



STATE OF MAINE

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LAND USE REGULATION COMMISSION
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PATRICK MCGOWAN
COMMISSIONER

TO: Commission Members
FROM: Marcia Spencer Famous, Senior Planner
DATE: October 27, 2009
SUBJECT: Schedule for rulemaking: Appendix F to Chapter 10, Expedited Wind Energy Development Area Designation

I. Background.

- A. *August 5, 2009.* On August 5, 2009, the Commission released for rule-making various changes to Appendix F of the Commission's Chapter 10 Land Use Districts and Standards, the Expedited Wind Energy Development Area Designation. The rulemaking includes: (1) staff initiated changes to Appendix F, pursuant to PL 2008 c. 415, Part D (reference LD 1475); and (2) a change to Appendix F proposed by TransCanada Maine Wind Development, Inc., (hereinafter "TransCanada") for expansion of the wind energy development expedited permitting area to include a specified place in Chain of Ponds Twp., pursuant to 12 MRSA, § 685-A(13) [*see* 35-A MRSA § 3404 and § 3453]. The Commission did not set the dates for the public comment period or the date for a public hearing at that time, but asked staff to propose a schedule to the Commission for discussion.
- B. *September 2, 2009.* Staff brought a schedule back to the Commission at the September 2, 2009 monthly business meeting, which included as an example one possible option for the dates for the public comment period and a public hearing. Prior to the meeting, the Attorney General's office had advised that Maine's Administrative Procedures Act (APA) requirements for rulemaking must govern the public comment period and hearing. The sample schedule, therefore, anticipated incorporation into the public comment and hearing process an opportunity for the Commission to obtain information regarding the applicable statutory criteria for expanding the expedited permitting area.

After the Commission identified the need for further guidance on how to implement the statutory criteria for expanding the expedited permitting area, the proposed rulemaking schedule was tabled, and the Commission directed staff to revise it to include provision for gathering background information on implementation of the pertinent statutory criteria [*see* 12 MRSA, § 685-A(13)] separately from TransCanada's petition to expand the expedited permitting area. The Commission requested that the background information focus on the work of the Governor's Task Force on Wind Power Development. In particular, the Commission requested information on how the map of the expedited permitting area was prepared. This map, which shows the designated areas for expedited permitting of wind energy development, is currently included in Appendix F of LURC's Chapter 10 Land Use Districts and Standards.

II. Introduction.

This memorandum outlines several process and timing options available to the Commission for the rulemaking to amend Appendix F to Chapter 10 as proposed by TransCanada to add a specified parcel in Chain of Ponds Twp. The staff requests that the Commission provide direction as to the process and timing that should be undertaken. For the staff-initiated changes to Appendix F mentioned in Section I,A(1), above, the start date for the public comment period could be set once the public comment period and hearing schedule for TransCanada's proposal are determined. A public hearing is not recommended for the staff-initiated changes.

III. Possible rulemaking/public hearing schedule for consideration of TransCanada's petition to expand the expedited permitting area to include a specified parcel in Chain of Ponds Twp.

The following outlines options for the rulemaking process, sample schedules, and other related information, as requested by the Commission, regarding TransCanada's petition to expand the expedited permitting area. Section A provides the purpose of Part One of the hearing, possible panelists, and discussion topics; and Section B describes briefly the purpose of Part Two of the hearing. Table 1 in Section C outlines the steps of the bifurcated public hearing process the Commission has expressed an interest in, and the related activities. Table 2 of Section C presents three possible options for the schedule to help facilitate the discussion today. These three options are only examples, and can be adjusted as long as all timelines required under the Commission's rules in Chapter 4 and 5 and the APA are met. The Commission's decision on rulemaking must occur within 90 days of the final closure of the public hearing, which would coincide with the end of the public comment period [*see* the Commission's rules Chapter 4, § 4.06(8)].

The key components of the rulemaking process that could vary and are discussed below are:

- Overall timing [except as provided in APA and the Commission's rules Chapters 4 and 5]
- Content of each part of the hearing
 - Part One
 - Deliberation
 - Part Two
- The amount of time between each step
- Location of the hearing
- Timing of preparing a guidance document
- The need for additional rulemaking

Consistent with the previous direction of the Commission, the public hearing for the rulemaking proposed by TransCanada could be in two parts: (1) testimony on and consideration of background information regarding the statutory criteria in order to guide the Commission's decision; and (2) testimony on and consideration of TransCanada's proposed additions to the expedited permitting area. Both parts of the hearing would be held within the public written comment period, with a minimum of 10 days written comment period and 7 days rebuttal period following the close of Part Two of the hearing [*see* Commission's rules, Chapter 5, Section 5.18].

- A. *Public Hearing, Part One: Background information and guidance.* The subjects addressed during Part One of the hearing could include the following:
- Overview of the mission and work of the Governor’s Task Force on Wind Power Development;
 - The method of preparation of the map showing the areas designated for expedited permitting; and
 - The legislative intent underlying 12 MRSA, Section 695-A(13) and 35-A MRSA, Section 3453, which authorize the Commission to add specific areas to the expedited permitting area, and established the applicable statutory criteria.

To facilitate consideration and discussion of these topics, Part One of the public hearing could consist of a panel presentation, as well as time reserved at the end for testimony from the general public. An opportunity for the Commission to deliberate on the information gathered could occur after Part One of the hearing, followed by preparation of a guidance document by staff, if the Commission so desires. Because many of the potential presenters are located in Augusta, it may make sense to hold Part One of the hearing there. Potential panelists and topics for consideration are listed below. Part One of the public hearing would occur prior to Part Two, the portion of the hearing specific to TransCanada’s proposal, which is referenced below. (**Note:** The steps for a separate rulemaking process for rules on how to implement expansion of the expedited area are not included here due to complexity, but are an option if the Commission so desires).

1. Possible panel participants

- *Senator Philip Bartlett:* Member of the Governor’s Task Force on Wind Power Development, Senate Democratic Majority Leader
- *Representative Stacey Fitts:* Member of the Governor’s Task Force on Wind Power Development; Joint Select Committee on Maine’s Energy Future; the Governor’s Task Force on Ocean Energy, and the Utilities and Energy Committee
- *Karin Tilberg,* Senior Policy Advisor to the Governor, Governor’s Office
- *Alec Giffen:* Director Maine Forest Service; Chair of the Governor’s Task Force on Wind Power Development
- *Peter Didisheim:* Natural Resources Council of Maine; Member of the Governor’s Task Force on Wind Power Development
- *John Kerry:* Director of the Office of Energy Independence and Security; member of the Governor’s Task Force on Wind Power Development and the Governor’s Task Force on Ocean Energy
- *David Littell:* Commissioner, Maine Department of Environmental Protection; Member of the Governor’s Task Force on Wind Power Development
- *David Publicover:* Appalachian Mountain Club; Alternate member of the Governor’s Task Force on Wind Power Development
- *Fred Todd:* LURC staff who helped to prepare the expedited area map
- *Wind power developer* (to be determined)

2. Possible subjects relevant to expansion of the expedited permitting area:

- What did P.L. 2007 c. 661 (hereinafter "the Wind Energy Act"), which enacted recommendations of the Governor's Task Force on Wind Power Development, do, and what did it not do?
 - To what size and type of wind energy projects does the Wind Energy Act apply?
 - Do the provisions of the Wind Energy Act apply to municipalities?
 - What state agencies were specifically charged with responsibilities under the Wind Energy Act?
 - Did the Wind Energy Act shift the bulk of the regulatory authority for projects in LURC jurisdiction from LURC to DEP? What laws were changed and what were not?
- Why was the expedited permitting area established?
 - How were the expedited permitting area boundaries determined?
 - What criteria were used to determine which areas would be included, which would not?
 - What was the intent of the expedited permitting area?
 - Were more stringent standards intended for the areas not included in the expedited permitting area?
- Why was the parcel in Chain of Ponds Twp. that TransCanada is proposing to include in the expedited area not included initially?
 - How was the parcel in Chain of Ponds Twp. that was designated for expedited permitting selected?
- Why was the expedited permitting area handled as a rule-making process rather than as zoning in LURC jurisdiction?
 - How does the rule-making process differ administratively from the rezoning process?
- How did the Governor's Task Force on Wind Power Development ("Task Force") and Legislature determine the three criteria [*see* 35-A MRSA, Section 3453] that govern the Commission's decision when considering a proposal to expand the expedited area?
 - What are the State's renewable energy goals referred to in the criteria, and how should the Commission determine if a particular project is important to achieving those goals?
 - Should the actual production of a wind power project once it is on-line be factored in?
 - What does "logical geographic extension" mean?
- Why did the Task Force recommend inclusion of a provision in the Wind Energy Act for adding land to the expedited permitting area?
 - What was the intent? Did the Task Force envision that (a) developers or others would petition LURC to add land to the expedited permitting area; (b) LURC would initiate an expansion; and (c) an expansion would include large areas or be limited to a specific development area?
 - Why was an option for removal of land from the expedited permitting area not included?
 - Did the Task Force envision that LURC should create guidance for how to proceed with assessing the three criteria in each case?

- B. *Public Hearing, Part Two: TransCanada's proposed expansion of the expedited permitting area.* Part Two of the public hearing would be held after Part One, on a separate day, and could be held somewhere in the vicinity of the proposed project. Testimony received during Part Two of the hearing would be on topics specific to TransCanada's petition to expand the expedited permitting area to include a specified place in Chain of Ponds Twp.

- C. *Three sample options for the rulemaking schedule.* Table 1, below, provides the steps involved with the rulemaking process options discussed above. Table 2 outlines three alternative schedules (options 1-3), and approximate dates for three possible options for the timing of the steps to complete this rulemaking.

Table 1: Rulemaking process steps for TransCanada’s petition to amend Chapter 10, Appendix F to expand the wind power expedited permitting area to included a specified parcel in Chain of Ponds Twp. [Note: The steps in the shaded rows are in addition to a typical rulemaking process and are optional.]

	Rulemaking process steps	
1	Public notice of the public hearing and comment period	<ul style="list-style-type: none"> ▪ Dates for the public hearing ▪ Structure and content of the hearing ▪ Dates for the public comment period ▪ Timing and content of Notice pursuant to APA [see Title 5, § 8052 & § 8053]
2	Part One of public hearing to gather background information	<ul style="list-style-type: none"> ▪ Testimony and background information on the wind power expedited permitting area established by the Wind Energy Act [PL 2007 Ch. 661]. ▪ Hearing conducted in accordance with LURC’s Chapters 4 and 5, and APA: Title 5, § 8052 and § 8053; in consultation with the AG’s office.
3	Commission deliberation on Part One	Consider the need for guidance or rules to implement the provisions of Title 12, § 685-A(13) Provide directive to staff
4	Staff recommendation on guidance document language (Note: See alternate timing for this step in row #8)	In response to Commission directive resulting from Part One of the hearing and the deliberative session
5	Part Two of public hearing on TransCanada’s petition	<ul style="list-style-type: none"> ▪ Testimony directly related to TransCanada’s proposal to add a specified parcel to the expedited permitting area, amending Appendix F to Chapter 10. ▪ Pursuant to Title 12, § 685-A(13) ▪ Hearing conducted in accordance with LURC’s Chapters 4 and 5, and APA: Title 5, § 8052 and § 8053
6	End of written comment period	In accordance with Chapter 5, § 5.18
7	End of rebuttal period	Rebuttal by interested parties in response to written comments In accordance with Chapter 5, § 5.18
8	Staff recommendation on guidance document language (Note: see alternate timing in row #4)	To be determined
9	Commission deliberation and decision on TransCanada petition	Within 90 days of the final closure of the public hearing [Chapter 4, § 4.06(8)(a)]

Table 2: Sample alternative schedules for rulemaking process for TransCanada’s petition to amend Chapter 10, Appendix F to expand the wind power expedited permitting area to include a specified parcel in Chain of Ponds Twp. [Note: *CM* = *Commission meeting*]

	Rulemaking process steps	Option 1	Option 2	Option 3
1	Public notice: Public comment period and hearing, schedule	December 30	November 25	November 25
2	Part One of public hearing to gather background information*	January 20	December 16	December 16
3	Commission deliberation on information gathered during Part One of the public hearing	February 3 (<i>CM</i>)	December 16	December 16
4	Staff recommendation for guidance document (alternatively, see step #8, below)	April 7 (<i>CM</i>)	***	***
5	Part Two of public hearing on TransCanada’s petition	April 21	January 20	December 17
6	Final date for public to submit written comments to the file	May 3	February 1	December 28
7	End of rebuttal period	May 10	February 8	January 4
8	Staff recommendation for guidance document	***	March 3 (<i>CM</i>)	February 3 (<i>CM</i>)
9	Commission decision on TransCanada petition	June 2 (<i>CM</i>)	April 7 (<i>CM</i>)	March 3 (<i>CM</i>)

* Part One date is also subject to availability of panelists

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Interested Persons

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