Verrill Dana LLP
Attorneys at Law

JULIET T. BROWNE
jbrowne@verrilldana.com
Direct: 207-253-4608

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

November 25, 2009

VIA E-MAIL and U.S. MAIL

Board Chair Susan Lessard
c/o Terry Hanson
Board of Environmental Protection
28 Tyson Drive, Ray Bldg.
Augusta, ME 04333

RE: Departmental Orders L-24441-24-A-N, L-2441-TF-B-N
Record Hill Wind LLC - Record Hill Wind Project

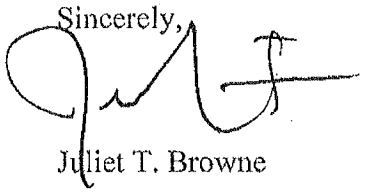
Dear Chair Lessard:

Attached is the objection of Record Hill Wind LLC ("RHW") to a petition for a temporary restraining order filed by the Concerned Citizens to Save Roxbury and several individuals (collectively the "Appellants") on November 3, 2009.

The Appellants' petition relates to a submission made by RHW in accordance with a condition contained in RHW's permit. As such, the petition pertains to *Department action after issuance of the permit* and does not challenge the Department's issuance of the permit itself. Accordingly, the petition is distinct from the *appeal of the permit* filed by Appellants on September 21, 2009. To the extent the Board determines that these two matters should be combined for the sake of economy, RHW has no objection. However, we believe it is important not to conflate issues related to compliance with the terms and conditions of the permit (as is at issue in the petition for a temporary restraining order) with the appeal of the underlying permit. Additionally, in the event these matters are heard together, RHW assumes that all the submissions (and attached exhibits) made to the Board by Appellants and RHW with respect to Appellants' request for a temporary restraining order will be considered at that time.

Thank you for your attention to this matter.

Sincerely,



Juliet T. Browne

JTB/prf
Enclosure
cc: Peggy Bensinger, Assistant Attorney General
Cynthia S. Bertocci, BEP Executive Analyst
Marybeth Richardson
Rufus E. Brown, Esq.

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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

Record Hill Wind LLC	)	
Roxbury, Oxford County	)	RECORD HILL WIND LLC'S
RECORD HILL WIND PROJECT	)	OBJECTION TO APPELLANTS'
L-24441-24-A-N (approval)	)	REQUEST FOR TEMPORARY
L-24441-TF-B-N (approval)	)	RESTRAINING ORDER

Record Hill Wind LLC ("RHW") objects to the request for a temporary restraining order submitted by the Concerned Citizens to Save Roxbury and several individuals (collectively the "Appellants"). On November 3, 2009, the Appellants filed a petition with the Board for a "Temporary Restraining Order on the Issue of Financial Capacity." The Appellants claim that RHW's demonstration of financial capacity is insufficient and therefore the Board should issue an "emergency order" prohibiting construction pending resolution of the Appellants' objections to the demonstration of financial capacity. Appellants' Petition at 2, 4-5. As discussed below, the Appellants' request is without merit and should be denied.

INTRODUCTION

On August 20, 2009, the Department of Environmental Protection (the "Department") issued the above-captioned permit to RHW for the construction of a 22-turbine expedited wind energy facility (the "Project"). This occurred after a comprehensive review process that included a public meeting where the Department sought and obtained public input on the Project, a review of sound issues by Warren Brown of EnRad Consulting, and a review of health issues by Dr. Dora Mills of the Maine Centers for Disease Control. On September 21, 2009, the Appellants filed an appeal with the Board of Environmental Protection (the "Board"). One of the claims raised by the Appellants was that RHW had not made the demonstration of final financial capacity prior to commencing construction.

On or about October 1, 2009, the Department notified RHW that demonstration of final financial capacity was required prior to construction, not prior to operation, as had been erroneously stated in the permit. RHW immediately complied and submitted documentation of financial capacity in the form of a letter dated August 27, 2009, to Commissioner Littell from the Northern Trust Company. The letter confirmed that RHW's controlling majority owner possesses unencumbered assets in excess of $150 million. The cost of the Project is estimated at $120 million. The Department reviewed and approved this submission as sufficient to demonstrate financial capacity, as indicated by a letter of confirmation dated October 5, 2009.[1]

The Project originally had a targeted in-service date of 2010, and to meet that schedule RHW began construction shortly after receiving approval from the Department.[2] Due to business considerations, including falling energy prices, however, RHW has delayed the Project's targeted in-service date until 2011. See November 24, 2009 Letter from RHW to the Department.[3] As a result, instead of continuing construction through the winter, as previously planned, construction at the Project site is scheduled to end by mid-December and will not recommence until sometime after mud season in 2010. Any work still underway is focused on completing roadwork to the point that erosion and sedimentation control measures are in place and the site is stabilized for the winter. Moreover, and in light of questions regarding financial capacity, RHW has offered to submit to the Department updated documentation of financial capacity at least 15 days prior to recommencing construction.

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[1] The demonstration of financial capacity and the Department's approval of that showing are attached to the Appellants' Petition as Exhibits B and C.

[2] The Department's order approving the Project was effective upon signature and was not stayed by Appellants' appeal. 06-096 CMR Chapter 2, § 19(D); 5 M.R.S.A. § 11004.

[3] RHW's November 24, 2009 letter is attached hereto as Exhibit A.

DISCUSSION

I. The Board Is Not Vested with Authority to Grant the Extraordinary Relief Requested by the Appellants

The Appellants designate their request as a petition for a "temporary restraining order," however they fail to cite any legal authority that would entitle them to the remedy they seek. A temporary restraining order is a form of extraordinary equitable judicial relief "only to be granted with utmost caution and only when justice urgently demands it and the remedies at law fail to meet the requirements of the case." Dirigo Housing Assocs., Inc. v. Crowley, 2003 WL 22309103, *5 (Me. Super. 2003). The Board's enabling statute does not vest the Board with either equitable jurisdiction or the authority to grant a temporary restraining order. See 38 M.R.S.A. § 341-D (enumerating Board's duties and responsibilities); 5 M.R.S.A. § 11007(4) (agency action reversible when in excess of statutory authority); see also Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74, 76 (Me. 1980) (equitable jurisdiction to issue a temporary restraining order to stay agency action must be created by statute).

In addition, to the extent that the Appellants' petition is a request for the Board to initiate an enforcement action related to RHW's compliance with the terms of its permit, that is also beyond the Board's jurisdiction. RHW's permit contains a condition requiring a "final demonstration of financial capacity to be completed before construction of the project." Letter from Beth Callahan to Robert Gardiner, Oct. 5, 2009.[4] The Appellants claim that RHW's final demonstration of financial capacity is insufficient and therefore the Board should issue an order halting construction because the permit condition has purportedly not been met. Appellants' Petition at 2. The Appellants' petition does not allege that the permit was invalidly issued, but

[4] The letter is attached as Exhibit C to Appellants' Petition.

rather alleges that RHW is not in compliance with the permit's condition related to financial capacity.

Accordingly, the petition is a de facto request for the Board to enforce a permit condition, which is outside the Board's jurisdiction. See 38 M.R.S.A. § 341-D(6). The Board's enabling statute enumerates four areas where the Board has enforcement authority:

> Enforcement. The board shall:
>
> A. Advise the commissioner on enforcement priorities and activities;
> B. Advise the commissioner on the adequacy of penalties and enforcement activities;
> C. Approve administrative consent agreements pursuant to section 347-A, subsection 1; and
> D. Hear appeals of emergency orders pursuant to section 347-A, subsection 3.

Id. None of these enumerated powers create Board jurisdiction to initiate an enforcement action. By contrast, the Department is vested with specific statutory authority to initiate enforcement action to compel compliance with a permit condition:

> Whenever it appears to the *commissioner*, after investigation, that there is or has been a violation . . . of the terms or conditions of a license, permit or order issued by the board or the commissioner, the *commissioner* may initiate an enforcement action by taking one or more of the following steps . . . .

38 M.R.S.A. § 347-A(1)(A); see also id. § 341-A(2) ("The department shall consist of the Board of Environmental Protection, in the laws administered by the department called "board," and of a Commissioner of Environmental Protection, in the laws administered by the department called "commissioner."). This statutory scheme clearly demonstrates that the authority to initiate enforcement actions has been delegated to the Department and has not been vested in the Board.

Accordingly, the Board does not have jurisdiction to grant any request by the Appellants to enforce the financial capacity condition in RHW's permit.

II. There Is No Basis for Issuing a Stay of the Department's Finding on Financial Capacity

To the extent that the Appellants are requesting that the Board issue a stay of the Department order pursuant to 5 M.R.S.A. § 11004, and assuming for the sake of argument that the Board is authorized to issue such a stay,[5] the Appellants fail to prove, and in some cases fail even to allege, the elements required for the Board to stay the Department order. To obtain such a stay, the Appellants must demonstrate that 1) they have a strong likelihood of success on the merits, 2) they will suffer irreparable injury absent the requested stay, and 3) there will be no substantial harm to adverse parties or the general public if the stay is issued. See 5 M.R.S.A. § 11004; see also Me. Op. Atty. Gen. 80-116 (stating that petition to the Board for stay of agency action is governed by 5 M.R.S.A. § 11004). A preliminary injunctive remedy such as the Appellants request here "is an extraordinary remedy that may only be awarded upon a clear showing that the [Appellants are] entitled to such relief." Winter v. Natural Resources Defense Council, 129 S. Ct. 365, 376 (2008) (vacating preliminary injunction against Navy training exercises due to potential harm to public interest in military preparedness despite "near certainty" of irreparable environmental harm). As discussed below, the Appellants have not shown that they are entitled to the extraordinary Board action that they request.

A. Appellants Fail to Demonstrate a Strong Likelihood of Success on the Merits

The Appellants have not demonstrated a strong likelihood of success on the merits of their claim regarding financial capacity. The documentation of financial capacity submitted by RHW and approved by the Department complies with both the letter and the intent of the

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[5] RHW is not aware of any express statutory authority for the Board to issue such a stay. Cf. Bar Harbor Bank and Trust, 411 A.2d 74 (equitable jurisdiction to issue injunctive relief must be created by statute).

statutory and regulatory standards. The Site Location of Development Act ("Site Law") requires the Department to find that a developer "has the financial capacity and technical ability to develop the project in a manner consistent with state environmental standards and with the provisions of this article." 38 M.R.S.A. § 484(1).

The Department has wide discretion in determining what constitutes a sufficient demonstration of financial capacity. See In re Lappie, 377 A.2d 441, 444 (Me. 1977) (upholding Department determination that sufficient financial capacity was demonstrated by bank letters stating that applicant had "an excellent credit rating" and that applicant "was capable of handling the financial responsibilities" of project); Sablegolf, LLC v. DEP, 2005 WL 2716531, *2 (Me. Super. 2005) (not reported in A.2d) (upholding Department's discretion to allow applicant to demonstrate financial capacity after permit has been issued).

The Department's discretion is evident in the language of the statutory financial capacity standard, which allows the Department to approve a project based upon evidence of a loan or "with evidence of *any other form* of financial assurance the board determines by rule to be adequate." 38 M.R.S.A. § 484(1) (emphasis added). That discretionary language is carried over to Chapter 373 of the Department rules, which provides a list of examples of potentially sufficient forms of evidence. 06-096 CMR Chapter 373, § 1(B). Contrary to the Appellants' assertion, Chapter 373 does not require an applicant to submit one of the listed forms to demonstrate financial capacity. Preceding the list of examples, the rule states that project applications must provide evidence of financial capacity "including information, *such as the following, when appropriate*." Id. (emphasis added). One of the examples listed is the following: "[c]opies of bank statements *or other evidence* indicating availability of funds, when the developer will personally finance the development." Id. § 1(B)(6) (emphasis added).

The discretion and flexibility reflected in the regulations governing demonstration of financial capacity is a practical necessity. Project financing, especially in capital-intensive projects such as grid-scale wind energy facilities, is a complex and competitive process, and there are several tools available for financing such projects. A one-size-fits-all approach is not practicable and would have a chilling effect on project development. Accordingly, the August 27, 2009 letter submitted by RHW demonstrates that RHW has the financial capacity to develop the Project, and it was well within the Department's discretion to determine that the RHW submission constituted sufficient evidence of financial capacity under the Site Law and Chapter 373.

B. Appellants Have Not Demonstrated and Cannot Demonstrate Irreparable Harm

Even assuming for the sake of argument that the Department erroneously approved RHW's demonstration of financial capacity, the Appellants have not alleged nor can they demonstrate any irreparable harm stemming from the Department's decision.[6] Furthermore, because RHW is halting construction for the winter, the Appellants' request for an "emergency order" to stop Project construction is moot.

1. Any Harm Related to Financial Capacity is Entirely Speculative

The purpose of the Site Law financial capacity requirement is to ensure that an applicant has sufficient funds to build the project in compliance with "state environmental standards." 38 M.R.S.A. § 484(1); see also 06-096 CMR Chapter 373, § 1(A); In re Maine Clean Fuels, 310 A.2d 736, 754-55 (1973). Accordingly, the only potential risk of harm related to an allegedly

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[6] The only harm alleged in the Appellants' petition is a purported generalized environmental harm stemming from RHW's permitted construction activities. As such, the Appellants have not alleged any particularized injury and therefore have not demonstrated standing to challenge the Department's action. In order to demonstrate standing, the Appellants must allege that they will be impacted in a manner distinct from the public at large. See Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18, 973 A.2d 735, 740-41. Even accepting every one of the Appellants' assertions as true, the petition does not identify any particularized injury to the appellants.

inadequate demonstration of financial capacity is that – at some point in the *future* – the Project will not be built in accordance with state environmental standards. Any such harm is therefore entirely speculative and does not constitute irreparable harm. See, e.g., Water Keeper Alliance v. U.S. Dept. of Defense, 271 F.3d 21, 34 (1st Cir. 2001) ("vague concerns" regarding impact to endangered species insufficient to demonstrate irreparable harm; "concrete showing of probable deaths" of endangered species required).

The Appellants have not produced any evidence that Project construction has not complied with applicable environmental standards. The only information the Appellants provide regarding the purported injury they will suffer are the following generic, conclusory statements: "Construction continues, doing irreparable damage to the project area" and "there is an unacceptable *risk* that there will be irreparable damage to the environment associated with the project." Appellants' Petition at 2, 4 (emphasis added). The Appellants fail to identify with any specificity what harm is purportedly resulting from the permitted activities undertaken by RHW. Additionally, the Appellants fail to provide any factual support whatsoever for their allegation of harm. In fact, the work conducted to date has been in accordance with the state environmental standards, and there is no evidence that RHW has failed to commit the necessary financial resources to ensure that appropriate erosion control and other protective environmental measures are in place.

Moreover, the Appellants have not suggested that they will suffer irreparable harm due to construction of the Project in accordance with the environmental terms of RHW's permit. The Department's approval of RHW's demonstration of financial capacity does not in itself result in any harm to the Appellants. Even if, assuming for the sake of argument, the Department approval was made in error, the Project will still be built in compliance with state environmental

standards. All evidence to date indicates that construction has been and will continue to be conducted in accordance with environmental standards.

Finally, for Appellants to demonstrate irreparable harm they must show that they will suffer an injury for which there is no adequate remedy at law. See Bar Harbor Banking & Trust, 411 A.2d at 79. Project compliance with state environmental standards is assured by the conditions contained in RHW's permit. If Project work is not conducted in accordance with those conditions, the Department can institute enforcement action, as prescribed by statute, to compel compliance with environmental standards. Accordingly, there is an adequate remedy at law for any potential harm related to RHW's financial capacity and the Appellants cannot allege irreparable harm.

2. *RHW Is Halting Construction for the Winter and therefore Appellants Cannot Demonstrate Irreparable Harm due to Construction*

To the extent that Appellants are simply objecting to construction, which appears to be the case, their request for extraordinary relief is moot because construction activities are ceasing for the winter. As described above, RHW has notified the Department that it has delayed the Project's in-service date by one year and, as a result, it is closing down the site for the winter and will not recommence construction until 2010. In addition, and though not required, RHW has agreed to provide the Department with an updated demonstration of financial capacity at least 15 days prior to recommencement of construction. Accordingly, the Appellants' request for an "emergency order" to stop Project construction on the basis of financial capacity is moot.

C. The Public Interest Weighs Against Appellants' Requested Stay

The Appellants' petition makes no mention whatsoever of the potential harm suffered by the public if a stay were to be issued. On that basis alone, the request should be denied as the Appellants have failed to allege, let alone prove, one of the elements required for a stay. The

public's interest in the Project is manifest by the Legislature's enactments promoting the development of wind energy facilities like the Project. See P.L. 2008, ch. 661 ("An Act to Implement Recommendations of the Governor's Task Force on Wind Power Development") (hereafter the "Wind Power Act"). The Legislature took the unusual step of enacting the Wind Power Act as emergency legislation, underscoring the need to bring wind power on-line as soon as practicable. See id. The Wind Power Act requires public officials to take "every reasonable action" to attract appropriately sited wind energy projects. 35-A M.R.S.A. § 3404. Thus, as evidenced by the Wind Power Act, consideration of the public interest weighs in favor of allowing construction to proceed on expedited wind power developments that have undergone comprehensive review by the Department, as has occurred here.

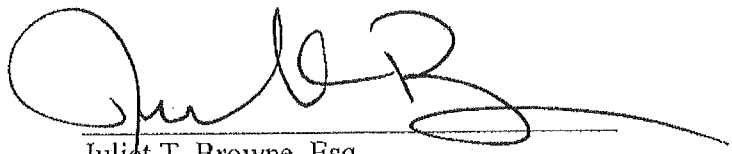
Additionally, granting a stay in this instance would result in potential environmental harm *that would not occur* if the stay were denied. As noted above, RHW is currently closing down the site and implementing site stabilization and other environmental control measures. Those measures will minimize erosion and sedimentation due to stormwater and snowmelt over the winter and spring. A stay issued now would halt those mitigation measures and result in potential environmental harm. Thus, the public interest strongly weighs against issuance of a stay.

CONCLUSION

As discussed above, the Appellants have not identified any legal authority that would entitle them to the extraordinary remedy they request. The Appellants' requests for the Board to issue a temporary restraining order and to initiate enforcement action regarding compliance with RHW's permit conditions are both beyond the scope of the Board's statutory jurisdiction. Furthermore, the Appellants have not met the test for obtaining a stay pursuant to 5 M.R.S.A. §

11004. Finally, RHW is ceasing construction activities until the second quarter of 2010 and will provide updated information on financial capacity prior to recommencing work. Accordingly, RHW respectfully requests that the Board DENY the Appellants' request for a temporary restraining order.

Dated: November 25th, 2009



Juliet T. Browne, Esq.
Gordon R. Smith, Esq.
Attorneys for Record Hill Wind LLC
Verrill Dana, LLP
One Portland Square
Portland, ME 04112
(207) 774-4000

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EXHIBIT A

Browne, Juliet

From: Rob Gardiner [roberthgardiner@gmail.com]
Sent: Tuesday, November 24, 2009 2:32 PM
To: Richardson, Marybeth
Cc: Browne, Juliet; Ryan, Jonathan; Mike Novello; Angus King
Subject: change of schedule
Attachments: Dear Mary Beth(2).DOC

Mary Beth,

Attached is a letter describing the plans for shutting down work on the Record Hill Wind Project earlier than originally planned this winter. I believe it addresses all concerns that we discussed on the phone, but please notify me if you need additional information. We expect to have a more formal plan for the work within a few days, but I didn't want to wait to send you what I have ready today. We also expect that working with Steve, we'll develop more detail about the final erosion control measures that will applied under "best management practices".

Rob Gardiner

Record Hill Wind LLC
Brunswick, ME

November 24, 2009

To: Mary Beth Richardson, DEP

Re: Record Hill Wind, LLC; L-24441-24-A-N; L-24441-TF-B-N

Dear Mary Beth,

I am writing to confirm the change of timing in our Record Hill Wind project and the winding down of construction activities for the winter.

Due to business considerations, including current energy markets, we have decided to delay the project's target in-service date until 2011, and do not expect delivery of turbines before the spring of 2011. As a result, we have, altered the construction schedule for the work that is already underway under our licenses from MDEP and the Army Corps of Engineers. Although we initially intended to continue construction through the winter, instead we are winding down construction activities and will put the site to bed for the winter. We anticipate that all work required to do so will be completed in the next three to four weeks. Remaining activities include:

- Completing the access road to the ridge, which is currently nearly complete; and,
- Completing blasting for and formation of the bases of the pads and crane path road along the ridge between turbines #17 and #22.

Completing these sections will allow us to properly protect the development from erosion and sedimentation; in short, the more complete the road, the better it will be at handling stormwater. This plan calls for all rock sandwich, other drainage, and erosion control measures to be in place in those sections before we shut down work for the season. We will not put the final surface material on these road sections until next year, however, so we must keep the project's main access road gated near its entrance at Route 120. We are sending a letter to all Roxbury residents letting them know about this.

In addition to completing the access road to the ridge and the bases of the pads and crane path road along the ridge between turbines #17 and #22, we will implement best management practices to ensure that the site is stabilized for the winter. We will consult with Steve Roberge on these measures and expect that his Third Party Inspector visits will continue until work is closed down in mid-December. I have communicated this to Steve already. We assume that you will want to work with us to assure that all appropriate steps are taken to secure the quality of the work accomplished so far and to protect against any possible erosion situations. Steve has been helpful in this way to date, and we'd like him to continue. We will consider any guidance that you or Steve may offer on the need for inspections over the course of the winter.

Currently we do not have a firm schedule for the restart of construction, but we expect to resume soon after mud season in 2010. We expect to complete construction of roads, pads, and foundations by late 2010 and to begin erection of turbines as early in 2011 as possible. We will provide advance notice to DEP and third party inspector to ensure that your project oversight is in place and all conditions of the permit are being met. Additionally, in response to questions that have been raised regarding financial capacity, we are willing to provide updated documentation of financial capacity at least 15 days prior to commencement of construction activities.

If you have any questions or concerns about this plan, please contact me. Thank you.

Sincerely,

Robert Gardiner
President

Cc: J. Browne, J. Ryan