁶

II. BLUE SKY EAST HAS EXCEEDED THE REQUIREMENTS RELATED TO DEMONSTRATION OF SIGNIFICANT TANGIBLE BENEFITS.

The Bull Hill Project will provide significant tangible benefits that not only meet but exceed the statutory requirements. Under the Wind Energy Act, an applicant must demonstrate that the wind energy development will provide significant tangible benefits.⁷ Here, it is undisputed that the Bull Hill Project will provide the following tangible benefits:

- Displacement of air pollution associated with fossil-fuel based generation and contribution toward the State's greenhouse gas reduction objectives;⁸
- Energy benefits related to increased diversification of energy sources;
- Direct and indirect economic benefits related to construction, including the creation of approximately 225 jobs during construction;⁹
- Three permanent employment positions to operate and maintain the facility and five additional technicians employed by the manufacturer to be on-site for at least the first three years of the Project;¹⁰
- Average annual tax payment of \$342,343 adjusted by credit enhancement agreement;¹¹
- State income taxes on the income generated from operation of the project;
- A host community benefit payment of \$5,848 per megawatt per year to Hancock County;¹²
- A community benefit payment of \$20,000 per turbine per year to the Town of Eastbrook;¹³
- One-time \$25,000 contribution to the Downeast Salmon Federation for conservation projects in the Narraguagus River Watershed; and
- Annual contribution of \$20,000 to the Downeast Salmon Federation to establish a fund for the improvement of water quality in Spectacle Pond, Narraguagus Lake, and the Narraguagus River watershed.¹⁴

⁶ June 14, 2011 BPL Memorandum at 2.

⁷ 12 M.R.S.A. § 685-B (4-B).

⁸ Although the environmental and more general energy benefits have not been quantified, as a matter of law, the Commission shall presume that a wind energy development offsets pollution from other fossil-fuel based generation and will make a "significant contribution to the State's renewable energy and greenhouse gas reduction objectives." 35-A M.R.S.A. §§ 3402 (1), 3453.

⁹ Application at 24.

¹⁰ June 15, 2011 Blue Sky Response to Commissioner questions at 3.

¹¹ Application at 24 and Pre-Filed Direct testimony of Kearns, et. al. at 11.

¹² Community Benefit Agreement dated June 2, 2011 between Blue Sky East and Hancock County Commissioners.

¹³ Community Benefit Agreement dated May 6, 2011 between Blue Sky East and Town of Eastbrook.

While the Wind Energy Act does not quantify the tangible benefits that must be provided by an applicant, the benefits provided as part of this application are consistent with those associated with other expedited wind energy development approved to date.

Finally, the Legislature recently amended the Wind Energy Act in an effort to provide greater predictability regarding the benefits to communities that host wind developments.¹⁵ As amended, the law now requires an applicant to establish a community benefits package of qualifying payments that total \$4,000 per turbine per year, averaged over a 20-year period.¹⁶ For the 19-turbine Bull Hill Project, Blue Sky East is required to provide a minimum of \$4,000 per turbine per year for a 20-year period, or, a combined annual payment of \$76,000 per year. Blue Sky East has more than doubled this statutory requirement with its comprehensive community agreements that provide local and regional benefits.

III. THE BULL HILL PROJECT WILL NOT RESULT IN AN UNDUE ADVERSE EFFECT TO ANY ENVIRONMENTAL RESOURCES, HABITATS, OR PLANT OR ANIMAL SPECIES.

Blue Sky conducted extensive surveys to identify all environmental resources within the Project area and has sited the turbines and associated facilities in a manner that avoids or minimizes environmental impacts to the greatest practicable extent.

A. Blue Sky Surveyed and Identified All Resources in the Project Area.

Blue Sky conducted robust and extensive surveys for sensitive habitats, endangered species, vernal pools, wetlands and many other environmental resources. These surveys were conducted in accordance with approved methodologies, were developed in conjunction with interested state and federal resource agencies, and were done in a manner consistent with other

¹⁴ Kearns, et. al Pre-Filed Direct testimony at 12 (Agreement finalized on June 28, 2011).

¹⁵ 35-A M.R.S.A. § 3454(2).

¹⁶ Id. § A-7. The community benefits package consists of payments to host communities, excluding property taxes, payments that reduce energy costs in the host community, and donations for land or natural resource conservation. Id. § A-3.

wind power projects in Maine.

Blue Sky worked with Maine Inland Fisheries and Wildlife (“MDIFW”) and United States Fish and Wildlife Service (“USFWS”) in the design of the raptor-use and migration surveys, avian and bat studies (including bat acoustic surveys), and bald eagle nest surveys. Stantec conducted wetland and vernal pool surveys in accordance with MDIFW regulations and the Maine Association of Wetland Scientists survey protocols for vernal pools.¹⁷ Furthermore, Stantec conducted multiple rounds of vernal pool and wetland surveys—both during the initial design phase of the Project and after final micro-siting decisions had been made—in order to confirm the nature and scope of any Project impacts.

Although witnesses for intervenor Concerned Citizens for Rural Hancock County (“CCRHC”) initially raised several questions regarding the sufficiency of the resource surveys, ultimately they either confirmed they had no objections or admitted they had no factual basis for their objections. Specifically, Michael Good questioned whether it was true that Blue Sky had avoided all wetland impacts, stating that based on his “just driving around” there may be “seeps” or other wetlands that may be impacted by the project.¹⁸ Mr. Good acknowledged, however, that he did not conduct independent field studies and could not identify any errors or missing information from the studies conducted by Stantec.¹⁹

Similarly, in her pre-filed testimony Nancy O’Toole suggested that, given the timing, the

¹⁷ Gravel et al. Rebuttal Testimony at 6.

¹⁸ Hearing Transcript Vol. II at 202 (hereinafter “Tr.”).

¹⁹ *Id.* Mr. Good also claimed that Stantec’s finding of no rare, threatened, or endangered species in the Project area was “totally inaccurate and an attempt to hide the truth about Avian life in Maine forests.” Good Pre-Filed Testimony at 1. After making this statement Mr. Good never offered any support for this claim—not in rebuttal testimony or during the hearing. When asked during the hearing whether he had any evidence that Stantec withheld information from the Commission, he acknowledged that he had none, and that he conducted no surveys and had no evidence that any such species existed in the Project area. Tr. Vol. II at 204-205. Instead, he simply insisted that based on his “20 years of being in the forests of Maine” he knows that these rare, threatened, and endangered species are present everywhere. *Id.* at 205.

vernal pool testing was “incomplete and therefore suspect.”²⁰ During the hearing, however, and after listening to testimony from Dale Knapp explaining the timing of vernal pool testing, Ms. O’Toole testified that she “understood” why testing took place when it did and that she was “comfortable” with the timing of the surveys.²¹ Ms. O’Toole also raised some concerns about the sufficiency of the wetland surveys, suggesting that Blue Sky had underestimated the extent of wetlands in the Project area with the intention of “claiming no impacts,” identifying wetlands later, then “mitigating” instead of avoiding them.²² As with Mr. Good, Ms. O’Toole offered no facts to support these allegations and agreed during cross-examination that Blue Sky understood regulatory approval would be required for any wetland impacts.²³

In summary, CCRHC’s concerns about the sufficiency of Blue Sky’s survey work are without merit. Blue Sky retained Stantec to conduct all the resource surveys in the Project area. This firm has conducted over 180 distinct seasons of pre-construction avian surveys in twelve states, including full scale resource studies for fifteen utility-scale projects in Maine.²⁴ The surveys conducted to identify rare, threatened or endangered species, or their habitats, were based on proven protocols and techniques and consultation with state and federal natural resource agencies, including MDIFW and USFWS.²⁵ Blue Sky’s survey techniques are appropriate and time/agency/project tested and reliable.

B. The Project Will Not Result in an Undue Adverse Impact to Bats, Raptors, or Other Avian Species.

As discussed in greater detail below, construction and operation of the Bull Hill Project will not result in any undue adverse impacts to bats due to the relatively low number of bats

²⁰ O’Toole Pre-Filed Testimony at 4.

²¹ Tr. Vol. II at 200.

²² O’Toole Pre-Filed Testimony at 12.

²³ Tr. Vol. II at 195-196.

²⁴ Gravel et al. Pre-Filed Testimony at 3.

²⁵ Id. at 4-5.

identified in the Project area, comparative low mortality data results from operational wind projects, and the collaborative mortality study and curtailment strategy that will be implemented by Blue Sky, in conjunction with MDIFW and a third party investigator.

First, detection rates during acoustic surveys showed there are fewer bats present in the Bull Hill Project area than at Stetson I, Stetson II and Mars Hill and mortality rates at these three existing projects have been low.²⁶ As the Bull Hill project is smaller than these other projects and given the lower detection rates at Bull Hill, bat mortality is likely to be even lower at Bull Hill.²⁷

Second, the particular bat species of concern—the Myotis species—that suffers from White Nose Syndrome, tend to fly at lower altitudes and are, therefore, less likely to collide with wind turbines than other bat species. As noted by MDIFW during the hearing, it is the long-distance migrating bats, and not the Myotis species, that have the higher risk of collision, as they “tend to be flying higher through the site.”²⁸ To the extent Myotis species are present in the Project area, therefore, they are less likely than other species to be flying in the rotor swept area.

Third and finally, although the data indicates that this Project does not present a significant risk of bat mortality, Blue Sky has committed to working with MDIFW to develop appropriate methodologies for a study of bat risk and mortality which will include curtailment at a portion of turbines during the season identified as highest risk, and MDIFW has provided input and recommendations on this protocol.²⁹ Blue Sky and MDIFW have agreed that a detailed study design for the first two years of operation will be developed in consultation with MDIFW,

²⁶ Gravel et al. Pre-Filed Testimony at 18.

²⁷ Gravel Pre-Filed Testimony at 22.

²⁸ Testimony of Richard Bard, Tr. Vol. II at 244.

²⁹ June 2, 2011 Letter from Blue Sky; June 15, 2011 MDIFW Response to Commission Questions.

the Bat and Wind Energy Cooperative, Bat Conservation International (“BCI”). BCI has confirmed their commitment to participating in the design of the study.³⁰

At the conclusion of this two-year study Blue Sky proposes to submit to LURC a copy of the survey data and any reports, conclusions, or other summaries of the results of the study.³¹ This report, and any operational control measures proposed by Blue Sky, along with comments from MDIFW regarding the study and any operational controls, will be submitted for review and approval by the Commission.

With respect to other avian impacts, the data shows that the vast majority of nocturnal migrants fly at altitudes far above the rotor swept zone of the proposed turbines.³² MDIFW has not raised any specific concerns regarding bird collision risk at the Project and, as with other projects, Blue Sky has committed to perform post-construction monitoring in accordance with all comments and requirements requested by MDIFW. An adaptive management plan that involves close coordination with state and federal agencies will also be implemented if significant impacts to migratory species occur as a result of the project. A revised post-construction monitoring plan, incorporating all of MDIFW’s final comments, was submitted as part of Blue Sky’s May 16, 2011 revised Exhibit 19. In short, Blue Sky has incorporated all of MDIFW’s comments and suggestions in the post-construction monitoring plan.

Finally, risk to raptor species is anticipated to be very low at this Project. Raptor migration through the Bull Hill Project area is similar to other sites proposed in Maine and there has been only one raptor collision documented in the eight year combined operating history at

³⁰ Id.

³¹ June 15, 2011 Blue Sky Response to Commission’s questions posed in the Sixth Procedural Order.

³² Gravel et al. Pre-Filed Testimony at 23.

Mars Hill, Stetson I, or Stetson II (one Barred owl at Mars Hill).³³ No active bald eagle nests were documented in the Project area and the closest nest is two miles from the Project.³⁴ No agency has raised any significant concerns regarding impacts to raptors, and Blue Sky will continue to monitor these species as part of its post-operation surveys.

C. The Project Will Not Result in an Undue Adverse Impact to Wetlands or Vernal Pools.

The Bull Hill project will not impact a single wetland.³⁵ Use of existing logging roads and transmission facilities and burying the collector line within the road network have avoided all impacts to wetlands.

For vernal pools the Project will not result in any impacts to significant vernal pools (“SVPs”) or their associated buffer areas. As discussed during the hearing, there continues to be a policy disagreement between Blue Sky and MDIFW whether existing vernal pool impacts associated with the existing permanent logging roads (to be used by Blue Sky to access the Project site) should be attributed as impacts of the Project.³⁶ Specifically, MDIFW was concerned that the existing clearing associated with two existing roads and the Bangor Hydro transmission line corridor exceeded the 25% threshold in the buffer around SVP 34CF.³⁷ Blue Sky contends that such impacts are not attributable to the Project as they already exist and will continue to exist regardless of whether the Project is constructed.

Blue Sky has confirmed with MDIFW and the Commission, that only one of the roads in the buffer area will be used by Blue Sky and Blue Sky has no control or access rights to the

³³ Gravel et al. Pre-Filed Testimony at 17; Kearns et al. Pre-Filed Direct Testimony at 3 (totaling years of operation of the three projects).

³⁴ Id. at 16.

³⁵ Application at 16.

³⁶ Compare May 12, 2011 MDIFW Comments, Section III(3) (regarding a 39% impact to the buffer of SVP “34CF”) with May 16, 2011 Blue Sky Response to MDIFW Comments.

³⁷ May 9, 2011 MDIFW Comments.

Bangor Hydro transmission corridor within the buffer area.³⁸ Accordingly, MDIFW concluded that impacts to SVPs and their buffers, including any existing impacts attributable to the existing logging roads, “will be less than the 25% threshold...so no further recommendations or mitigation are necessary.”³⁹ MDIFW agrees that the “policy discussion” regarding whether to count existing impacts as Project impacts can be put off “for another day.”⁴⁰

D. The Project Will Not Result in an Undue Adverse Impact to Other Surface or Groundwater Supplies.

Construction of the Project will include specific techniques and mitigation measures, proven at other projects and reviewed by state agencies, to ensure that construction will not result in any undue adverse effect to surface or groundwater supplies.

The Project will largely utilize existing permanent logging roads for access and is located immediately adjacent to an existing Bangor Hydro transmission line.⁴¹ In addition, the collector line will be located within the footprint of the existing and proposed roadways.⁴² This use of existing access ways, transmission lines, and co-location of Project components will substantially reduce the footprint of the Project and will minimize stormwater impacts, both during construction and operation.

In her pre-filed testimony Ms. O’Toole suggested that the Project area contains perched water tables, extensive wetlands, and groundwater resources that will be “significantly changed” as a result of construction of the access roads and turbine pads.⁴³ Ms. O’Toole also argued that

³⁸ Tr. Vol. II at 239-240; June 15, 2011 MDIFW Response to Commission Questions at 3 (only a “very small portion” of the SVP 34CF buffer is part of the Project).

³⁹ June 15th MDIFW Response to Commission Questions at 3 and Blue Sky’s Response to Commission Questions at 3 and Exhibit B (figure depicting the impacts of 1% of the buffer).

⁴⁰ Tr. Vol. II at 240.

⁴¹ Kearns et al. Pre-Filed Testimony at 6.

⁴² Hart et al. Rebuttal Testimony at 3.

⁴³ O’Toole Pre-Filed Testimony at 11-12.

the “toolbox method,” in which construction techniques to minimize erosion and runoff are developed in the field, “will not work” for this area.⁴⁴

Contrary to Ms. O’Toole’s assertion, Blue Sky has not proposed a “toolbox” approach to managing site hydrology and has, instead, designed construction techniques based on anticipated site conditions. The Maine Soil Scientist, David Rocque, confirmed this in his testimony, explaining why the “predictability” of the site conditions does not require a toolbox approach. When asked by Chair Hilton why he was not recommending the toolbox method on this Project, Mr. Rocque responded that unlike other projects where steep mountain areas may have “hidden features” that create uncertainty about groundwater conditions,

This [Project area] is just regular ground. It has—should have none of those hidden features. . . . You should be able to predict what’s wherever it is and plan it that way. So it made it a much simpler, easier project for me to review and should be the same to build.⁴⁵

Accordingly, the toolbox method is not being recommended for this Project because the Project area is “just regular ground” and Mr. Rocque has no reason to believe that there are any unpredictable hydrological features.

Finally, during the hearing Ms. O’Toole appeared to retract her concerns about the lack of “geotechnical” information and her concerns that “direct impacts” to wetlands and vernal pools would result from construction-related groundwater and surface water runoff. Ms. O’Toole confirmed that she understood that Blue Sky was not waiting to use a toolbox method to identify erosion control measures, but instead as part of the consultation process with Mr. Rocque has “now specified specific erosion control measures to be used in specific locations.”⁴⁶ Ms. O’Toole also recognized, and did not dispute in any way, Dave Waddell’s conclusion that

⁴⁴ Id. at 11.

⁴⁵ Tr. Vol. II at 236-237.

⁴⁶ Tr. Vol. II at 198.

the Project meets the DEP Chapter 500 stormwater standards or his recommendation of “approval of the project in its current form.”⁴⁷

In summary, the testimony demonstrates, and the State’s experts and Blue Sky’s consultants all agree that construction and operation of the Project will be conducted in accordance with all applicable standards for managing groundwater and stormwater impacts and construction and operation of the Project will not, therefore, have a undue adverse effect on these resources.

E. The Project Will Not Result in an Undue Adverse Impact to Any Other Environmental Resource or Species.

Construction of the Project will not result in any undue adverse impacts to any other identified resource or species. The predominant forest types in the Project area are Spruce-Fir Northern Hardwoods, a “very common, widespread ecosystem throughout most of northern Maine,” and Beech-Birch-Maple, the “dominant hardwood forest” in the state.⁴⁸ There are no rare or exemplary natural communities in the Project area, with the closest, Frenches Meadow (a domed bog ecosystem), 1.25 miles away from the Project.⁴⁹

Finally, with the exception of a single peregrine falcon, no rare, threatened, or endangered species or significant or essential wildlife habitats were observed in the Project area.⁵⁰ Stantec conducted robust surveys, and MDIFW indicated that no Significant or Essential Wildlife Habitats or significant fisheries resources are known to exist in the Project area.⁵¹ None of the resource agencies have raised any concerns about the single peregrine falcon sighting, nor

⁴⁷ Id.; see also Dave Waddell’s May 5, 2011 Comments (Blue Sky “has addressed all my concerns with this project”).

⁴⁸ Gravel et al. Pre-Filed Direct Testimony at 10.

⁴⁹ Id. at 11.

⁵⁰ Id. at 7.

⁵¹ July 8, 2009 Letter from Rick Jordan and June 23, 2009 Letter from James Hall (at Exhibit 13B to the Application).

concerns with any other aspect of Blue Sky's field work or conclusions.

IV. OPERATION OF THE BULL HILL WIND PROJECT WILL COMPLY WITH THE DEP NOISE REGULATIONS AND WILL NOT RESULT IN ANY SIGNIFICANT SOUND IMPACTS TO ABUTTING PROPERTIES.

In accordance with special provisions established as part of the Wind Energy Act, the Bull Hill Project must comply with noise regulations established by the Board of Environmental Protection.⁵² These regulations were promulgated by the Maine Department of Environmental Protection (DEP) under the authority of the Site Location of Development Law (38 M.R.S.A. §§ 481-490) and referenced as Maine DEP Chapter 375.10, Control of Noise. As a result, Maine DEP 375.10 applies to the Commission's review of the Bull Hill Wind Project instead of Chapter 10, Section F,1.

As described in the application and testimony, in recognition of the quiet rural area, Blue Sky elected to apply the DEP's more stringent "quiet" area limits of 45 dBA during the nighttime and 55 dBA during the daytime. As a result, the relevant hourly equivalent sound level limits include the following:

- 75 dBA at the Project boundary;
- 55 dBA during the daytime at protected locations
- 45 dBA during the nighttime at locations within 500 feet of a residence on a protected location.⁵³

LURC's acoustical consultant, EnRad Consulting, reviewed Blue Sky's sound assessment and concluded that it was "reasonable and technically correct according to standard engineering practices required by LURC under 12 M.R.S.A § 685(4-B)(A) Regulations on Control of Noise." The record is clear that the Bull Hill Project complies with the DEP noise rules. When operating at full sound output, the Project will meet the DEP nighttime limits at all

⁵² 12 M.R.S.A. § 685-B(4-B)(A).

⁵³ 06-096 CMR ch. 375 § 10(C)(1)(a)(v), (G)(16). "Protected Location" is defined, in relevant part, as any location on a parcel containing a residence or other development. This definition does not include undeveloped privately held land.

protected locations.⁵⁴ For example, the estimated hourly sound limit at the lot line of the nearest residence is 39.6 dBA (at a distance of 3,705 feet from the nearest turbine), well below the required nighttime limit of 45 dBA. EnRad also determined that the sound levels from the Project would be 5 dBA or more below applicable quiet limits, tonal sounds were not expected to occur, and SDR events were not expected frequently. In the event SDR events occurred, the Project has a buffer of at least 5 dBA between predicted levels and the applicable limits.⁵⁵

The DEP rules also provide that for developments in “one municipality when the noise produced by the development is received in another municipality,” the DEP would “take into consideration” any quantifiable noise standards in the receiving municipality’s ordinance, if any existed.⁵⁶ Assuming this provision also applies to development located within the unorganized areas of the State, the Commission is required only to “take into consideration” any “quantifiable noise standards” in an adjacent municipality’s sound ordinance.⁵⁷

There are three quantifiable noise standards in the Eastbrook Wind Ordinance: a nighttime sound limit of 40 dBA applied at all locations on a parcel containing a residence and extending 660 feet beyond the parcel boundary; (2) an hourly sound limit of 35 dBA at any location greater than two miles from any turbine; and (3) 5 dBA may be added to measured sound levels for purposes of determining compliance if there are certain tonal sounds. There are no other “numerical limits governing noise” in the Eastbrook Ordinance.⁵⁸

⁵⁴ Bodwell Pre-Filed Direct Testimony at 6.

⁵⁵ EnRad Consulting Peer Review at Section 6.3. and 8.0, p. 5.

⁵⁶ 06-096 CMR ch. 375 § 10.

⁵⁷ 06-096 CMR ch. 375 § 10(B)(1). It is not clear that this “adjacent municipality” provision applies to the Commission. The regulation distinguishes between “municipalities” and “unorganized areas” of the State but only requires “consideration” of an adjacent municipality’s sound rules for “development located within one municipality,” not for development within the unorganized area. *Id.* (emphasis added).

⁵⁸ June 7, 2011 Blue Sky Response to Public Comments. The DEP regulations define “quantifiable noise standard” as “[a] numerical limit governing noise from developments that has been duly enacted by ordinance by a local municipality.” 06-096 CMR ch. 375, § 10(G)(17).

When deciding how to “consider” the Eastbrook noise standards, Blue Sky contends that it is important for the Commission to distinguish between Ordinance provisions that are reasonably related to the purpose of the DEP sound regulations—to protect existing uses and, in particular, residents from unreasonable sound impacts generated from development in adjacent towns. In contrast, the DEP regulations are not intended to, and are not intended to allow municipalities to, regulate sound impacts on private undeveloped land or to influence what types of development may exist in areas outside the municipality’s town limits. With this distinction in mind there are certain provisions in the Eastbrook Ordinance that should be considered, and some that should not be considered.

The Commission could reasonably consider Eastbrook’s more stringent nighttime limit of 40 dBA instead of the DEP limit of 45 dBA. This provision reflects the intent of the Town of Eastbrook to set more stringent limits to protect residents’ use and enjoyment of their property. The modeling shows that the Bull Hill Project will in fact comply with this more stringent 40 dBA standard at all protected locations in Eastbrook.⁵⁹ Blue Sky’s modeling also shows that the Project will comply with the two other quantifiable noise standards in the Ordinance, by not exceeding 35 dBA two miles from any turbine, and not generating tonal sounds that would trigger application of the tonal penalty.⁶⁰

The Ordinance provision that should not be applied is the “660-foot” provision. Unlike the DEP regulations, which regulate sound on developed parcels and regulate nighttime sound within 500 feet of dwellings located on these parcels, the Eastbrook Ordinance sets limits that apply 660 feet beyond the boundaries of these developed lots.⁶¹ As the Eastbrook limits apply to

⁵⁹ Bodwell Pre-Filed Testimony, pp. 8-10.

⁶⁰ Bodwell Pre-Filed Testimony, pp. 8-10.

⁶¹ A figure showing the distinction between the DEP and Eastbrook Ordinance can be found on page 9 of Scott Bodwell’s Pre-Filed Testimony.

all areas on developed lots, this 660 foot provision would only work to create an additional compliance area that extends onto undeveloped land adjacent to these protected locations and, in some circumstances, would apply to land outside the municipal boundaries. As a result, the Eastbrook Ordinance regulates land use on adjacent properties and, in this case, attempts to regulate development in LURC jurisdiction.

Blue Sky believes there is no rational reason to apply any standard on land not owned by these residents (and upon which no houses exist) or at any location outside the Town's jurisdictional limit. These parcels do not contain any "resident" that may be impacted by sound from the Project and the purpose of the DEP sound regulations is to protect existing uses, not to allow neighboring towns to regulate development in LURC jurisdiction.⁶²

Further, it is very likely that the Project will, nevertheless, comply with the Eastbrook standard at locations 660-feet from the property line. As noted in Mr. Bodwell's testimony, there is only one location 660 feet from the property line of one parcel (parcel P-1) where the modeling does not show compliance with the 40 dBA standard.⁶³ However, although the modeling suggests that sound levels at this location will be 41.5 dBA, operation of the Stetson I and Stetson II projects has shown that actual sound levels have been 2-4 dBA below the conservative models used for these projects, including Bull Hill. As a result, as Mr. Bodwell testified in the hearing, it is likely that the Bull Hill Project will meet that standard the majority of the time at that location 660 feet from P-1.⁶⁴

In summary, there is no question that the Project will comply with the DEP limits and the more stringent 40 dBA nighttime limit on every parcel in Eastbrook and the Project will not

⁶² The "no adverse effect" standard in the Site Law protects "natural resources" and "existing uses." 38 M.R.S.A. § 484(3) (emphasis added).

⁶³ Bodwell Pre-Filed Testimony, p. 10 n. 5.

⁶⁴ Tr. Vol. II at 113-114.

result in any undue adverse sound impacts to Eastbrook residents or any property owner.

V. THE BULL HILL WIND PROJECT WILL NOT HAVE AN UNREASONABLE ADVERSE EFFECT ON THE SCENIC CHARACTER OF ANY RESOURCE OF STATE OR NATIONAL SIGNIFICANCE.

The Bull Hill Wind Project will not have an unreasonable adverse effect on scenic character or existing uses related to scenic character because it will not significantly compromise views from any of the scenic resource of state or national significance.

A. The Wind Energy Act Creates a Specific and Defined Scope of Review for Assessing Impacts to Scenic Character from Wind Energy Projects.

The Legislature found that wind energy development is “unique in its benefits to and impacts on the natural environment [and] makes a significant contribution to the general welfare of the citizens of the State,” and that, given the realities of constructing grid-scale wind power projects, there are going to be necessary, but acceptable, visual impacts from this development.⁶⁵ In order to objectively assess those visual impacts, the Legislature established a focused scope of review using a defined methodology that applies to wind energy projects in the expedited permitting area.

The scope of review for impacts to scenic character is expressly limited to “identified scenic resources of state or national significance,” and a determination of whether a proposed project “significantly compromises views” from these resources “such that the development has an unreasonable adverse effect on scenic character or existing uses related to scenic character” of these resources.”⁶⁶ Unlike scenic impacts analyses for other types of development, the Wind Energy Act provides a specific and well-defined set of standards for assessing scenic impacts to

⁶⁵ 35-A M.R.S.A. § 3402 (1).

⁶⁶ 35-A M.R.S.A. § 3452 (1). This section also provides that a determination of harmonious fit regarding scenic character or existing uses related to scenic character is not required for generating facilities. In the Third Procedural Order, Presiding Officer Hilton concluded that the Wind Energy Act scenic standard applies to review of the visual impacts related to associated facilities as well. Thus the entire Bull Hill Project will be reviewed under the Wind Energy Act scenic standard. See Third Proc. Order at 4-5.

the identified resources. Those standards require that the Commission consider the significance of the potentially affected scenic resource, the character of the surrounding area, the expectations of the typical viewer, the extent nature and duration of potentially affected public uses of the scenic resource, and the potential effect of views of the turbines on the public's continued use and enjoyment of the resource.⁶⁷

The Wind Energy Act also expressly states that the fact that a wind energy facility is a "highly visible feature in the landscape," is not, by itself, a "sufficient basis for a determination that the proposed wind development has an unreasonable adverse effect on scenic character or existing uses related to scenic character."⁶⁸ Additionally, there is a presumption that visual impacts to identified resources located beyond three miles from the Project are less significant and do not require a visual impact assessment.⁶⁹

B. The Project Will Not Result In An Unreasonable Adverse Effect on Any Scenic Resource of State or National Significance.

There is one resource of state or national significance, Narraguagus Lake, located within three miles of the Project.⁷⁰ Fourteen additional scenic resources of state or national significance are located within the eight mile study area.⁷¹ Eight of these resources will have no views of the Project. Blue Sky conducted a visual impact assessment ("VIA") which evaluated the scenic impacts to the remaining seven resources. In addition, Blue Sky commissioned a user survey, which was conducted by a research firm, Market Decisions, Inc., in consultation with LURC's visual resources peer reviewer, Dr. Palmer, to collect information regarding user expectations

⁶⁷ 35-A M.R.S.A. § 3452 (3).

⁶⁸ Id.

⁶⁹ 35-A M.R.S.A. § 3452(4).

⁷⁰ DeWan Pre-Filed Testimony at 12; Palmer Report at 4.

⁷¹ Id. At 13.

and impacts of the Project on use and enjoyment of recreational resources in the Project area.⁷²

Both Blue Sky's expert, Terry DeWan, and the Commission's expert, Dr. James Palmer, have concluded that the Project will not result in a unreasonable adverse effect on any scenic resource of state or national significance.⁷³ Although each expert ranked the impacts slightly differently (with Mr. DeWan's rankings running from None to "Low-Medium" and Dr. Palmer's rankings running from None to "Medium-High"), Dr. Palmer noted these as "slight differences," and concluded that there was "general agreement" between him and Mr. DeWan regarding the application of the evaluation criteria and the conclusion that the impacts were not unreasonably adverse.⁷⁴

A full discussion of the impact of the Project on each of the resources has been provided in the VIA, Dr. Palmer's report, and testimony provided to the Commission, and the full assessment will not be repeated here. Instead, these comments focus on several key issues relevant to the ultimate conclusion by these experts that the scenic impacts of the Project are not unreasonable and views of the Project are not going to have an undue adverse effect on users' expectations or their likelihood of continuing to visit the Project area.

First, visibility of turbines must be considered in the context of use. Visibility of the Project is variable, with the Project significantly visible in some areas and less visible in others. As noted by Dr. Palmer, the simple fact that turbines can be seen is only the beginning of the assessment.⁷⁵ As noted in the evaluation criteria, "scope and scale of project views" is only one of the regulatory criteria used in making a determination of visual impacts. For example, Dr. Palmer and Mr. DeWan both gave the same ranking to impacts to Narraguagus Lake and Donnell

⁷² DeWan Pre-Filed Rebuttal Testimony at 2.

⁷³ DeWan Pre-Filed Testimony at 3; Palmer Report at 41.

⁷⁴ Palmer Report at 41.

⁷⁵ Palmer Report at 23.

Pond (“Medium” for Dr. Palmer and “Low-Medium” for Mr. DeWan).⁷⁶ Visibility of the Project, however, is significantly different from these two resources, as Narraguagus Lake is much closer to the Project and, therefore, the views of the Project are more pronounced. Dr. Palmer noted that the high visibility of turbines at Narraguagus Lake “will be moderated by an anticipated low use of Narraguagus Lake for activities where scenic value is a central part of the experience.”⁷⁷

For Donnell Pond, the turbines “will not be visually dominant” (while an existing telecommunications tower on Martin Ridge will be), but the higher use means that the overall impact is roughly the same.⁷⁸ The ranking for these resources is the same because there are far fewer users of Narraguagus Lake, so that the greater visibility has the same impact as Donnell Pond, where the turbines are farther away, but more people will see them.

Similarly, Dr. Palmer noted that views of the Project from the summit of Black Mountain were “significant,” however, the summit “receives relatively few visits in a year” and that at Tunk Mountain, use is low as there is no “formal access and use is thought to be light.”⁷⁹ These findings are supported by the Wind Energy Act’s statement that high visibility alone is not sufficient to find unreasonable adverse effects—and the context of the resources in the Project area are such that the overall impact is not unreasonable.

During the hearing some Commission members asked whether more remote resources, which may be considered outstanding because they see very little human use, should still be

⁷⁶ Palmer Report at 40; DeWan Pre-Filed Testimony at 41.

⁷⁷ Palmer Report at 41. There is no express right to vehicular access to Narraguagus Lake. As noted by the landowner’s representative, Attorney Beaupain, Lakeville Shores permits campowners to use logging roads to access the lake “but there is very little public use to Narraguagus Lake. It’s very difficult to get to. I don’t know how you’d get a boat there if you don’t have a camp there.” Tr. Vol. III at 15.

⁷⁸ Palmer Report at 41, 42.

⁷⁹ *Id.*

protected from unreasonable visual impacts.⁸⁰ Blue Sky is not suggesting (and Blue Sky does not believe Dr. Palmer is suggesting) that the amount of use is the most important factor, such that resources that receive infrequent use are not protected by the Wind Power Act. Instead, this factor is important, but it is one of several considerations visual experts use when determining overall reasonableness of Project effect on a regulated resource. It may be that in certain circumstances, where the scenic value and remote feel is the objective of the user, the impacts to those users may, in fact, be a larger factor. By comparison, however, Narraguagus Lake is not such a remote and wild resource. The lake is largely surrounded by private timberland and ongoing logging operations and its relatively low usage is a function of limited public access. There are camps on the lake and it is not the type of resource that users travel to expecting a remote backcountry type of experience.

Second, when views of the Project constitute only a portion of the views from a resource and, in particular, when the impacted view is not the primary scenic view, the impact is more likely reasonable. This is true for the Bull Hill Project where from the summit of Tunk and Black Mountain the entire Project can be seen from a distance of 4.9 and 7.9 miles, respectively.⁸¹ Views of the Project only take up a portion, however, of the views from these mountains. On Tunk Mountain the Project is seen only over an arc of 22° out of a 360° view.⁸² On Black Mountain the visibility is less, only 11° of the full views.⁸³

Importantly, these views of the Project are to the North, while the “higher rated” and higher quality views are to the South.⁸⁴ As Dr. Palmer noted, while views of the Project from

⁸⁰ Tr. Vol. II at 117-123.

⁸¹ DeWan Pre Filed Direct Testimony at 32.

⁸² VIA at 35.

⁸³ VIA at 33.

⁸⁴ DeWan Pre Filed Direct Testimony at 32. This distinction in the quality of the views was consistent with responses in the user surveys. As part of the surveys users were asked to rank the existing views to

Black Mountain may be significant, users “have the option to look at a higher rated view.”⁸⁵ Mr. DeWan concluded that “the Project will have no effect on the most highly rated view, i.e., towards Mount Desert Island and Acadia National Park to the south.”⁸⁶ Similarly, from Tunk Mountain, “it is expected that users will focus on the superior view towards the coast (it is a coastal visual resource after all).”⁸⁷ Moreover, on Tunk Mountain the Project will not be visible at all from “the majority of the overlooks...which are oriented to the south toward Frenchman Bay and the mountains of Mount Desert Island.”⁸⁸

As a result, both experts concluded that although the Project will be highly visible for some portion of the views from these mountains, the overall impact is not unreasonable as there are numerous other views and the Project does not interfere with the most highly rated views—meaning that when hikers climb Tunk or Black Mountain for a scenic view, they tend to look at the higher rated view to the south, away from the Project.

Third, users do not mind seeing wind turbines. Dr. Palmer has properly noted that the relevant evaluation criteria under the Wind Power Act “is less the apparent Scenic Impact, *per se*, and more about its Effect on the Experience of users at significant scenic resources.”⁸⁹ It is not how large or visible the turbines are, it is whether views of the turbines will interfere with the users’ experience or cause them to stop coming to the resource. The user study conducted for this Project, as well as other surveys conducted to assess the impact of wind power projects on users’ enjoyment and continued use of resources, consistently demonstrate that these projects are

the North and South of Black Mountain, on a scale of 1-7 with 7 being the highest ranking. VIA at 33. While only 41% said that views to the North ranked at a 7, 93% said that southerly views ranked at a 7. VIA at 33.

⁸⁵ Palmer Report at 42.

⁸⁶ VIA at 34.

⁸⁷ Id.

⁸⁸ VIA at 35.

⁸⁹ Palmer Report at 23.

not interfering with the users appreciation of these resources or likelihood to return to them.

As noted in the testimony, Blue Sky conducted a user survey in the Donnell Pond Unit over Columbus Day weekend in 2010.⁹⁰ This study shows that even at locations where users found that views of the Project would be severe, the Project was not likely to adversely impact their enjoyment of the resource or their likelihood of returning to the resource.⁹¹ For hikers on Black Mountain, most respondents (74%) stated that the visibility of the Project would have no effect or a minor effect on their likelihood of returning.⁹² For users of the Schoodic Beach area of Donnell Pond, 92% stated the Project would have no impact or a minor impact on their enjoyment or likelihood of returning.⁹³ In addition, although 3% said that views of the turbines would make it less likely they would return, 4-5% said the views would make it more likely they would return—a positive impact.⁹⁴

As noted in Blue Sky's June 15, 2011 response to Commission questions, the conclusions in the Market Decisions Report are consistent with numerous other recreational user surveys that show that views of wind power projects do not interfere with recreational users use and enjoyment of these resources.⁹⁵ In particular, a 2010 study of users of Baskahegan Lake, in the vicinity of the Stetson Wind Power Project, shows that visibility of the Stetson project, from a lake that receives relatively high recreational use, has not had any impact on the public's

⁹⁰ Application Exhibit 18, Market Decisions Report. Dr. Palmer noted that the site and timing of the survey was chosen for the "prominent views of the Project" and the fact that on a busy holiday weekend "there might be more visitors than at other scenic resources where the project will be visible." Palmer Report at 7. On balance, Dr. Palmer found that although there were some limitations to the study, "similar limitations are commonly encountered in marketing research, and there do not appear to be any obvious biases introduced into the study." Id. at 22.

⁹¹ Market Decisions Report pp. 33-39 (Application Exhibit 18).

⁹² Id. at 33.

⁹³ Id. at 39.

⁹⁴ Id. at 38-39.

⁹⁵ June 15, 2011 Response to Commission Questions at 4.

continued use and enjoyment of that Lake.⁹⁶ When asked about conditions that interfered with use and enjoyment of the Lake, survey participants complained about impacts from residential camp development and human impacts to campsites, but not a single survey participant identified the visual impacts from the turbines as having any impact on use and enjoyment of the lake.⁹⁷

After reviewing the specific impacts to each resource of state or national significance, Mr. DeWan concluded that the Project would not have an unreasonable adverse impact on scenic values and existing uses of resources in the Project area.⁹⁸ Similarly, Dr. Palmer stated that any areas of adverse or very adverse impacts are “very limited” and the overall scenic impact from the Bull Hill Project does “not appear to be Unreasonably Adverse within the guidance of the Wind Energy Act.”⁹⁹

VI. BLUE SKY’S DECOMMISSIONING PLAN MEETS LURC’S SUBMISSION REQUIREMENTS.

The Wind Power Act requires the DEP and LURC to adopt guidance for submission requirements regarding decommissioning plans.¹⁰⁰ The Act does not, however, impose any regulatory requirements on applicants regarding decommissioning, and provides the Commission with flexibility in administering this requirement. LURC has published submission requirements relevant to wind power projects in the form of an Application checklist and guidance, which describes the necessary components of a decommissioning plan.¹⁰¹ Blue Sky East submitted a decommissioning plan with the Application.

As described during the hearing and in follow-up submissions, Blue Sky has modified

⁹⁶ Id. Exhibit A (Baskahegan Stream Watershed Recreation Use & Resource Analysis, 2010).

⁹⁷ Id. (Baskahegan Study at 14).

⁹⁸ VIA at 37.

⁹⁹ Palmer Report at 41.

¹⁰⁰ P.L. 2007, ch. 661, Part B, Sec. 13-13(6) (effective April, 18, 2008).

¹⁰¹ Windpower Application Checklist and Guidance, Section 7, Decommissioning Plan, dated November 2008.

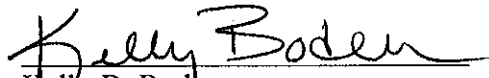
that decommissioning plan so the estimated salvage value and overall estimated decommissioning costs will be reassessed at the end of year seven (7) and fifteen (15).¹⁰² As the scrap value can fluctuate, these “true-ups” ensure that sufficient funds would be available for decommissioning in the event scrap values dropped in the future.¹⁰³ In addition, if the Project is operated beyond the 20-year anticipated life of the turbines, Blue Sky will reevaluate scrap value and overall costs at years 20 and 25 as well.¹⁰⁴

For each round of reassessment, Blue Sky will submit the revised scrap value and decommissioning cost estimates to the Commission for review and approval. Both the cost back up and calculation methodology will be included for Commission review. In the event the decommissioning funds are insufficient to cover any revised estimate, Blue Sky will make a lump sum contribution to the reserve fund within 60 days of Commission approval of the revised estimate.¹⁰⁵ The guarantees made by Blue Sky with respect to Decommissioning and provided in the record, ensure that the decommissioning plan, if it must be used, will be sufficient to cover the costs of Project removal and site restoration.

CONCLUSION

For the foregoing reasons, Blue Sky East, LLC respectfully requests that the Commission approve DP 4886. Attached hereto as Exhibit A are proposed Key Findings of Fact.

Dated: July 8, 2011


Kelly B. Boden
Juliet T. Browne
Verrill Dana LLP
PO Box 586
Portland, ME 04112-0586
Tel: (207) 774-4000
Attorneys for Blue Sky East, LLC

¹⁰² June 15, 2011 Response to Commission questions at 5.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

EXHIBIT A

PROPOSED KEY FINDINGS OF FACT

Site Selection

Finding. The Project will largely utilize existing permanent logging roads for access and is located adjacent to an existing BHE transmission line. (Kearns et al. Pre-Filed Test. at 6).

Finding. The collector line will be located within the footprint of the existing and proposed roadways, and will not impact any existing resources. (Hart et al. Rebuttal Test. at 3).

Finding. The predominant forest types in the Project area are Spruce-Fir Northern Hardwoods, a common, widespread ecosystem throughout most of northern Maine, and Beech-Birch-Maple, the dominant hardwood forest in the state. (Gravel et al. Pre-Filed Direct Test. at 10).

Finding. No rare or exemplary natural communities were located in the Project area, with the closest, Frenches Meadow (a domed bog ecosystem), 1.25 miles away from the Project. (Gravel et al. Pre-Filed Direct Test. at 11).

Finding. With the exception of a single peregrine falcon, no rare, threatened, or endangered species or significant or essential wildlife habitats were observed in the Project area. (Gravel et al. Pre-Filed Direct Test. at 7). No Significant or Essential Wildlife Habitats or significant fisheries resources are known to exist in the Project area. (July 8, 2009 Letter from Rick Jordan and June 23, 2009 Letter from James Hall (Exhibit 13B to the App.)).

Tangible Benefits

Finding. The Bull Hill Project will result in the displacement of air pollution associated with fossil-fuel based generation and contribute toward the State's greenhouse gas reduction objectives. (35-A M.R.S.A. §§ 3402 (1), 3453).

Finding. Blue Sky anticipates that the Project will create approximately 225 construction jobs, 3 permanent employment positions to operate and maintain the facility, and 5 technicians employed by the turbine manufacturer to be on-site for at least the first three years of the Project. (App. at 24; June 15, 2011 Blue Sky Response to Commissioner Questions at 3).

Finding. The Project will result in an average annual tax payment of \$342,343 adjusted by the credit enhancement agreement. (App. at 24; Kearns, et. al. Pre-Filed Direct Test. at 11).

Finding. Blue Sky has agreed to a host community benefit payment of \$5,848 per megawatt per year to the Hancock County Commissioners, a community benefit payment of \$20,000 per turbine per year to the Town of Eastbrook, a one-time \$25,000 contribution to the Downeast Salmon Federation for conservation projects in the Narraguagus River Watershed, and an annual contribution of \$20,000 to the DSF to establish a fund for the improvement of water quality in Spectacle Pond, Narraguagus Lake, and the Narraguagus River watershed. (Community Benefit Agreement dated June 2, 2011 between Blue Sky East and Hancock County Commissioners; Community Benefit Agreement dated May 6, 2011 between Blue Sky East and Eastbrook; Kearns et al. Pre-Filed Direct at 12).

Bats

Finding. Detection rates during acoustic surveys were at the low end of the range for other similar studies conducted at Stetson I, Stetson II, and Mars Hill. (Gravel et al. Pre-Filed Test. at 18).

Finding. Myotis species bats, which species suffers from White Nose Syndrome, tend to fly at lower altitudes than migratory bats. As a species, the long-distance migrating bats, and not the Myotis species, have the higher risk of collision with turbines, as they “tend to be flying higher through the site.” (Test. of Richard Bard, Tr. Vol. II at 244-245).

Finding. Blue Sky has committed to working with MDIFW to develop methodologies for a study of bat risk and mortality which will include curtailment at a portion of turbines during the season identified as highest risk. A detailed study design for the first two years of operation will be developed in consultation with MDIFW, the Bat and Wind Energy Cooperative, Bat Conservation International (“BCI”), and potentially the University of Maine and BCI has confirmed their commitment to participating in the design of the study. (June 2, 2011 Letter from Blue Sky; June 15, 2011 MDIFW Response to Commission Questions).

Avian/Raptors

Finding. The vast majority of nocturnal migrants fly at altitudes far above the rotor swept zone of the proposed turbines. (Gravel et al. Pre-Filed Test. at 23).

Finding. Blue Sky has committed to perform post-construction monitoring in accordance with comments and requirements requested by MDIFW and an adaptive management plan will also be implemented, if necessary. (Blue Sky’s May 16, 2011 revised App. Exhibit 19).

Finding. Raptor migration through the Bull Hill Project area is similar to other sites proposed in Maine and there has been only one raptor collision documented at Mars Hill, Stetson I, or Stetson II (one Barred owl at Mars Hill). (Gravel et al. Pre-Filed Test. at 17).

Finding. No active bald eagle nests were documented in the Project area and the closest nest is two miles from the Project. (Gravel et al. Pre-Filed Test. at 16).

Wetland/Vernal Pools/Ground and Surface Water

Finding. The Bull Hill Project will not impact any wetlands. (App. at 16).

Finding. The Project will not result in any new impacts to significant vernal pools or their buffer zones. (App. at 16; Gravel et al. Pre-Filed Direct Test. at 14).

Finding. Any impacts to vernal pools or their buffer zones associated with existing logging roads will not exceed the 25% threshold for requiring mitigation. (Tr. Vol. II at 239-240; June 15, 2011 MDIFW Response to Commission Questions at 3; June 15, 2011 Blue Sky’s Response to Commission Questions at 3).

Sound

Finding. When operating at full sound output, the estimated hourly sound limit at the lot line of the nearest residence is 39.6 dBA (at a distance of 3,705 feet from the nearest turbine), which is below the required DEP nighttime limit of 45 dBA and the Project will meet all other DEP requirements at all protected locations. (Bodwell Pre-Filed Direct Test. at 6). EnRad also determined that the sound levels from the Project would be 5 dBA or more below applicable quiet limits, tonal sounds were not expected to occur, and SDR events were not expected frequently. In the event SDR events occurred, the Project has a buffer of at least 5 dBA between predicted levels and the applicable limits. (EnRad Peer Review at Section 6.3. and 8.0, p. 5).

Finding. The adjacent Town of Eastbrook has enacted a municipal ordinance with three quantifiable noise standards: a nighttime sound limit of 40 dBA applied at all locations on a parcel containing a residence and extending 660 feet beyond the parcel boundary; (2) an hourly sound limit of 35 dBA at any location greater than two miles from any turbine; and (3) 5 dBA may be added to measured sound levels for purposes of determining compliance if there are certain tonal sounds.

Finding. Blue Sky's sound modeling predicts that the Project will comply with Eastbrook's 40 dBA standard at all protected locations, 35 dBA standard two miles from any turbine, and will not generate tonal sounds that would trigger application of Eastbrook's tonal penalty. Operation of the Stetson I and Stetson II projects has shown that actual sound levels have been 2-4 dBA below the models used for these projects, including Bull Hill. (Tr. Vol. II at 113-114).

Visual

Finding. There is one resource of state or national significance, Narraguagus Lake, located within three miles of the Project. Fourteen additional scenic resources of state or national significance are located within eight miles of the Project. (DeWan Pre-Filed Test. at 12; Palmer Report at 4).

Finding. Of the 15 scenic resources, the Project cannot be seen from 8 resources. (DeWan Pre-Filed Test. at 12-13).

Finding. Blue Sky submitted a visual impact assessment and conducted a user survey, by a research firm, Market Decisions, Inc., in consultation with LURC's visual resources peer reviewer, Dr. Palmer, to collect information regarding user expectations and impacts of the Project on use and enjoyment of recreational resources in the Project area. (DeWan Pre-Filed Rebuttal Test. at 2).

Finding. The high visibility of turbines at Narraguagus Lake "will be moderated by an anticipated low use of Narraguagus Lake for activities where scenic value is a central part of the experience." (Palmer Report at 41).

Finding. For Donnell Pond, the turbines "will not be visually dominant." (Palmer Report at 41).

Finding. The summit of Black Mountain is approximately 7.9 miles from the Project. (DeWan Pre Filed Direct Test. at 32). Views of the Project from the summit of Black Mountain are "significant," however, the summit "receives relatively few visits in a year." (Palmer Report at

41). On Black Mountain the Project is seen only over an arc of 11° out of a 360° view. (VIA at 33). The views of the Project from Black Mountain are to the North, while the “higher rated” and higher quality views are to the South. (DeWan Pre Filed Direct Test, at 32). While views of the Project from Black Mountain may be significant, users “have the option to look at a higher rated view.” (Palmer Report at 42). Mr. DeWan concluded that “the Project will have no effect on the most highly rated view [from Black Mountain], i.e., towards Mount Desert Island and Acadia National Park to the south.” (VIA at 34).

Finding. Tunk Mountain is approximately 4.9 miles from the Project. (DeWan Pre Filed Direct Test, at 32). At Tunk Mountain, recreational use is low as there is no “formal access and use is thought to be light.” (Palmer Report at 41-42). On Tunk Mountain the Project is seen only over an arc of 22° out of a 360° view. VIA at 35. From Tunk Mountain, “it is expected that users will focus on the superior view towards the coast.” (VIA at 34). On Tunk Mountain the Project will not be visible at all from “the majority of the overlooks... which are oriented to the south toward Frenchman Bay and the mountains of Mount Desert Island.” (VIA at 35).

Finding. Blue Sky conducted a user survey in the Donnell Pond Unit over Columbus Day weekend in 2010. (App. Exhibit 18, Market Decisions Report).

Finding. Dr. Palmer noted that the site and timing of the user survey was chosen for the “prominent views of the Project” and the fact that on a busy holiday weekend “there might be more visitors than at other scenic resources where the project will be visible.” (Palmer Report at 7). Dr. Palmer found that although there were some limitations to the study, “similar limitations are commonly encountered in marketing research, and there do not appear to be any obvious biases introduced into the study.” (Palmer Report at 22).

Finding. This study shows that even at locations where users found that views of the Project would be severe, the Project was not likely to adversely impact their enjoyment of the resource or their likelihood of returning to the resource. (Market Decisions Report at 33-39). For hikers on Black Mountain, most respondents (74%) stated that the visibility of the Project would have no effect or a minor effect on their likelihood of returning. (MD Report at 33). For users of the Schoodic Beach area of Donnell Pond, 92% stated the Project would have no impact or a minor impact on their enjoyment or likelihood of returning. (MD Report at 39). In addition, although 3% said that views of the turbines would make it less likely they would return, 4-5% said the views would make it more likely they would return. (MD Report at 38-39).

Decommissioning

Finding. Blue Sky has proposed a decommissioning plan which includes decommissioning costs (\$1,885,000) minus total salvage value (\$1,636,000) for a net decommissioning cost of \$249,000. (Blue Sky April 13, 2011 Response to Agency Comments at 5).

Finding. Blue Sky will reassess the estimated salvage value and overall estimated decommissioning costs at the end of year seven (7) and fifteen (15). (June 15, 2011 Response to Commission questions at 5). If the Project is operated beyond the 20-year anticipated life of the turbines, Blue Sky will reevaluate scrap value and overall costs at years twenty (20) and twenty-five (25). (June 15, 2011 Blue Sky Response to Commission questions at 5).

From: [Lynne Williams](#)
To: [Murphy, Donald;](#)
cc: [Kelly Boden; Geoff West;](#)
[Mills, Amy;](#)
Subject: Letter to Chair
Date: Saturday, July 09, 2011 4:04:14 PM
Attachments: [Letter re Brief.pdf](#)
[ATT554602.txt](#)

Hello Don: Attached please find my explanatory letter to Chair Hilton re: the CCRHC Final Brief.
Best, Lynne

STATE OF MAINE

LAND USE REGULATION COMMISSION

IN THE MATTER OF DEVELOPMENT)	
APPLICATION DP 4886)	
BLUE SKY EAST, LLC)	POST-HEARING BRIEF
BULL HILL WIND PROJECT)	INTERVENOR CONCERNED
)	CITIZENS OF RURAL HANCOCK
)	COUNTY

INTRODUCTION

Concerned Citizens of Rural Hancock County (CCRHC) is an association of individuals and families who own land in Township 16, neighboring Eastbrook and Osborn. The group has been monitoring the plans of First Wind and their subsidiary, Blue Sky East, LLC (BSE) for a couple of years, since plans were initially revealed for an industrial wind project in the Town of Eastbrook. When Eastbrook passed a strict wind ordinance, the location of the project suddenly shifted to Township 16 and CCRHC's monitoring continued. CCRHC strongly objects to the project proposed for Bull Hill and Heifer Hill and sets out its arguments below.

I. THE BULL HILL WIND PROJECT WILL HAVE AN UNDUE ADVERSE IMPACT ON THE SCENIC CHARACTER AND EXISTING USES OF RESOURCES OF STATE SIGNIFICANCE

12 M.R.S.A. §685-B (4)(C) sets forth the legal criteria for determining scenic impacts:

“Adequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character, and natural and historic resources in the area likely to be affected by the proposal...
 In making a determination under this paragraph, regarding an expedited wind energy development, as defined in Title 35-A, section 3451, subsection 4, the commission shall consider the development’s effects on scenic character and existing uses related to scenic character in accordance with Title 35-A, section 3452.

35-A M.R.S.A. §3452 (1) provides additional guidance for making a determination of scenic impact:

“...whether the development significantly compromises views from a scenic resource of state or national significance such that the development has an unreasonable adverse effect on the scenic character or existing uses related to scenic character of the scenic resource of state or national significance.”

35-A M.R.S.A. §3452 (3) (E) and (F) evaluation criteria read as follows:

“E. The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities’ presence on the public’s continued use and enjoyment of the scenic resource of state or national significance; and F. The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from scenic resource of state or national significance and the effect of prominent features of the development on the landscape.”

The burden is upon the Applicant to demonstrate that they meet each and every applicable statutory criteria and agency rule. BSE did not meet this burden in multiple ways.

BSE relies on the hiker survey done by Market Decisions in 2010 to argue that the presence of the turbines will have little impact on hiker enjoyment or on hikers' intent to continue to recreate in the area. The methodology of the survey, however, is flawed and it is neither valid nor reliable¹. Its conclusions can hardly be taken more seriously than the conclusions of the daily online poll in the Bangor Daily News, which includes a disclaimer stating that “this is not a scientific poll.”

The survey results included no statement of the margin of error, which is necessary to consider when taking into account the effects of chance and uncertainty in the sampling process. The margin of error is also referred to as the confidence interval, and without this number there should be no confidence in a survey or poll. In addition to failure to include a margin of error, this survey also suffers from a non-response bias, due to the fact that the sample of hikers was self-selected, and the

¹ Reliability is the extent to which a survey yields the same results on repeated trials. Validity refers to the degree to which a survey accurately reflects or assesses the specific concept that the researcher is attempting to measure. “Introduction to Survey Quality,” Bierce, Paul P. And Lars E. Hyberg, John Wiley & Sons, Inc. (2003).

characteristics of the hikers who agreed to be interviewed could be very different from those who refused to be interviewed.²

Even LURC's owner peer reviewer, Dr. James Palmer, was critical of the survey, noting that

“the survey primarily addressed one type of user (hiker), at a significant distance from the project (nearly 8 miles), for primarily one type of scenic resource (mountain summit in a state park), at the very end of the hiking season. There is little to no information about the scenic sensitivity to grid-scale wind power projects for other users (e.g., people fishing, boating, swimming, ice skating, skiing, attending an outdoor interpretive program, stopping at a scenic turnout, or using a historic site), at closer distances, during other seasons, and other types of scenic resources.”³

Further on in his report, Dr. Palmer again expresses concern with the survey, stating that “there are other Evaluation Criteria that currently are not being addressed by the survey data and should be: [] Criteria C Expectations of the typical viewer [] Criteria E.1 Extent (i.e., numbers of users) and duration of user activities.”⁴

The Bureau of Public Lands (BPL) also expressed concerns with the design of the survey instrument.

“The Bureau has no special expertise related to survey design. However, we offer the following comments as to questions the Commission should consider in interpreting the results. Beyond that, we suggest that until there is a consistent survey methodology established through peer review that guides future visual impact user surveys, the Commission should have an independent professional review of the survey instrument to determine if it introduces any particular bias to the results.”⁵

BPL Comments, dated June 14, 2011, at 4.

The BPL goes on to state that the survey may not be representative of the range of users, that there are differences between back-country hikers and day hikers, weekday users may differ from weekend users, and both may differ from holiday users, and the survey should have presented visual simulations from both Black and Tunk Mountains to actual visitors to those peaks.⁶

2 Id.

3 “Review of the Bull Hill Wind Project Visual Impact Assessment,” James F. Palmer, dated March 21, 2011, at 43 (Palmer).

4 Id.

5 Bureau of Public Lands Comments, dated June 14, 2011, at 4 (BPL).

6 Id.

In their reliance on the results of what is a poorly constructed survey that utilized a small, self-selected sample, BSE spins the results as demonstrating little potential impact of the presence of the turbines on visitor willingness to return to the Donnell Pond unit. Yet, both Dr. Palmer and the Natural Resources Council of Maine (NRCM)⁷ predict that the impact will be medium at some locations, and high at others. (“The greatest adverse impact of the project on resources of state significance is on the mountains of the Donnell Pond Unit.....the turbines will be very visible.”)⁸ (“While James Palmer characterized the overall scenic impact on Black and Tunk Mountains as Medium-High, we would probably characterize it as High, when you add the impacts on Schoodic and Caribou Mountains to the impacts on Black and Tunk Mountains.”)⁹ (“Finally, there will adverse scenic impacts on Donnell Pond, itself....Overall, we agree with Jim Palmer’s assessment that the impacts would be medium.”)¹⁰

NRCM likewise notes that no assessment of the scenic and recreational impacts on Narraguagus Lake was done, even though “[t]he most direct impact from the project will be on [Narraguagus Lake].” “[M]any turbines will be visible, and they are relatively close (starting at less than 3 miles.)” “Given these factors, we agree with James Palmer that the overall impact on Narraguagus Lake is medium.”¹¹

A medium impact in some areas and a high impact in others is no small outcome. Likewise, calling a 20% decrease in the likelihood of a hiker returning to the Donnell Unit “no significant decrease,” is very misleading, as is the use of the same language with reference to 18% of those surveyed stating that they would be less likely to use Donnell Pond for water activities.¹² While 20% and 18% might not be statistically significant¹³, those percentages most certainly should be significant to the Commission and both the Commission and the BPL should take them very seriously.

In summary, the concerns of the BPL, NRCM, the 20% of those surveyed, who are much less

⁷ With a few exceptions, NRCM has either supported prior industrial wind proposals or not participated in the permitting process. The fact that the organization expressed such concerns about the potential scenic and recreational impacts of the Bull Hill Wind Project should be weighed very seriously by this Commission.

⁸ Comments of the Natural Resources Council of Maine, dated May 16, 2011, Public Hearing Comments at 23 (NRCM).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² “Bull Hill Wind Power Project Intercepts,” Market Decisions, October 2010, at 38, 39 (Survey).

¹³ It is curious that the surveyers would be concerned about “statistical” significance when they disregarded other standards of good survey research, such as including a margin of error.

likely to return to the Donnell Unit, and the many residents and recreationists who testified, strongly suggest that there will not only be significant visual and recreational impacts of the Bull Hill Wind Project on scenic resources of state significance, but that those impacts will have an “unreasonable adverse effect on the scenic character or existing uses related to scenic character of the scenic resource of state....significance.”¹⁴ Given the critical design issues, and the concerns expressed above, the survey should be given little consideration. The best advice is that offered by Market Research itself: “We cannot say whether the data would be the same for other days. Additional data would be necessary to make more definitive conclusions.”¹⁵

These potential visual and recreational impacts alone give this Commission a basis for denying the BSE application.

II. IMPACTS ON WILDLIFE WILL BE INCONSISTENT WITH THE COMPREHENSIVE LAND USE PLAN AND MAINE'S SITE LOCATION OF DEVELOPMENT LAW

While the Expedited Wind Law made it more difficult for the Commission to consider potential visual impacts of an expedited wind project, with this exception the Commission continues to have the same discretion as before to consider the Comprehensive Land Use Plan (CLUP) and Maine's Site Location of Development Law in the same ways it would review the permitting standards for a non-wind project of similar size and scope. This is particularly salient when considering the potential impacts on wildlife.

Section 5.2 (C) of the CLUP states that in reviewing a development application, the Commission must be assured (2) that "adequate provision has been made... to assure there will be no undue adverse effect on..." natural resources, including wildlife.” Likewise, the Site Location of Development Law requires that there be no adverse effect on the natural environment....”¹⁶

Maine Department of Inland Fisheries and Wildlife (MIFW) expressed grave concerns in their oral and written testimony, as well as in comments submitted subsequent to the public hearing, about threats to the bat population in Maine. (“As expressed in MDIFW’s pre-filed comments and at the hearing, non-

14 35-A M.R.S.A. §3452 (1).

15 Survey at 2.

16 38 Sec. 483-A (3)

migratory populations of cave-dwelling bats remain a very serious concern for the Department. Since the Public Hearing on May 16 and 17, 2011, Maine has confirmed the presence of White Nose Syndrome in bat hibernacula inside the state for the first time. Any additive risk factors, including wind turbine mortality, may place these populations in jeopardy.”¹⁷ MDIFW and BSE have apparently come to an agreement to “pursue a rigorous study of operational curtailment at the Bull Hill facility.” However, this study is far less than the significant curtailment that MDIFW initially pursued and which they still consider necessary. (“In the event that a final study design can not be agreed on, IF&W restates our recommendation that all turbines be curtailed from April 20 to October 15 from 30 minutes before sunset to 30 minutes after sunrise whenever wind speeds are below 5.0 mps.”)¹⁸

The reason that MDIFW compromised on what the wildlife biologists in the Department feel is necessary to protect the bat population can be summed up in the following statement: “...IF&W understands that operational curtailment of the Bull Hill wind facility comes at a financial price for the applicant....”¹⁹ However, financial impact, particularly due to operational changes that are necessary to protect a threatened species, is not a factor that either can or should be considered by this Commission. Undue adverse impact, yes; scenic impact, yes; threats to wildlife, yes; financial impact on the applicant, definitely no.

CCRHC continues to have concerns that the “compromise” position between MDIFW and BSE is insufficient to protect the population of non-migratory, cave-dwelling bats in Maine, particularly now that they are threatened by White Nose disease. It is incumbent on this Commission to take into account the repeated recommendations of the biologists in our own wildlife agency, and demand that BSE follow the strong recommendations made by the Department, whether or not that comes at a financial loss. If BSE refuses to do so, this Commission should deny the application based on BSE's refusal to avoid undue adverse impact on wildlife that the Department considers to be a threatened

¹⁷ MDIFW Responses to Questions from LURC, dated June 15, 2011, at 1 (MDIFW)

¹⁸ Id.

¹⁹ Id.

population.

BSE has also failed to address concerns about impacts on migratory bird populations in the project area. The Stantec studies note that a total of 12 species of raptor were documented in the vicinity of the project area, including one state-listed endangered species, a peregrine falcon.²⁰ Furthermore, two state species of special concern were observed in winter and spring 2010 – northern harrier and bald eagles, although Stantec is quick to state that all of the bald eagles were outside the project area.²¹

To isolate location in this manner is unscientific and unsupportable. There is no wall around the project area that will prevent birds, or other wildlife, from entering the project area. The issue of concern regarding birds is not so much that they will be killed by the blades²² but rather that the species will be harmed by habitat fragmentation and destruction. As ornithologist Michael Good noted in his written testimony, “fragmentation of any kind threatens birds and their survival and each cumulative change to Maine's forest system...threatens birds.”²³ Good further states that the bald eagles and other raptors are almost certainly utilizing the many ponds, lakes, streams and wetlands within and surrounding the project site.²⁴ Likewise, environmental scientist Nancy O'Toole noted about the peregrine falcon, “this bird is in early recovery as a local breeding population. It cannot withstand very much disturbance or mortality through habitat loss, nest disturbance or "take" from turbine blade strikes.”²⁵ O'Toole also suggests that basing the assumption of no undue adverse impact to bald eagles at Stetson and Mars Hill on the absence of fatalities over two years of operation is misleading. As she

20 Blue Sky East, LLC Application, Exhibit 13(C), at 19 (Application).

21 *Id.*

22 Although, as Stantec itself notes, radar studies have indicated that the seasonal average flight height for spring (217 ± 8 meters) is on the low end of the range of flight heights recorded at other wind projects in the east (210 meters to 552 meters in spring). The estimated percent below turbine height during spring 2010 radar surveys at the project was 38 percent for the season. The percent below turbine height at other publicly available wind projects in the eastern United States during spring ranges from 3 to 26 percent. Yet rather than admit that given that this region is in the migratory flight path of tropical birds, as ornithologist Michael Good testified, Stantec discounts the validity of its own numbers. Application Narrative at 17.

23 Written Direct Testimony of Michael Good, dated April 25, 2011, at 2 (Good).

24 *Id.*

25 Written Rebuttal Testimony of Nancy O'Toole, dated May 6, 2011, at 3 (O'Toole Rebuttal).

states, “[t]here are indirect impacts from habitat loss, fragmentation and edge effect and noise that can prevent the area being [sic] suitable habitat for many passerines and raptors.”²⁶

While BSE has tried to frame vernal pool concerns as isolated only to legal setbacks, both Good and O'Toole are clear that the connection between vernal pool alternation and avian survival in the area is critical. “Any watersheds altered during construction could have detrimental impacts on birds because they require very specific habitat for nesting and rearing of young.” [Emphasis in original]²⁷ Good goes on to recommend limiting wetland manipulation “in all ways possible,” especially with vernal pools, which calls the “lifeblood of terrestrial systems.”²⁸

As seen by just these excerpts from the experts, and the MDIFW comments, there are significant concerns about avian impacts, not just from direct mortality but from indirect impacts due to habitat and wetland alterations. Yet the only thing BSE proposes in order to address the serious threats to migratory birds, particularly raptors, is post-construction monitoring.²⁹ And, while BSE grudgingly agreed to a post-construction study in order to determine the necessity of curtailment in order to protect bats, they resisted following the Department's recommendations, presented many time in written and oral comments, due to the “financial impact.”

However, to be truly protective of the above-named species of concern and endangered species in this area, such piecemeal mitigation and minimization measures are neither consistent with the CLUP standard of “no adverse impact,” nor with the Site Location of Development Law of “no adverse environmental impact.” It should be very clear to the Commission that the collective wildlife concerns presented in both written and oral testimony demonstrate that the project location is not an appropriate location for an intensive industrial wind facility such as that proposed by BSE, and thus the application for the Bull Hill Wind Project should be rejected on these grounds.

26 Id.

27 Good at 2.

28 Id.

29 Application, Exhibit 19.

III. THE COMMISSION SHOULD CONSIDER THE EASTBROOK NOISE REGULATIONS

As was testified to, the Town of Eastbrook passed an ordinance regulating wind turbines, and that ordinance includes a noise standard.³⁰ The Eastbrook ordinance is more restrictive than the state noise regulations, permissible under state law. (“Nothing in this subsection may be construed to prohibit a municipality from adopting noise regulations stricter than those adopted by the board.”)³¹

This Commission is required, under Title 12, to find that the project will have no undue adverse affects on existing uses.³² The Commission is also permitted to consider “quantifiable noise standards” in an adjacent municipality's ordinance.³³ BSE concedes that the Eastbrook Ordinance includes “quantifiable noise standards,” and that Eastbrook is an adjacent municipality. They object, however, to the locations at which the noise measurements must be taken, to wit within 660 feet of the property line of a protected location.³⁴

This objection, of course, is due to the fact that there is one location where the Eastbrook noise standards would not be met, and that is problematical for BSE. In order to avoid having to admit that the Bull Hill project configuration violates the Eastbrook ordinance, they parse the interpretation of the ordinance by arguing that since the location at issue is not a residence, it shouldn't really be counted. However, when interpreting an ordinance, one looks first to the plain meaning of the language, and this language is very clear – 40 dbA is the night time sound limit of any location within 660 feet of a protected location. One does not get to intent if the plain language is as plain as this language is.

CCRHC strongly encourages this Commission to at least take the opportunity to review the Eastbrook Ordinance and to take it into consideration when making its findings on whether BSE has met all legal and regulatory standards. We contend that such an analysis will necessarily lead to a finding that the violation of the Eastbrook Ordinance prevents them from having met all standards and

30 Oral and Written Testimony of David Boulter, May 17, 2011, Public Testimony at 52-53 (Boulter).

31 38-483-A (3) (C)

32 12 M.R.S.A. Sec 685-B(4) (C).

33 Section 375.10 B of the Board of Environmental Protection Rules.

34 BSE Rebuttal to Public Comments, dated June 7, 2011, at 2-3.

that the application should be rejected.

IV. THE BLUE SKY EAST, LLC DECOMMISSIONING PLAN IS INADEQUATE

As the Commission will recall, there was much discussion at the public hearing about scrap and salvage value of the turbines and the turbine components, and there was particularly insightful and informative testimony on decommissioning submitted by Alan Michka during the evening session.³⁵

LURC's own application submission guidelines require an applicant to "*Provide a demonstration of current and future financial capacity that would be **unaffected by the applicant's future financial condition** to fully fund any necessary decommissioning costs commensurate with the project's scale, location, and other relevant considerations, including but not limited to, those associated with site restoration and turbine removal.*" [See PL 2008, Sec. B-13]" [Emphasis added].

LURC must apply its own rules. Rather than rely on the speculative nature of the future scrap and salvage value of the turbines and related components, the Commission should require the Applicant to carry the risk of market fluctuations by requiring the Applicant to provide full funding for the entire decommissioning project *prior* to construction in the form of a bond or other surety, rather than waiting seven years to even assess what decommissioning might cost thirteen years hence. The Commission has the authority to require this and, in fact, has the fiduciary responsibility not to put the state and the county at major financial risk. If the Commission does approve this industrial development, CCRHC strongly urges that this financial requirement be imposed.

V. IT IS TIME FOR A CONSIDERATION OF CUMULATIVE IMPACT

When she testified at the evening session, Kathleen Donohue submitted a map into evidence and CCRHC asks that the Commission study this map closely. A copy is submitted as Attachment A to this brief.

³⁵ Oral and Written Testimony of Alan Michka, dated May 16, 2011, Public Testimony at 29-30.

What the map shows, are the locations in just three counties in Downeast Maine, of operating industrial wind projects, pending applications, proposed projects and met towers. Hancock, Washington and Penobscot Counties, with only one exception west of Route 95, are being overrun with industrial wind facilities that are out of scale and deleterious to this region's economy, environment and scenic and recreational values.

As NRCM requested in their testimony,

“There is one other issue which we urge the Commission to consider. It is our understanding that there may be additional wind projects, or a project expansion, planned for this region. If this project is approved, it will act as a magnet for other projects, both because of the economic efficiencies of managing projects that are geographically close to each and because the scenic resources will have already been adversely impacted. This is a situation where LURC has the ability to think about the cumulative impacts of multiple projects before any of the projects have been built.”³⁶

Likewise, Michael Good warned in his testimony that

“there should be consideration of cumulative effects to eagles and all birds and their ecosystems by reviewing the effects: 1) effects [sic] occur away from the source (changes or consequences can occur some distance from the project. 2) Fragmentation or change in landscape patterns (forestry, cuts for roads and diversion of waterways 3) effects arising from multiple sources or pathways (like multiple industrial wind facilities and 4) any secondary indirect effect.”³⁷

As noted above, environmental scientist Nancy O'Toole also expressed serious concerns about cumulative impacts on birds, particularly the endangered peregrine falcon, which is in “early recovery,” stating that “[p]ossible cumulative impacts on migrating routes along the coast and inland should be considered.”³⁸ O'Toole also noted that “[t]he Atlantic Salmon's critical habitat has already been impacted by...other in-progress projects and cumulative effect concerns should be raised in light of the numerous other proposed grid scale wind energy projects waiting in the wings.”³⁹ “LURC needs to review incremental and cumulative impacts to Bald Eagle historic nesting sites as well as hunting and

36 NRCM at 24.

37 Good at 2.

38 O'Toole Rebuttal at 3.

39 Written Direct Testimony of Nancy O'Toole, dated April 25, 2011, at 4 (O'Toole Direct).

foraging grounds in and around the project area.”⁴⁰

According to the Stantec studies, “six species of special concern were observed in the project area. It is important to note these same species are being impacted by other projects, including Spruce and Saddleback mountains. The species included are the American Redstart, the Black and White Warbler, Chestnut Warbler and White Throated Sparrow. Now more than ever, cumulative impacts to species of concern, or those listed as threatened, should be included in considerations of development projects across Maine. Rollins Project is +/- 44 miles away, the Bower Mountain proposal is 48 miles, and Stetson II is 58 miles away.”⁴¹

As the Commission reviews the map, please note the following realities. Three sets of met towers have been permitted outside of the expedited area, in Townships 28 and 34, and Devereaux Township. Will First Wind soon be asking to, once again, expand the expedited area? Met towers have been permitted in Trescott, the only part of the UT that extends down to the coast. Just like Transcanada did with the Kibby expansion, First Wind already has a Bull Hill expansion in the planning stage, in the Town of Eastbrook. A massive project is proposed for the Town of Danforth, one that would dwarf any project to date.

The economy of this region of Maine is almost fully based on its beauty and environmental integrity and wilderness values. Acadia National Park is not the only treasure in Hancock County, as the Donnell Unit is valued and visited by thousands of visitors from local towns and far away countries. Impacts on the uses of that location of statewide significance is bad enough; but, when we look at the pending, proposed and likely to be proposed projects throughout this region, one cannot help but come to the conclusion that there is a concerted, well-coordinated attack on the values, economy and very lifeblood of Downeast Maine. In light of this, CCRHC pleads with this Commission to take the long view, and consider not just the isolated, although significant, impact on rural Hancock County, but also the cumulative impacts of incremental industrial development on the region as a whole.

CONCLUSION

As stated in the beginning of this document, the burden is on the Applicant to demonstrate that the Application meets all applicable standards. The Applicant has failed to meet that burden, by

⁴⁰ O'Toole Direct at 9.

⁴¹ Id. at 11.

submitting an Application that:

1. Compromises views from a scenic resource of state significance, the Donnell Unit, resulting in an unreasonable adverse effect on the scenic character and existing uses related to the scenic character of the Donnell Unit;
2. Produces undue adverse impacts on wildlife and on the natural environment due to direct and indirect impacts on non-migratory bats, birds and raptors, both endangered, threatened and of special concern;
3. Fails to meet the Town of Eastbrook Noise Ordinance, which this Commission has the authority to consider; and
4. Fails to meet even the basic dictates of financial capacity, as required under LURC Rules, by failing to demonstrate the ability to fund future decommissioning without regard to the future financial condition of BSE.

For these reasons, and in consideration of the the increasingly negative cumulative impact of incremental development of industrial wind facilities in Downeast Maine, CCRHC respectfully requests that this Commission reject the application of BSE to construct an industrial wind facility on Bull and Heifer Hills in Twp. 16, Hancock County, Maine.

Respectfully submitted,

/s/Lynne Williams
Attorney for the Concerned Citizens for Rural Hancock County
Maine Bar. No. 9267
13 Albert Meadow
Bar Harbor, ME 04609
(207) 266-6327

