

Record Hill Wind, LLC // Natural Resources Protection Act  
Construction of 50.6 megawatt wind energy development - Roxbury

- Licensee reply submitted by Juliet Browne and Gordon Smith on behalf of Record Hill Wind LLC

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

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|---------------------------|---|------------------------|
| Record Hill Wind LLC      | ) | RECORD HILL WIND LLC'S |
| Roxbury, Oxford County    | ) | RESPONSE TO APPEAL OF  |
| RECORD HILL WIND PROJECT  | ) | THE DEPARTMENT'S ORDER |
| L-24441-24-A-N (approval) | ) | APPROVING THE PROJECT  |
| L-24441-TF-B-N (approval) | ) |                        |

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Record Hill Wind LLC ("RHW") hereby responds to the appeal of the above-captioned Order filed by the Concerned Citizens to Save Roxbury, the Silver Lake Camp Owners Association and several individuals (collectively the "Appellants").<sup>1</sup>

**INTRODUCTION**

The Appellants claim that the Department of Environmental Protection (the "Department") failed to conduct an adequate review of RHW's Application to construct a 22-turbine expedited wind energy facility in and around the Town of Roxbury (the "Project"). Specifically, the Appellants claim that the Department made erroneous conclusions regarding the Project's potential sound, health and scenic impacts, as well as purported errors related to decommissioning, title, right or interest, and post-construction wildlife monitoring. On the contrary, the Department's determination that the Project complies with all applicable laws and

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<sup>1</sup> At least some of the individually named Appellants have alleged sufficient injury to demonstrate standing to appeal the Order and therefore RHW does not dispute that the Board has jurisdiction to hear the appeal. Several of the Appellants, including Concerned Citizens to save Roxbury ("CCSR") and the Silver Lake Camp Owners Association, do not have standing, however, and therefore the Board should dismiss them as parties to the appeal. For example, both CCSR and Silver Lake Camp Owners Association appear to be unincorporated associations and therefore lack legal capacity to sue or otherwise bring a legal appeal. See, e.g., Tisdale v. Rawson, 2003 ME 68, ¶ 15, 822 A.2d 1136, 1140 (an unincorporated association lacks standing); Gulick v. Bd. of Env'tl. Prot., 452 A.2d 1202, n.1 (Me. 1982) (removing unincorporated association from lawsuit due to lack of legal capacity); Moffat Tunnel League v. United States, 289 U.S. 113, 118-119 (1933) (unincorporated association's "interest is not a legal one. It is no more than a sentiment . . ."). A number of the individually named Appellants including, but not limited to, Antonio DeSalle, Tom Ganley, Linda Kuras, Dale Hodgkins, B.J. Hodgkins, Colleen Martineau, Cathy Mattson, Lauren Olsen, Rob Olsen, Vicky Stanislawski, Todd Stanislawski, Eric Roderick, Rob Roy, Richard Theriault, Eben Thurston, and Lester Thurston have not alleged injuries to their property, pecuniary or personal rights or harm that is distinct from the harm allegedly experienced by the public at large and should be dismissed on that basis. See Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18.

regulations is based upon an exhaustive eight-month review process and is well supported by the record. As discussed below, the information in RHW's Application was confirmed by independent peer review and inter-agency consultation and all of the Appellants' claims were addressed by RHW and the Department during a comprehensive permitting process that involved extensive public comment and input. As a result, the Board should uphold the Department's decision and deny the request for a public hearing on the appeal.

### **PROCEDURAL BACKGROUND**

On December 2, 2008, RHW submitted an application to the Department of Environmental Protection (the "Department") for permits to construct a 22-turbine expedited wind energy facility (the "Project"). In early 2009, one of the Appellants, Steve Thurston, requested that the Department hold a public hearing. See E-mail from Steve Thurston to Beth Callahan, January 11, 2009 (attached as Exhibit 1).<sup>2</sup> Mr. Thurston's request was the only written request for a public hearing on the Project. Order at 4. Although Mr. Thurston identified concerns with three aspects of the Project, he did not provide any evidence of "conflicting technical information," which is the prerequisite for holding a public hearing. Moreover, Mr. Thurston stated in his request that "if written testimony carries the same weight as testimony presented in a public hearing, *then a hearing is probably not warranted.*" Exhibit 1 (emphasis added). Written testimony most certainly carries the same weight as testimony presented during a public hearing, and because it found that there was not "sufficient credible conflicting technical information to warrant a public hearing," the Department did not hold a formal public hearing. See Letter from Commissioner David Littell to Steve Thurston, January 23, 2009 (attached as Exhibit 2). As discussed below, however, the Department held a public meeting where members

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<sup>2</sup> Exhibits 1 through 14 are all part of the administrative record and are separately bound and provided to the Board here for its convenience.

of the public submitted extensive oral and written testimony and then sought and responded to public comment and input throughout the review process. After an eight-month review process, which included significant interaction between the Appellants and the Department, consultation with experts and sister review agencies, and an exhaustive public process and opportunity for comment and input, the Department issued the above-captioned permits to RHW pursuant to the Site Location of Development Act and the Natural Resources Protection Act.

Before even filing and during the processing of the application, RHW held numerous public meetings in the Project area. For example, on August 25, 2007, RHW met with the Roxbury Pond Camp Owners Association. In November 2007 as well as in February, June and November of 2008, RHW hosted public informational meetings at the Roxbury Town Hall. For all of these meetings an invitation was sent to every Roxbury postal patron. In addition, RHW representatives were present at 8 public meetings of the Roxbury Planning Board in 2008 and 2009, and at 12 public meetings of the Roxbury Board of Selectmen from 2007 to 2009. And, in addition to these 27 public meetings, the Project was debated and discussed at 2 full official town meetings (March, 2008 and January, 2009) at which the majority of the town's residents in attendance voted in favor of the project. Virtually all of the meetings of the Selectmen and the Planning Board were attended by residents of the Project area, including many of the Appellants, who participated in discussions regarding the Project.

The DEP review process also included substantial opportunity for public comment and input. For example, RHW held a public informational meeting in January, 2009, as part of the requirements associated with its DEP application. DEP staff were present at that meeting. On February 18, 2009, the Department held a public meeting in the auditorium of the Rumford High School pursuant to 38 M.R.S.A. § 345-A(5) to receive public input and to allow interested

parties to submit information. See Letter from Commissioner Littell to Interested Parties, January 23, 2009 (attached as Exhibit 3). Many of the Appellants attended the meeting, at which they submitted information and provided input to the Department on many of the same issues that are the subject of this appeal. See February 18, 2009 Public Meeting Attendance Sheet; Beth Callahan Notes on Public Meeting, February 18, 2009; E-mail from Steve Thurston to Other Interested Parties, February 6, 2009 (listing topics to discuss at DEP public meeting as including sound and health impacts) (all attached as Exhibit 4). The Department's sound expert, Warren Brown, was also present at that meeting. The Appellants were represented by legal counsel at that time. See Letter from Lynne Williams to David Littell, February 16, 2009 (attached as Exhibit 5).

In response to comments and information that interested parties submitted to the Department at the public meeting and in the months that followed, the Department produced a written response that was circulated to interested parties. The Department's response to comments addressed all of the issues that are the basis of this appeal. See Questions/Answers from Public Meeting & Submissions, June 15, 2009 (addressing comments related to sound and health impacts; scenic impacts; decommissioning; title, right or interest; electricity transmission infrastructure; and wildlife) (attached as Exhibit 6).

Furthermore, the Department contracted with an independent acoustical engineer, Warren Brown of EnRad Consulting, who peer-reviewed the technical submissions related to the Project's sound impacts. See Order at 9-11. The Department also sought review and input on the Project by other state agencies, including the Department of Health and Human Services, the Department of Inland Fisheries and Wildlife and the Maine Public Utilities Commission,

regarding potential impacts within those agencies' areas of expertise. The inter-agency review and approval process is detailed in the Department's Order. See Order at 10, 19-25.

During the review process senior Department staff, including Director of the Bureau of Land and Water Quality Andrew Fisk, Director of the Division of Land Resource Regulation James Cassida, and Project Manager Beth Callahan, met with representatives of the Appellants to discuss the issues that are the subject of this appeal. See E-mail from Steve Thurston to Beth Callahan, Andrew Fisk and James Cassida, July 27, 2009 (setting meeting agenda to include noise and siting issues associated with wind turbines) (attached as Exhibit 7). In addition, the Appellants inspected the administrative permitting record at the Department's offices on more than one occasion. See E-mail from Kevin Thurston to Kristen Chamberlain and Beth Callahan, June 3, 2009; E-mail from Steve Thurston to Beth Callahan, July 20, 2009; E-mail from Monique Aniel to Beth Callahan, July 23, 2009 (all attached as Exhibit 8).

On September 21, 2009, the Appellants, through counsel, filed this appeal with the Board.<sup>3</sup>

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<sup>3</sup> The Appellants' brief makes citation to numerous exhibits that were submitted in an appendix to the brief. Many of the Appellants' exhibits could have been but were not submitted to the Department during its review of the Project. On January 21, 2010, Board Chair Susan Lessard notified the parties that a substantial number of the Appellants' exhibits, particularly those with respect to purported sound and health impacts, were not admissible and would not be considered by the Board. See Letter from Board Chair Susan Lessard regarding Proposed Supplemental Evidence, January 21, 2010 (attached as Exhibit 9). Consistent with that ruling, RHW will not discuss the specifics of the many exhibits cited in the Appeal of Final Order ("Appellants' Brief"). All of the substantive issues addressed in those exhibits, however, were analyzed during the Department's review of the Project. The Board Chair also ruled that although submitted to the Department prior to permit issuance, the post-construction sound monitoring results from the Stetson project were not considered by the Department and therefore would not be considered part of the record on appeal. Consistent with the Chair's ruling, RHW will not discuss them here. RHW believes, however, that those results are properly part of the record and preserves this objection for appeal.

## DISCUSSION

### I. THE APPELLANTS' CLAIMS REGARDING ACCURACY OF THE SOUND MODELING ARE UNAVAILING

The Appellants have raised theoretical concerns regarding the ability of the sound model to accurately predict sound emissions associated with the Project. The sound model, however, has been peer-reviewed, empirically verified, and incorporates a number of conservative assumptions to ensure that the Project will meet the State's noise limits under "worst-case" conditions - - those most favorable to sound propagation.

The Project's sound modeling was conducted by Resource Systems Engineering ("RSE"), which has decades of experience in the use of computer models to predict sound emissions from an array of industrial sources. In particular, RSE has extensive experience and expertise in modeling sound emissions produced by wind energy facilities in Maine. In addition to the sound modeling for Record Hill Wind Project, RSE conducted the sound modeling for the Mars Hill, Rollins, Stetson and Oakfield wind energy projects. In addition to predictive modeling, RSE performs compliance monitoring to assure that actual sound emissions at operating wind energy facilities comply with regulatory limits and correspond to the levels predicted by the sound model. As a result of its compliance monitoring, RSE has calibrated its computer modeling to ensure its predictive accuracy.

Warren Brown of EnRad Consulting ("EnRad") has also verified that the RSE model is accurate and appropriate for predicting wind turbine sound emissions. Record Hill Wind Project Sound Level Assessment Supplement - - Peer Review ("EnRad Report") (attached as Exhibit 10).<sup>4</sup> EnRad is the third-party acoustical engineer retained by the Department to review the

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<sup>4</sup> EnRad reviewed the RSE Sound Level Assessment that was based on the initial Clipper turbines ("April 30 EnRad Report") and the RSE Supplement to Sound Level Assessment that was based on the Siemens turbines ("EnRad Report"). Both EnRad reports are included as Exhibit 10.

Project's Compliance with Department noise regulations and has peer-reviewed noise emissions from industrial facilities around the State. In particular, EnRad has evaluated both predictive modeling and/or compliance monitoring for several wind energy facilities in Maine, including the Mars Hill, Stetson, Rollins, and Oakfield projects. EnRad peer-reviewed four rounds of quarterly sound monitoring at Mars Hill and based on that experience has identified wind and weather conditions most favorable to wind turbine sound propagation and established minimum post-construction monitoring requirements to ensure that a project complies with the applicable noise limits under such conditions.

Furthermore, the predicted sound levels for the RHW Project are from 5-11 dBA **below** the nighttime sound level limit of 45 dBA that applies within 500 feet of a resident and 12-20 dBA below the nighttime limit of 55 dBA that applies at locations greater than 500 feet from a residence. See Order at 9; RSE Supplement to Sound Level Assessment (June 16, 2009) ("RSE Supplement") at 5 (attached as Exhibit 11).<sup>5</sup> Accordingly, even if the Appellants' claims regarding the model's accuracy had merit, which they do not, there is a substantial buffer between predicted levels and the most stringent DEP noise limits. It should be noted that a 5 dBA differential is substantial; because of the logarithmic nature of the dBA scale, 45 dBA is 1 1/2 times as loud as 40 dBA.

Even though the RSE model has been confirmed as accurate and appropriate through field measurements and independent, expert peer-review and the Project is well below the State's

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<sup>5</sup> Table 5-2S of the RSE Supplement mistakenly identifies a 15 dBA difference between predicted levels at PL4 (40 dBA) and the DEP noise limit at that location (45 dBA); it should state a 5 dBA difference. The original RSE Sound Level Assessment is based on the Clipper turbines and the RSE Supplement to the Sound Level Assessment reflects the change in turbines to Siemens 2.3 MW turbines. Both RSE reports are included as Exhibit 11. At most locations, the sound impacts are reduced as a result of the change in turbine type. See RSE Supplement at Table 5-2S.

most stringent sound limits, the Appellants persist in raising claims about theoretical limitations or inaccuracies in RSE's methodology. As discussed below, these claims are without merit.

A. The RSE Sound Model Is Appropriate for Predicting Wind Turbine Noise

The Appellants claim that the RSE model is flawed because it is based on ISO 9613-2, the International Standards Organization protocol for calculating attenuation of sound during propagation outdoors. Appellants' Brief at 19. ISO 9613-2 is the generally recognized standard for estimating outdoor sound propagation from a variety of sources. Order at 8; RSE Supplement at 1, 5. Even so, Appellants' apparent contention is that because ISO 9613-2 was not specifically designed for wind turbines, it cannot be used to accurately model wind turbine sound emissions. Appellants' Brief at 19. As discussed above, this theoretical concern of the Appellants is baseless in light of the model's real-world verification by both RSE and EnRad.

The sole support in the record for the Appellants' claim regarding ISO 9613-2 is a series of wind turbine sound measurements taken in New York by a fishery biologist with no apparent training or background as an acoustical engineer. See Appellants' Exhibit K-7 (Clifford P. Schneider, "Accuracy of Model Predictions and the Effects of Atmospheric Stability on Wind Turbine Noise at the Maple Ridge Wind Power Facility, Lowville, NY – 2007," April 10, 2008) at 27. Regardless of the author's lack of expertise, the turbine design and location, topography, and a variety of modeling assumptions, to name just a few variables, will have major effects on a model's sound level predictions, and measurements taken at an unrelated wind facility that are compared to predictions made by an unrelated sound model created by an unrelated entity provide no credible, factual basis to question RSE's sound level assessment of the RHW project.

In fact, the recommendations made by Mr. Schneider, the study's author, mimic the exact methods employed by RSE. Mr. Schneider states that ISO 9613 has an uncertainty factor of +/-3

dBa. Appellants' Exhibit K-7 at 22. The RSE model estimates include an additional 5 dBA to address uncertainty factors in the maximum sound power specifications and the model. Order at 9; EnRad Report at 2; RSE Supplement at 3-4 (showing an additional 5 dBA added to maximum sound power output). Mr. Schneider states that modeling software should be validated "with actual measurement data." Appellants' Exhibit K-7 at 22. Unlike the sound models discussed by Mr. Schneider, the RSE model was calibrated based on four rounds of quarterly testing at Mars Hill. Mr. Schneider also recommends that modeling and compliance measurements should account for worst-case atmospheric conditions where turbine noise is most noticeable.

Appellants' Exhibit K-7 at 22. The RSE model assumes full sound power production from all turbines operating simultaneously with moderate downwind conditions in all directions. Model calculations exclude potential sound attenuation due to foliage. The surfaces of nearby waterbodies were assigned no attenuation due to ground absorption. General ground absorption was calculated conservatively by assuming a mix of hard and soft ground. RSE Supplement at 5. Furthermore, the RHW noise compliance assessment plan requires monitoring under atmospheric conditions most favorable to sound propagation and therefore most likely to result in worst-case sound impacts. Order at 9; EnRad Report at 4-5 (describing meteorological and other requirements for post-construction monitoring); RHW Wind Turbine Sound Compliance Assessment Plan ("Sound Compliance Plan") (attached as Exhibit 12).

In other words, RSE used very conservative assumptions to produce a truly worst-case analysis and still showed results substantially below DEP limits.

Accordingly, the use of the ISO 9613-2 methodology is consistent with international standards and appropriate for modeling wind turbine sound emissions.

B. Point Source Calculations Are Appropriate for Sound Modeling of Wind Turbines

The Appellants claim that RHW should have used line source rather than point source calculations in the sound modeling for the Project. Appellants' Brief at 21-22. To the contrary, the use of point source calculations in modeling wind turbine noise is supported by industry practice and its accuracy has been verified by measurements taken at operating wind energy facilities. The accepted international standard for determining sound power levels from wind turbines treats wind turbines as point sources. See IEC 61400-11, Wind Turbine Generator Systems – Part 11: Acoustic Noise Measurement Techniques (2002). Consistent with IEC 61400-11, RSE modeled wind turbines as point sources. RSE Supplement at 2.

The Department's independent sound consultant, Warren Brown of EnRad, reviewed the Appellants' claim that the turbines should have been modeled as line as opposed to point sources and concluded that RSE's use of point source calculations was in fact the most accurate method of modeling wind turbine sound propagation. Order at 10-11 ("In the case of known sound sources in a linear array, such as wind turbines along a ridge, calculations are the most accurate when based on each turbine as a point source.").

Accordingly, modeling turbines as point sources is consistent with accepted international standards and the Appellants' allegation that the use of point source analysis in the RSE sound model is insufficient to predict the Project's sound impacts is not supported by the evidence and is without merit.

C. The Appellant's Claims Regarding SDRS Are without Merit

The Appellants claim incorrectly that the Department did not properly account for potential Short Duration Repetitive Sounds ("SDRS") in its assessment of the Project's compliance with noise limits. Appellants' Brief at 23-24. However, even assuming that the

Project resulted in SDRS 24 hours a day, seven days a week (a completely unrealistic scenario that not even Appellants would claim to be the case), the Project would still comply with the Department's most stringent noise limits due to the substantial buffer that exists between predicted sound levels and applicable noise limits.

SDRS are defined as a sequence of sound events, each clearly discernable, that cause an increase of 6 dBA or more in the sound level observed before and after the event. See 06-096 CMR Chapter 375, § 10(G)(19). Because they can be annoying, there is a 5 dBA "penalty" that applies when SDRS occur. Specifically, 5 dBA is added to the observed levels of the SDRS for purposes of determining compliance with the applicable standards. Id. § 10(C)(1)(e). As noted above, the Project's sound emissions are at least 5 dBA below regulatory limits at all protected locations. RSE Supplement at 5; Order at 9. Accordingly, even if SDRS were occurring around the clock, which nobody is suggesting could happen, resulting in the maximum penalty of 5 dBA added to the Project's average hourly sound output, the Project would still comply with the Department's nighttime noise limits.

Appellants' claim regarding a change in language related to SDRS between the draft and final orders is similarly exaggerated. Appellants state that it is "striking that the Draft Order acknowledged that a 'review of studies shows that 5-6 dBA is common and 10-15 dBA is possible.'" Appellants' Brief at 24. Appellants then claim that "[t]his statement was struck from the Final Order. But, striking the reference to what studies show does not make the studies go away." Id. In fact, the Final Order contains the exact same information as the draft: "Interested parties stated a review of studies of wind turbine noise can produce SDR sounds of 5-6 dB commonly and 10-15 dB in some instances." Order at 11. The Appellants' argument is an

attempt to call into question the Department's integrity and competence. However, the Appellants' mischaracterization of the record serves only to undermine their own credibility.

Published studies of noise from wind turbine operations indicate that the fluctuation of sound over brief periods due to the passage of the turbine blades typically ranges from 2 to 4 dBA. RSE Supplement at 8 (citing Van den Berg). Nonetheless, in recognition of the potential for SDRS to occur and to ensure that applicable sound limits are met during all operating conditions, RHW submitted a sound compliance assessment plan developed in consultation with the Department and EnRad. See Sound Compliance Plan. The compliance protocol is designed to measure operating sound levels under meteorological conditions most favorable for sound propagation and when there is the greatest likelihood for SDRS to occur. Order at 9-10. As discussed below, in the unlikely event that the Project exceeds applicable noise limits due to SDRS or any other reason, RHW is required to submit for Department review and approval a revised operation protocol to ensure that the Project will be in compliance at all protected locations. Order at 12.

D. The Compliance Measures Imposed by the Department are Sufficient and Consistent with Regulatory Requirements

The Appellants' complaints regarding the sound compliance protocol imposed by the Department are without merit. First, the Appellants claim that the "compliance assessment plan does not address what will happen if there is non-compliance and this is essential to the validity of the plan." Appellants' Brief at 30. This claim is simply incorrect. The Order states exactly what will happen in the event of non-compliance: "within 60 days of a determination of non-compliance by the Department, the applicant must submit, for review and approval, a revised assessment plan that demonstrates that the project will be in compliance at all protected locations surrounding the development." Order at 12, 48-49 (Special Conditions 5 and 6). In other words,

in order for RHW to comply with the terms of the permit, it must affirmatively demonstrate to the Department that the Project is in compliance with Department noise limits. Moreover, the suggestion that if the Project did not meet applicable limits it would be granted a variance from those limits is completely unfounded. Appellants' Brief at 30. If it is not in compliance, then RHW must evaluate strategies such as turbine shutdown scenarios to ensure that the Project will operate in compliance. Order at 12, 48-49 (Special Conditions 5 and 6).

Second, the Appellants claim that the compliance assessment protocol is flawed because it does not "provide for notice to interested parties so that they will have an opportunity to review and, if appropriate, challenge the adequacy of the compliance testing and mitigation requirements." Appellants' Brief at 30. Any information submitted to the Department by RHW, including any submission related to the compliance assessment protocol, is a public record as defined by 1 M.R.S.A. § 402. As such, the Appellants and any other interested party are free to inspect and copy the information submitted as part of the compliance assessment protocol. *Id.* § 408.

Accordingly, the Appellants' arguments that the compliance assessment protocol contained in the Order does not articulate measures taken in the event of non-compliance and does not provide for public access to submissions ignore the plain language of the Order and are without merit.

II. APPELLANTS' CLAIMS REGARDING HEALTH EFFECTS WERE FULLY CONSIDERED AND THE DEPARTMENT FOUND THEM TO BE WITHOUT MERIT

One of the important characteristics of this Project is that it is sited with very large setbacks from residences. Specifically, there is one structure located approximately 2,344 feet from the closest turbine and due to steep terrain, predicted sound limits are only 39 dBA there.

See RSE Supplement Sound Level Contours Map, Figure 5-2S. The next closest residence is approximately 3,100 feet from a turbine, and projected sound impacts there are 40 dBA, 5 dBA below the quiet nighttime limit. These substantial setbacks mean that sound emissions from the Project will be from 5 to 20 dBA below regulatory thresholds even at the closest protected locations. RSE Supplement at Table 5-2S (Exhibit 11). Consequently, the speculative health concerns that Appellants have raised by allusion to perceived impacts at other wind energy facilities are simply not an issue with the RHW Project.

The Appellants incorrectly claim that the Department “fail[ed] to consider the health effects of nighttime noise.” Appellants’ Brief at 24. As the Appellants acknowledge in their brief, the Department consulted with the Maine Centers for Disease Control (“MCDC”) regarding potential health-related impacts associated with wind turbines. Appellants’ Brief at 27; Order at 10. Appellants further acknowledge that “the Final [Department] Order relies on Dr. Dora Mills, Director of the Maine Center for Disease Control” for the determination that there is “no evidence in peer-reviewed medical and public health literature of adverse health effects from the kinds of noise and vibrations heard by wind turbines other than occasional reports of annoyance.” Appellants’ Brief at 27; Order at 10.; see also Wind Turbine Neuro-Acoustical Issues, Dora Anne Mills, MD, MPH, Maine CDC/DHHS, June, 2009, at 3 (hereinafter “MCDC Report,” attached as Exhibit 13). Appellants argue that the Department’s reliance on Dr. Mills – the State’s chief medical officer – is not valid because Dr. Mills did not understand the term “annoyance” as used by the authors of the public health literature she reviewed. Appellants’ Brief at 27. According to the Appellants, the cause of the misunderstanding is that the studies’ authors were not medical doctors and were not “native

English speakers.” Id. Not only is the Appellants’ argument complete supposition, it strains credulity.

Furthermore, the Appellants have not identified evidence that calls into question the conclusions of the Department and the MCDC. In particular, Appellants have not provided any evidence whatsoever indicating that the *RHW Project* will result in adverse health impacts. Instead of providing facts, the Appellants allude to “the potential health effects of the Record Hill Wind Project given the potential seriousness of the health issues,” Appellants’ Brief at 25, “preliminary but significant findings from Mars Hill,” id. at 26, and “a potential landmark book” by Dr. Nina Pierpont that has been “well received” by unnamed “foremost experts.” Id. In this same vein, the Appellants’ brief claims that a study regarding health effects of the Mars Hill project “will soon be published in the New England Journal of Medicine.” Id. at 25. However, the study’s author, Dr. Michael Nissenbaum, states in an affidavit that he is “preparing a formal study” and that a “draft will be sent to the New England Journal of Medicine for consideration for publication.” Appellants’ Exhibit I at 1. In short, the Appellants’ “evidence” on health impacts consists of a series of speculations that does not provide any concrete technical information relevant to this Project’s compliance with permitting standards.

On the contrary, there is a considerable body of evidence published in peer-reviewed scientific journals that the Department and Dr. Mills considered, and which demonstrates that sound from appropriately sited wind turbines does not pose a measurable health risk. See Exhibit 13 (citing references). The record clearly shows that the MCDC and the Department reviewed the medical literature on wind turbine noise, specifically considered the potential health effects of low-frequency vibrations and infrasound, and concluded that the sound levels associated with the Project do not pose any health risk. MCDC Report at 4. The Department

applied the most stringent noise limit possible under existing regulations, which the Department has determined are protective of human health and the environment. Additionally, as noted above, the predicted sound levels for the Project are significantly below regulatory requirements at all protected locations. See RSE Supplement at 5. Accordingly, the Appellants' claims regarding health effects are without merit.

### III. THE DECOMMISSIONING PLAN APPROVED BY THE DEPARTMENT IS CONSISTENT WITH STATUTORY REQUIREMENTS

The Appellants claim that the Wind Power Act requires the Project's decommissioning plan to be fully pre-funded such that the entire cost of decommissioning is escrowed prior to permit issuance. Appellants' Brief at 31-33. However, the Appellants' reading of the Act is incorrect as it imposes no such requirement. As the Appellants point out, the Act requires the Department and the Land Use Regulation Commission to adopt guidance for submission requirements regarding, among other things, decommissioning plans for wind energy developments. P.L. 2007, ch. 661, Part B, Sec. 13-13(6) (effective April 18, 2008).

The Department's interpretation of a statute it administers is "given great deference and should be upheld unless the statute plainly compels a contrary result." S.D. Warren Co. v. Bd. of Env'tl. Prot., 2005 ME 27, ¶ 4, 868 A.2d 210, 213 (upholding Board of Environmental Protection interpretation of Clean Water Act). The Act explicitly does not require the agencies to promulgate formal regulations regarding decommissioning plans, suggesting that the Legislature intended to impart even greater flexibility to the Department in administering this submission requirement. P.L. 2007, ch. 661, § 13-B.

The DEP analyzed the Wind Power Act and, as directed, adopted submission requirements for decommissioning in the instructions for a revised Site Location of Development Act application. The language related to decommissioning funding states:

4. *Demonstration in the form of a performance bond, surety bond, letter of credit, parental guarantee or other form of financial assurance as may be acceptable to the department that upon the end of the useful life of the wind generation facility the applicant will have the necessary financial assurance in place for 100% of the total cost of decommissioning, less salvage value. The applicant may propose securing the necessary financial assurance in phases, as long as the total required financial assurance is in place a minimum of 5 years prior to the expected end of the useful life of the wind generation equipment.*

Site Law General Instructions § 29(4). LURC has adopted identical guidance language.

<http://www.maine.gov/tools/whatsnew/index.php?topic=lurcfiles&id=61044&v=tplfiles>

Thus, the Department and LURC specifically allow an applicant to set aside the necessary funding in phases, as long as the decommissioning plan is fully funded five years prior to the expected end of the useful life of wind generation equipment. This makes practical sense and strikes an appropriate balance between the potential risks associated with decommissioning and the costs and benefits of requiring applicants to set aside funds for a process that may or may not be required at some point 20 years or more in the future. Megawatt-scale wind turbines are designed and certified by independent agencies for a minimum expected operational life of 20 years. As the wind turbines approach the end of their expected life, it is anticipated that technological advances will make available more efficient and cost-effective generators that will economically drive the replacement of the existing generators. Thus, the risk of decommissioning a wind project once it begins energy production is very low.

Additionally, the disassembly and earthwork associated with decommissioning are relatively straightforward tasks and the risks associated with decommissioning a wind project are similar to the risks associated with a number of other developments, including energy generation projects, none of which require an applicant to set aside costs to decommission the project.

RHW's decommissioning plan provides for incremental annual funding until full funding is achieved in year 15, which is 5 years prior to the end of the project lifespan. See RHW

Application § 29.6. Accordingly, RHW's decommissioning plan complies with Department guidance and the Act, and is consistent with what has been required on other wind power projects.<sup>6</sup> Finally, Appellants' objection to a deduction for consideration of salvage value due to market price volatility is addressed by the requirement in Year 15 to reassess salvage value assumptions and update the decommissioning costs accordingly. Order at 43.

IV. ALL SCENIC ASSESSMENTS REQUIRED BY STATUTE WERE CONDUCTED BY RHW AND APPROVED BY THE DEPARTMENT

The Appellants claim that the Wind Power Act "violates the Due Process and Equal Protection Clauses of the United States and Maine Constitutions" because the Act does not require that RHW conduct a visual impact assessment for Roxbury Pond. Appellants' Brief at 34-35. On the contrary, the Act's explicit scenic impact requirements are rationally related to the goal of limiting visual impacts that would "significantly compromise" views from a "scenic resource of state or national significance," 35-A M.R.S.A. § 3452(1), and are therefore valid.<sup>7</sup> Furthermore, RHW conducted an extensive scenic impact assessment of the proposed project that was reviewed and approved by the Department.

The Wind Power Act requires the Department to determine that an expedited wind energy development will not have an unreasonable adverse effect on a scenic resource of state or national significance. 35-A M.R.S.A. § 3452(1). Among the places that qualify as a "scenic resource of state or national significance" are "the 66 great ponds located in the State's organized area identified as having outstanding or significant scenic quality in the 'Maine's Finest Lakes' study published by the Executive Department, State Planning Office in October 1989." *Id.* §

<sup>6</sup> To date, LURC and DEP have collectively permitted four grid-scale wind energy developments under P.L. 2007, ch. 661, including the Stetson II project in LURC jurisdiction, and the Rollins, RHW and most recently Oakfield projects in DEP jurisdiction. Each project utilizes a phased approach for funding decommissioning costs.

<sup>7</sup> The constitutionality of the Wind Power Act is beyond the scope of the Board's Jurisdiction, which is defined by statute. See 38 M.R.S.A. § 341-D. However, RHW addresses the Appellants' constitutional claim to avoid any claim of waiver upon further judicial appeal.

1451(9)(D)(1). Roxbury Pond (also known as Ellis Pond) is not one of the 66 ponds in the State's organized territory identified as possessing outstanding or significant scenic quality. See Maine's Finest Lakes, Appendix D at 5; Order at 14-15. Accordingly, because it is not a scenic resource of state or national significance under the Act, the visual impacts of the Project on Roxbury Pond may not be considered by the Department.

Furthermore, the Appellants' argument that Wind Power Act violates their constitutional rights because it incorporates "Maine's Finest Lakes" by reference is patently without merit. The Appellants are not part of a protected class nor does their claim implicate fundamental rights. As a result, the provision of the Wind Power Act at issue need only pass rational basis scrutiny to be valid. See State v. Haskell, 2008 ME 82, ¶ 5, 955 A.2d 737, 739. Under rational basis scrutiny a statute bears "a strong presumption of validity" and the party challenging the constitutionality has the burden of establishing its infirmity. Town of Baldwin v. Carter, 2002 ME 52, ¶ 9, 794 A.2d 62, 66. "In order to prevail, a party must establish the complete absence of any state of facts that would support the need for [the statute's] enactment." Haskell, 2008 ME 82, ¶ 5 (internal quotations omitted). Furthermore, legislative enactments "are not subject to 'courtroom fact-finding' and need not be supported by evidence or empirical data." Id. ¶ 6 (internal quotations omitted). Under rational basis review, a statute is valid when (1) the state's police powers are exercised to provide for the public welfare; (2) the legislative means employed are appropriate to achieve the ends sought; and (3) the manner of exercising the power is not unduly arbitrary or capricious. Id.

The Appellants claim that their rights are violated because the heightened protections the Act provides to scenic resources of state and national significance are not provided to Roxbury Pond. The Act does not infringe on any rights possessed by the Appellants. Quite the opposite,

it establishes greater protections for certain state resources. The fact that Roxbury Pond is not covered by those heightened protections is established by reference to “Maine’s Finest Lakes,” a comprehensive study prepared according to rational, objective criteria. See Maine’s Finest Lakes at 15-16, 202-205 (identifying criteria and methodology for inventory and ranking of scenic qualities of lakes).

Finally, the Appellants’ criticism of Maine’s Finest Lakes displays a misunderstanding of the study. For example, Appellants quote a statement regarding the study’s possible incompleteness with respect to shoreline characteristics, Appellants’ Brief at 34, but the Wind Power Act only refers to the study’s findings with respect to scenic quality, which purports to be exhaustive. See 35-A M.R.S.A. § 3452(1) (great ponds “having outstanding or significant scenic quality” classified as scenic resources of state or national significance) (emphasis added).

Accordingly, the Wind Power Act is valid because it achieves the legitimate state goal of protection of state resources by legitimate, rational means.

V. RHW HAS DEMONSTRATED ALL NECESSARY TITLE RIGHT OR INTEREST TO DEVELOP THE PROJECT

The Appellants claim that the Department erred in finding that RHW had sufficient title, right, or interest (“TRI”) because RHW purportedly “does not have the necessary transmission infrastructure to connect to the grid nor allow the grid to safely absorb the project’s output.” Appellants’ Brief at 35. The Appellants’ complaint pertains to activities beyond the scope of RHW’s application and the Department correctly found that RHW demonstrated all necessary TRI for the entire project under review.

In its application, RHW provided the Department with a copy of the lease giving it the right to develop a wind energy facility on land encompassing the entire project area. See RHW Application § 2. RHW also provided copies of the source deeds demonstrating the underlying

ownership of the lessor, Bayroot LLC. Id. Accordingly, the Department correctly determined that RHW demonstrated sufficient TRI “in all of the property that is proposed for development or use.” Moreover, contrary to Appellants’ suggestion, the Department is not required to look beyond the parameters of the proposed development when it addresses an applicant’s TRI. See Me. Dept. of Env’tl. Prot., 06-096 CMR Ch.2 § 11(D) (applicant must demonstrate sufficient TRI “in all of the property that is proposed for development or use”). Indeed, the argument that the Department cannot approve the Project until certain transmission infrastructure upgrades are implemented is contrary to law, impractical, and flies in the face of Department practice. Any complex energy project necessarily includes activities that are beyond the scope of the specific application before the Department.

The Board’s experience in recent LNG proceedings is instructive. For example, in Downeast LNG, Inc., the Board assumed jurisdiction over and held a public hearing on a proposed LNG facility. The gas from the facility would be transported through the Maritimes & Northeast Pipeline. That pipeline, however, would have to be expanded to accommodate the proposed volumes. The Board held that because there was not an application to expand the Maritimes & Northeast Pipeline facilities, the potential impacts of such an expansion would not be reviewed as part of the LNG proceeding. See Second Procedural Order in Downeast LNG, Inc. at 5 (attached as Exhibit 14). Similarly, there is no basis here for the Department to review the downstream activities, including transmission upgrades, as part of its review of the expedited wind energy development.

VI. POST-CONSTRUCTION AVIAN AND BAT MONITORING REQUIREMENTS IMPOSED BY THE DEPARTMENT ARE CONSISTENT WITH STATUTORY REQUIREMENTS AND WILL ENSURE NO UNDUE ADVERSE IMPACT

The Appellants claim that the Department made “pernicious” changes to the draft Order that purportedly undercut the effectiveness of the post-construction wildlife monitoring protocol imposed by the Department. Appellants’ Brief at 36. The Appellants’ claim is basically “we liked the language in the draft Order better;” however Appellants do not and cannot identify any legal deficiency in the final Order. Despite any changes to the draft Order, the Department and IF&W retain post-construction oversight over operations to verify no undue impacts to wildlife. As stated in the final Order, post-construction monitoring “will guide MDIFW and the applicant in the implementation of appropriate and practical measures for ensuring the avoidance or minimization of any unreasonable adverse impacts.” Order at 23.

Furthermore, the final Order language is consistent with other orders approved by the Board. See Department Order Approving Rollins Wind Power Project, April 3, 2009, at 20 (“the applicant must work with the Department and MDIFW to implement appropriate and practical measures for avoiding, minimizing or mitigating continued impacts.”). The change in language between the draft and final orders does not affect the substance of the regulatory protection. It simply gives the Department, MDIFW and RHW flexibility to utilize the most effective and practical measures to ensure compliance, rather than mandating that all measures be implemented in every single instance. Accordingly, the Appellants’ claim regarding the post-construction wildlife monitoring protocol is without merit.

VII. THE BOARD SHOULD DENY APPELLANTS’ REQUEST FOR A PUBLIC HEARING

Appellants claim there is “credible conflicting technical information regarding a licensing criteria” and therefore the Board *must* hold a public hearing. Appellants’ Brief at 37. They

misapprehend, however, the basis for holding a public hearing on an appeal of a licensing decision in which the Department has already evaluated the conflicting technical evidence and reached a decision as to its significance and weight. While the test for holding a public hearing on an application in the first instance is based on an assessment of whether there is “credible conflicting technical information regarding a licensing criterion and it is likely that a public hearing will assist the decisionmaker in understanding the evidence,” 06-096 CMR Chapter 2, § 7(B), the Department appropriately decided not to hold a public hearing on this application. The Department received only one written request for a public hearing and, as noted above, it did not identify any conflicting technical information regarding a licensing criteria. See Exhibit 1 (Thurston request for a public hearing). Moreover, the person making the request, who is also one of the Appellants, stated that if written testimony would be afforded the same weight as testimony in a public hearing, then a public hearing was not warranted. Id.

Although it did not hold a formal public hearing, in light of the substantial public interest in the Project the Department held well-attended public meetings in which it sought public input. As described above, there were some 27 public meetings held in Roxbury in connection with the project and two official town meetings. There was also an extensive review process and continuing opportunity for public comment and input and Appellants have not claimed that they were unable to participate in that process or that the Department did not consider their comments. Rather, as the record reflects, the Appellants participated fully and submitted technical information to the Department, including comments from the same two experts that they now proposed would testify in a hearing before the Board. In essence, Appellants simply seek to retry their case, this time before the Board, in the hopes that the Board will reach a

different result. That is not, however, a sufficient basis for the Board to hold a public hearing on an appeal.

Appellants cite Hannum v. Board of Environmental Protection, 2006 ME 51, 898 A.2d 392, for the proposition that because the Board held a public hearing on an application for a dock permit, it can't refuse to hold a public hearing on a wind energy facility. Appellants' Brief at 38. However, in the Hannum case, the Board held a public hearing in the context of reviewing a permit application pursuant to 38 M.R.S.A. § 341-D(2)(D) ("the board shall decide each application for approval of permits and licenses that in its judgment . . . [h]as generated substantial public interest.") not in its appellate capacity. The standard for the Board to hold a public hearing in an appellate proceeding such as this is higher than in a proceeding in which the Board has assumed original jurisdiction over a permit application. When the Board reviews an application in the first instance, a public hearing is intended to allow the Board to receive "information regarding a licensing criterion" that will assist it in determining a proposed project's compliance with regulatory standards. See 06-096 CMR Chapter 2, § 7(B). When the Board acts in its appellate capacity, its primary role is to review the administrative record that has already been developed and determine whether the Department arrived at the proper decision.

The Department has time, resources, and technical expertise that are not normally available to the Board in the evaluation of a project. For example, as noted above, the Department spent eight months reviewing the Project, hired an independent sound expert to peer-review the Project, sought and obtained detailed input from other state agencies, and had extensive communication with interested parties. State statute and Department rules structure the project review process to take advantage of the Department's resources and expertise by

requiring interested parties to present information to the Department in the first instance, with the Board performing an appellate function. This is especially true in the case of an expedited wind energy development, where the Board serves solely in an appellate capacity. 38 M.R.S.A. § 341-D(2) (“The board may not assume jurisdiction over an application for an expedited wind energy development.”).

Finally, much of the testimony that Appellants seek to introduce in a public hearing has no bearing on the Project’s compliance with existing licensing criteria, but is instead a critique of the Department’s regulatory standards themselves.<sup>8</sup> For example, half of the proposed testimony of Rick James of E-Cooustic Solutions is devoted to the adequacy of the Department’s nighttime noise limits and purported “inherent flaws in the Compliance/Mitigation rules.” See Appellants’ Exhibit M §§ 3-4. Although the Board has rulemaking authority under 38 M.R.S.A. § 341-D(1-B), such rulemaking must be conducted pursuant to the Maine Administrative Procedures Act and is distinct from the Board’s appellate jurisdiction under 38 M.R.S.A. § 341-D(4)(D), which governs this proceeding. Accordingly, this appeal is not the appropriate forum for the Appellants to seek to amend Department regulations.

The remainder of the Appellants’ proposed testimony is duplicative of information submitted to and considered by the Department, Warren Brown and the MCDC during the eight-month review of RHW’s application. For example, the proposed testimony from Rick James is a restatement of the many comments submitted by Mr. James to the Department in February 2009. Compare Appellants’ Exhibit C (discussing line source versus point source calculations and application of SDRS penalty) with Appellants’ Exhibit M §§ 1-2 (same). The proposed testimony of Dr. Michael Nissenbaum reiterates a presentation by Dr. Nissenbaum submitted to

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<sup>8</sup> The testimony Appellants seek to introduce in a public hearing is set forth in the affidavits of Richard James (Exhibit M to Appellants’ Brief) and Michael Nissenbaum (Exhibit I to Appellants’ Brief).

the Department during its review of the Project. See Michael A. Nissenbaum, M.D., *Industrial Wind Turbines: Are There Health Issues?* (undated). Furthermore, much of the proposed testimony of Dr. Nissenbaum, a medical doctor without any apparent expertise as an acoustical engineer, is dedicated to purported problem with the Project's sound model. Dr. Nissenbaum urges the Board to hold a public hearing "to ensure that an appropriately corrected modeling process (compared to the flawed model that was in fact used) is implemented to best predict the sound emissions that can be expected from the Record Hill Wind Project." Appellants' Exhibit I § 4. Dr. Nissenbaum also claims that the lack of investigation of health complaints stemming from "faulty pre-installation sound modeling . . . represents a failure by the Maine CDC." Id. § 7. Dr. Nissenbaum's proposed testimony further states that, "[p]ending the use of more appropriately designed modeling studies, and the establishment of more appropriate regulations" the Department should hesitate to permit wind energy facilities. Id. § 12. Accordingly, Dr. Nissenbaum's testimony either repeats information that was considered by the Department and its experts, or does not otherwise provide the Board with credible technical evidence or information related to an existing licensing criterion.

As the affidavits of Richard James and Michael Nissenbaum demonstrate, Appellants' request for a public hearing is based on their desire to re-present information that was already submitted to and considered by the Department, or to change the existing regulations. Neither constitutes an appropriate basis for holding a public hearing and therefore the Board should deny the request and decide the appeal on the basis of the administrative record before the Department.

Finally, the scope of any hearing held by the Board on an appeal of a permit for an expedited wind energy development is limited to evidence that meets the test for supplemental

evidence and therefore Appellants' request for a public hearing should be denied on the independent basis that the evidence they seek to introduce does not and cannot meet the test for "supplemental evidence." 38 M.R.S.A. § 341-D(4).<sup>9</sup> Supplemental evidence is permitted only when (a) the person seeking to submit such evidence showed "due diligence" in attempting to bring the information to the attention of the Department; or (b) the evidence is newly discovered and could not have been provided to the Department. 38 M.R.S.A. § 341-D(4)(A) and D(5); 06-096 CMR Chapter 2, § 24(B)(5)(a), (b). The purpose of this provision is to ensure certainty and predictability of decisions by requiring that all relevant information be brought forward and considered by the Department during review of the application and that parties not wait to present evidence in the first instance during an appeal to the Board. Appellants have not made and cannot make any showing that the evidence they seek to introduce in a public hearing was not or could not have been presented to the Department during the application review.

### CONCLUSION

As demonstrated by the foregoing, the Appellants' claims are without merit and RHW respectfully requests that the Board deny the Appellants' request for a public hearing and uphold the Department's Order.

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<sup>9</sup> A more complete discussion of the legal basis for this argument is set forth in Appendix A.

**HEARINGS ON APPEALS OF EXPEDITED WIND ENERGY PROJECTS ARE  
LIMITED TO SUPPLEMENTAL EVIDENCE**

When the Legislature enacted the Wind Power Act, it altered the scope of any Board appellate hearing regarding an expedited wind energy development by limiting such hearings to taking evidence that meets the “supplemental evidence” standard set forth in the Board’s rules. Accordingly, Appellants’ request for a public hearing on the appeal should be denied for the independent reason that the evidence Appellants seek to introduce at a public hearing does not and cannot meet the test for supplemental evidence.

A. Hearings on Board Appeals of Expedited Wind Energy Developments Are Limited to Introduction of “Supplemental Evidence”

38 M.R.S.A. § 341-D(4) establishes the Board’s jurisdiction to hear appeals and sets forth the process and standard of review for such appeals. For all appeals except those involving expedited wind energy developments, Section 341-D(4) provides that in issuing a decision on an appeal, the Board may base its determination on (1) the Department’s record; (2) any supplemental evidence admitted by the Board; and (3) any evidence submitted during any hearing held by the Board. See 38 M.R.S.A. § 341-D(4)(A) (appeals by aggrieved parties of Department decisions), (B) (appeals initiated by the Board) and (C) (appeals to the Board under other provisions of law); see also 06-096 CMR Chapter 2, § 24(B)(7). With regard to hearings, under the statute and the rules whether to hold a hearing is discretionary, and the Board may hold a hearing for any purpose it deems appropriate. See 38 M.R.S.A. § 341-D(4); 06-096 CMR Chapter 2, § 24(B)(1).

Appeals of expedited wind energy developments, such as the RHW Project, however, are governed by a separate provision under Section 341, which expressly limits the scope of a Board hearing on an appeal. Compare 38 M.R.S.A. § 341-D(4)(D) with D(4)(A-C). Section 341-

D(4)(D) provides that in an appeal of an expedited wind energy development, the Board *shall* base its decision on (1) the Department's record; and (2) any supplemental evidence. See 38 M.R.S.A. § 341-D(4)(D). This does not mean, necessarily, that the Board may not hold a hearing in an appeal of an expedited wind energy development. Instead, this change in the statute merely limits such hearings to those necessary to allow introduction of "supplemental evidence."

B. The Board Employs an Appellate Standard of Review in Appeals of Expedited Wind Energy Developments

This reading of the statute is consistent with the standard of review governing appeals of expedited wind energy developments. Prior to the enactment of the Wind Power Act, the standard of review for all Board appeals was the same. Specifically, Subsection 4(A) of Section 341-D states that

The board is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner.

This language indicates a *de novo* standard of review, with the Board free to ignore the Department's factual or legal findings and to substitute its judgment for the Department. Subsections 4(B) and 4(C), which prior to the enactment of the Wind Power Act denoted the only other types of appeals heard by the Board, each cross-referenced the procedures or standard of review set forth in Subsection 4(A). Accordingly, the appellate standards were the same for all Board appeals.

When the Legislature enacted Subsection 4(D), however, it did not cross-reference the procedures or the standard of review in Subsection 4(A), nor did it include the language cited above. In omitting the language "[t]he board is not bound by the commissioner's findings..." the Legislature intended that the Board not be free to ignore the factual or legal conclusions of

the Department. Further, the Legislature added new language regarding the standard of review not previously utilized in Subsections 4(A), 4(B) or 4(C), specifically, that “[t]he board may remand the decision to the department for further proceedings if appropriate.” 38 M.R.S.A. § 341-D(4)(D). The omission of the “not bound” language and the inclusion of the “remand” language demonstrates that the Board applies an appellate, not *de novo*, standard of review for expedited wind energy developments.<sup>1</sup>

In an appellate capacity, the Board should reverse a permitting decision by the Department only upon a showing that the Department’s action was arbitrary and capricious, or was otherwise not supported by substantial evidence in the record. See, e.g., Nergaard, 2009 ME 56, ¶ 11. This standard of review reinforces the argument above that the primary factual record is the Department’s agency record and any Board hearing should be limited in scope to evidence that was not and could not have been considered by the Department.

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<sup>1</sup> This interpretation, that the Legislature intended the Board to serve solely in an appellate capacity, is also evidenced by the fact that the Board may not assert primary jurisdiction over any expedited wind energy development, but may act only as an appellate body. See 38 M.R.S.A. § 341-D(2).