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## **OVERVIEW OF REGULATORY FRAMEWORK APPLICABLE TO WIND POWER DEVELOPMENT IN MAINE**

This document provides a general overview of the main state, federal and local land use and environmental approvals that may be required to construct and operate a commercial wind power generation facility in Maine. Projects may be sited on-shore, near-shore, or off-shore and the permitting requirements vary depending upon the specific project location and scale as well as other project-specific factors. This document directly addresses on-shore permitting requirements and, where appropriate, identifies additional requirements for projects located near or off-shore. Consultation with pertinent agencies is recommended to confirm the approval requirements, review procedures, and related information requirements for a specific project.

### **I. State Policy**

The Legislature, through passage of the Maine Wind Energy Act, 35-A M.R.S.A. § 3401, *et seq.*, encourages the development and siting of appropriate wind energy production in Maine. The Act promotes wind energy development in a manner that is, among other things, consistent with all state and federal environmental standards.

Department of Environmental Protection (“DEP”) and the Land Use Regulation Commission (“LURC”) are the state agencies with primary responsibility regarding environmental review and siting of wind power projects. DEP's statutory mission is to "prevent, abate and control the pollution of the air, water and land and preserve, improve and prevent diminution of the natural environment of the State", to "protect and enhance the public's right to use and enjoy the State's natural resources" and, in its discretion, to "educate the public on natural resource use, requirements and issues. 38 M.R.S.A. §341-A, sub-§1.

LURC's statutory mission is to -

" to extend principles of sound planning, zoning and subdivision control to the unorganized and deorganized townships of the State: To preserve public health, safety and general welfare; to prevent inappropriate residential, recreational, commercial and industrial uses detrimental to the proper use or value of these areas; to prevent the intermixing of incompatible industrial, commercial, residential and recreational activities; to provide for appropriate residential, recreational, commercial and industrial uses; to prevent the development in these areas of substandard structures or structures located unduly proximate to waters or roads; to prevent the despoliation, pollution and inappropriate use of the water in these areas; and to preserve ecological and natural values"; and to

"encourage the well planned and well managed multiple use of land and resources and to encourage the appropriate use of these lands by the residents of Maine and visitors, in pursuit of outdoor recreation activities, including, but not limited to, hunting, fishing, boating, hiking and camping." 12 M.R.S.A. §681.

## II. Land Use and Environmental Regulation

### A. State Regulatory Framework

DEP is the lead permit agency for projects located in the organized (within a municipal boundary) areas of the State, while LURC is the lead permit agency for projects located within the unorganized areas of the State. As described below, DEP and LURC both have standards for consideration of a project's potential effect on wildlife, habitat, wetlands, scenic, and other natural resources values in making a permitting decision, although there are differences in the agencies' specific review criteria and standards and decision-making procedures. As reflected in its above-referenced authorizing legislation, LURC has planning and zoning responsibilities (akin to THOSE of municipalities in the State's organized areas) in addition to its environmental review responsibilities.

See generally <http://www.maine.gov/dep/blwq/docstand/windpower.pdf> (This DEP guidance document identifies the types of issues DEP and other state regulatory authorities may consider when reviewing a proposed wind power development.)

#### 1. **Organized Areas (DEP- -lead permit agency)—Potential State Approvals Required**

##### (a) Site Location of Development Act ("Site Law")

<http://www.maine.gov/dep/blwq/docstand/sitelawpage.htm>

The Site Location of Development Law (the "Site Law"), 38 M.R.S.A. §§ 481 *et seq.*, regulates "any development of state or regional significance that may substantially affect the environment." 38 M.R.S.A. §483-A. A "development" includes, among other things, certain larger structures and projects that occupy an area of 20 acres or more. *Id.*, at §482(2) (definitions). Development of a commercial wind power project typically triggers Site Law review because it occupies an area in excess of 20 acres. In addition, construction of a new transmission line associated with the wind turbines may by itself trigger Site Law review, particularly if it involves construction of more than a few miles of 115 kV transmission line in a new corridor.

Enacted 35 years ago, the Site Law provides authority and flexibility to address the range of potential site-specific impacts from significant developments. Such impacts typically vary from one development to another, and from one site to another, even for the same type of development. The Site Law's approval standards include provisions addressing financial capacity, "no adverse effect on the natural environment", soil types, stormwater management and erosion control, groundwater, infrastructure, and flooding. The "no adverse effect on the natural environment" standard requires a developer to make "adequate provision for fitting the development harmoniously into the existing natural environment" and to show "that the development will not adversely affect existing

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uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities." *See* 38 M.R.S.A. §484.

DEP rules, *see* 06-096 CMR 371 – 380, implement these statutory criteria. Chapter 375 of DEP's rules implements the "no adverse effect on the natural environment" standard and includes sections addressing air quality, climate, natural drainage ways, runoff/infiltration relationships, erosion and sedimentation control, surface water quality, groundwater quality and quantity, buffer strips, control of noise, preservation of historic sites; preservation of unusual natural areas, access to direct sunlight, scenic character, and protection of wildlife and fisheries (stormwater rules are addressed in a separate chapter). Examples of rules applicable to issues that may arise in connection with wind power development include:

- Ch. 375(10) Control of Noise (17 pgs). Specific applicable noise limits depend upon a variety of factors. For example, in regards to sound from routine operation, requirements vary depending upon factors such as the existence of protected locations; zoning (or comprehensive plan) providing for commercial, transportation, or industrial uses; time of day; daytime and nighttime pre-development hourly sound levels; demonstrated hourly sound levels resulting from routine operation of the development; observed levels of tonal sounds; and the possibility of short duration repetitive sound. Each of these criteria is addressed in detail in the rules. Standards also address areas such as noise associated with construction and maintenance and measurement procedures.
- Ch. 375(14) No Unreasonable Impact on Scenic Character. This rule allows DEP to consider all relevant evidence in determining whether a development will have an unreasonable impact on scenic character and lists examples of such evidence. The Site Law application provides guidance on when a visual impact analysis may be required. Unlike the scenic impact rules enacted under the NRPA (see below), this rule does not limit DEP to consideration of scenic resources from the vantage of public areas but provides more flexible and discretionary authority.
- Ch. 375(15) Protection of Wildlife and Fisheries. DEP may consider all relevant evidence concerning whether a developer has made adequate provision for the protection of wildlife and fisheries. The Site Law application form advises applicants to contact DIF&W for assistance in determining potential impacts, and to submit a plan to minimize the development's detrimental effect.

<http://www.maine.gov/sos/cec/rules/06/096/096c375.doc> (DEP Rules, ch. 375)

Pre-application and pre-submission meetings clarify requirements as they apply to project-specific situations. The comprehensive Site Law application addresses each requirement and describes needed submissions.

- (b) Natural Resources Protection Act ("NRPA")

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<http://www.maine.gov/dep/blwq/docstand/nrpapage.htm>

The Natural Resources Protection Act (“NRPA”), 38 M.R.S.A. §§ 480-A, *et seq.*, regulates certain activities in, on, or over any protected natural resource or adjacent to certain protected natural resources. The NRPA was developed from prior resource-specific laws focused on coastal wetlands, streams, and great ponds, for example, which were consolidated into a consistent and overarching statute aimed at efficiently and effectively addressing potential effects on range of protected resources and their interconnections.

There are several aspects of a wind power project that may require NRPA approval, including but not limited to the following: construction of a permanent structure within a fragile mountain area; stream crossings (for roads and utility lines); activities in or affecting wetland or "significant wildlife habitat"; and construction adjacent to streams and certain wetlands. Regulated activities subject to the NRPA must either qualify for and be approved in connection with the permit-by-rule program or be the subject of an individual permit.

To obtain an individual permit, the applicant must demonstrate that the proposed activity meets standards relating to such matters as existing uses, soil erosion, wildlife habitat and fisheries, natural water flow, water quality, flooding, sand supply, outstanding river segments, and dredging. *See* 38 M.R.S.A. § 480-D. The “existing uses“ statutory standard, for example, requires that the activity not "unreasonably interfere" with scenic, aesthetic, recreational or navigational uses. The “harm to habitats; fisheries” standard requires in part that the activity not "unreasonably harm" any "significant wildlife habitat", freshwater wetland habitat, threatened or endangered plant habitat, freshwater wetland plant habitat, aquatic habitat, travel corridor, freshwater or estuarine or marine fisheries or other aquatic life.

The NRPA's general "unreasonable" impact standard is implemented by DEP rules, of which the most potentially applicable to wind power development projects include:

- Ch. 305, Permit by Rule. Provides a simplified application process for certain minor activities.
- Ch. 310, Wetlands and Waterbodies Protection. Provides requirements related to protected wetland and water resources, including provisions requiring an alternatives analysis and other steps aimed at avoiding, minimizing and at times mitigating adverse effect to wetlands.
- Ch. 315, Assessing and Mitigating Impacts to Scenic and Aesthetic Uses. The rule's preamble explains that "unreasonable adverse visual impacts are those that are expected to unreasonably interfere with the general public's visual enjoyment and appreciation of a scenic resource, or those that otherwise unreasonably impair the character or quality of such a place." These rules cover only listed "scenic resources", which include locations of national, state or local

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scenic significance, such as state or national parks, state or nationally designated trails, and "public natural resources or public lands visited by the general public, in part for the use, observation, enjoyment and appreciation of natural or cultural visual qualities (e.g., great ponds, the Atlantic Ocean)." The rules clarify that "[DEP] considers a scenic resource as the typical point from which an activity in, on, over, or adjacent to a protected natural resource is viewed."

The rules establish a visual assessment method and procedure for evaluating proposed activities' visual effects, and describe avoidance, mitigation, and offset measures that may eliminate or reduce unreasonable adverse impacts to existing scenic and aesthetic uses. DEP's assessment of a proposal's potential effects involves consideration of the scenic resource's significance, the existing character of the surrounding area, viewer expectations, the duration of the activity, the project purpose, and other factors.

<http://www.maine.gov/sos/cec/rules/06/096/096c315.doc>

- o Ch. 335. Significant Wildlife Habitat. Under the NRPA and these rules, "significant wildlife habitat" is not a qualitative term but an essentially geographic one which means -

"The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and critical spawning and nursery areas for Atlantic salmon as defined by the Atlantic Salmon Commission; and

The following areas to the extent that they have been mapped by the Department of Inland Fisheries and Wildlife or are within any other protected natural resource: habitat, as defined by the Department of Inland Fisheries and Wildlife, for species appearing on the official state or federal list of endangered or threatened animal species; high and moderate value deer wintering areas and travel corridors as defined by the Department of Inland Fisheries and Wildlife; seabird nesting islands as defined by the Department of Inland Fisheries and Wildlife; and critical spawning and nursery areas for Atlantic salmon as defined by the Atlantic Salmon Commission; and

(1) Significant vernal pool habitat;

(2) High and moderate value waterfowl and wading bird habitat, including nesting and feeding areas; and

(3) Shorebird nesting, feeding and staging areas."

38 M.R.S.A. §480-B(10).

These rules provide requirements aimed ensuring a project subject to the NRPA has no "unreasonable impact" on "significant wildlife habitat" or the "subject wildlife" ("wildlife species for which an area has been designated as significant wildlife habitat"). The rules require avoidance through demonstration that there is no less damaging practicable alternative, minimization and at times mitigation of unavoidable adverse effects. 38 M.R.S.A. §480-B.

<http://www.maine.gov/sos/cec/rules/06/096/096c335.doc>

(c) Erosion and Sedimentation Control Law

Maine's Erosion and Sedimentation Control Law, 38 M.R.S.A. § 420-C, contains basic erosion control requirements that apply within organized areas of the State. No permit is required, and the standards are typically most relevant for small projects. The requirements are consistent with, but generally more basic than, erosion control requirement related to permitting statutes such as the Site Law. The law also has provisions requiring that certain chronic erosion problems be addressed, and these are phased in over time.

<http://www.maine.gov/dep/blwq/docstand/stormwater/erosion.htm>

(d) Stormwater Program

(1) *Stormwater Management Permit*

The requirements of Maine's Stormwater Management Law, 38 M.R.S.A. § 420-D, are addressed as part of the Site Law permitting process. As stated in the introduction to DEP's implementing rules (DEP rules ch. 500), "many pollutants, such as nutrients and metals, attach to fine particles of soil from throughout the watershed. Soil and attached pollutants are carried in the stormwater down to a waterbody or wetland. A project is required to meet appropriate standards to prevent and control the release of pollutants to waterbodies, wetlands, and groundwater, and reduce impacts associated with increases and changes in flow."

<http://www.maine.gov/dep/blwq/docstand/stormwater/storm.htm>

(2) *Waste Discharge Permit (Maine Construction General Permit)*

Storm water associated with construction activity is separately regulated under state and federal law. Maine's Waste Discharge Law provides that "no person may directly or indirectly discharge or cause to be discharged any pollutant without first obtaining a license therefore from [DEP]." 38 M.R.S.A. §413(1). Maine has been delegated authority under the federal National Pollutant Discharge Elimination System (NPDES) program and,

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therefore, storm water associated with construction activities is now subject to permitting under Maine's waste discharge program. Maine has consolidated the application process for the Maine construction general permit (MCGP), the Stormwater Management Law and Site Law, however, and application requirements for the MCGP, Stormwater Management Law, and Site Law are considered concurrently.

<http://www.maine.gov/dep/blwq/docstand/stormwater/MEPDES.htm>

(e) Maine Endangered Species Act

The Maine Endangered Species Act prohibits the taking of an endangered or threatened species. 12 M.R.S.A. §§ 12802, *et seq.* The term "take" is broadly defined to include habitat alteration as well as more direct harm to the protected species. The law provides for an "incidental take" permit for activities, otherwise permitted, that may result in an incidental taking. *Id.*, at § 12808(3)(A). As part of its review of a project under the Site Law and NRPA, DEP seeks input from the Department of Inland Fisheries and Wildlife ("IF&W"), which is the State agency with principal oversight for endangered or threatened species.

[http://www.maine.gov/ifw/wildlife/species/endangered\\_species/es\\_act\\_part13.htm](http://www.maine.gov/ifw/wildlife/species/endangered_species/es_act_part13.htm)

(f) Maine Historic Preservation Commission

The Maine Historic Preservation Commission ("MHPC") is responsible for establishing policy to encourage and stimulate public interest in historic, architectural and architectural heritage of the State, and to advise the State Historic Preservation Officer on facilitating liaisons among government agencies and organizations interested in historic preservation, and to implement the National Historic Preservation Act. 27 M.R.S.A. §§ 501-503. In addition to reviewing the impacts of federal projects on resources listed or eligible for listing in the National Register of Historic Places, the Maine Historic Preservation Officer advises state agencies responsible for permitting projects that may impact historic or cultural resources. *See, e.g.*, DEP rules ch. 375(11). If a project is adjacent to properties with buildings or structures over fifty years of age or in an archaeologically sensitive area, the Commission may seek information, such as an archeological survey, to determine eligibility for the National Register of Historic Places, or whether the project is likely to disturb archaeological sites. If the MHPC determines that a project will result in an adverse effect to a historic property, it will consult with the project proponent on ways to avoid, minimize or mitigate such effects.

<http://www.maine.gov/mhpc/>

(g) Clean Water Act-401 Water Quality Certification

Applicants applying for a federal license or permit that may result in a discharge to navigable waters of the United States must submit a state certification to the federal

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licensing authority that any discharge will comply with state water quality standards. Typically, DEP issues the 401 Water Quality Certification as part of the Site Law and NRPA permitting process.

(h) Potential Municipal Approvals Required

(1) Shoreland Zoning

The Mandatory Shoreland Zoning Act requires municipalities to protect shoreland areas through adopting shoreland zoning maps and ordinances that provide for what types of activities can occur in certain areas. The shoreland areas covered by the law include areas within 250 of the normal high-water line of any great pond, river or saltwater body, areas within 250 feet of the upland edge of a coastal wetland, areas within 250 feet of the upland edge of a freshwater wetland except in certain situations, and areas within 75 feet of the high-water line of a stream. Municipal shoreland ordinances, which address issues such as building size and setbacks and the establishment of resource protection, general development, residential, and other zones, must be at least as stringent as and may be more protective than DEP's model ordinance guidelines (DEP rules ch. 1000). Municipalities are primarily responsible for administering the law subject to DEP oversight.

<http://www.maine.gov/dep/blwq/docstand/szpage.htm>

(2) Local land use approval under town ordinance(s) regarding such things as noise, tower construction, height, location, erosion control, visual impact, etc. Obtaining local land use approval may require a zoning change, variance or other project-specific approval.

(3) Local building permit

**2. Unorganized Areas (LURC- - lead permit agency with DEP involvement as a review agency)**

(a) Potential State Approvals Required

(1) LURC rezoning

Wind farms are not an allowed use in any LURC subdistrict. In order to obtain project approval, an applicant must request that the Commission rezone an existing subdistrict to a Planned Development Subdistrict (D-PD). *See* <http://www.maine.gov/doc/lurc/reference/rulechapters/ch10-04.pdf>

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Large-scale planned developments will be allowed if the site is the best one reasonably available for the proposed use, the development depends upon a natural feature or location which is available at the proposed site and the remaining standards and requirements of LURC's governing statute and regulations are satisfied.

12 MRSA §685-B(4) provides the statutory approval criteria. In sum, the law requires the applicant to demonstrate that:

- "Adequate technical and financial provision" has been made for compliance with state air and water pollution control and other environmental laws, including but not limited to those of the site law and NRPA (see above);
- "Adequate provision has been made for loading, parking and circulation of land, air and water traffic, in, on and from the site, and for assurance that the proposal will not cause congestion or unsafe conditions with respect to existing or proposed transportation arteries or methods";
- "Adequate provision has been made for fitting the proposal harmoniously into the existing natural environment in order to assure there will be no undue adverse effect on existing uses, scenic character and natural and historic resources in the area likely to be affected by the proposal";
- "The proposal will not cause unreasonable soil erosion or reduction in the capacity of the land to absorb and hold water and suitable soils are available for a sewage disposal system if sewage is to be disposed on-site;"
- "The proposal is otherwise in conformance with this chapter and the regulations, standards and plans adopted pursuant thereto." (Note: The requirements of the applicable D-PD rules are outlined below); and
- "In the case of an application for a structure upon any lot in a subdivision, that the subdivision has received the approval of the commission."

In addition, the applicant must demonstrate that "the public's health, safety and general welfare will be adequately protected." The law requires LURC to allow the applicant "to provide evidence on the economic benefits of the proposal as well as the impact of the proposal on energy resources." LURC may condition its approval as it deems appropriate.

(2) Planned development - preliminary approval

In order to approve an application for preliminary approval of a planned development plan, LURC's D-PD rules require the following in addition to demonstration that the above-noted statutory approval criteria are met:

- Demonstrated need in the community or area;

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- No undue adverse impact on existing uses and resources;
- Conforms to the objectives and policies of the Comprehensive Land Use Plan;
- Incorporates, where the land proposed for inclusion in the D-PD Development Subdistrict is in a Protection Subdistrict, a substantially equivalent level of environmental and resource protection as was afforded under such Protection Subdistrict;
- Utilizes the best reasonably available site for the proposed use;
- Conserves productive forest and/or farmland;
- Incorporates high quality site planning and design in accordance with accepted contemporary planning principles;
- Envisions a project that is reasonably self-sufficient in terms of necessary public services; and
- Provides for safe and efficient traffic circulation

<http://www.maine.gov/doc/lurc/reference/rulechapters/ch10-04.pdf> (see section G (8)(b)(1-8) (approval criteria))

(3) Planned development - final plan approval

LURC's approval of the final development plan involves basically a check-list review to ensure that the applicant has addressed all information and other requirements and conditions of the preliminary approval.

<http://www.maine.gov/doc/lurc/reference/rulechapters/ch10-04.pdf> (see section G(10)(a - b) (final plan requirements and approval on acceptance))

The following guidance materials provide an overview and summary of LURC's approach to siting wind power and related transmission facilities:

<http://www.maine.gov/tools/whatsnew/index.php?topic=lurcfiles&id=2642&v=tplfiles> (links to flowchart and related information on LURC process)

<http://www.maine.gov/tools/whatsnew/attach.php?id=2642&an=1> (approvals required for wind power development)

<http://www.maine.gov/doc/lurc/reference/ch10.html> (LURC land use districts and standards)

(b) Potential Local Approvals Required – none

### **3. Developments Located in both DEP and LURC Jurisdiction**

In 2005, the Legislature amended the NPRA and Site Law statutes to eliminate (i) dual review of linear projects located partially within and partially outside of the unorganized territories and which required review by both DEP and LURC, and (ii) the requirement that the DEP take into account and permit under the Site Law and NRPA those aspects of a linear projects located in the unorganized territories. L.D. 1588, Committee Amendment A (2005). The legislation was enacted, in part, to address the regulatory anomalies that exist with wind power projects located in the unorganized territories where a small portion of an associated transmission line is located outside of LURC jurisdiction.

DEP may assume jurisdiction over the portion of a project located in LURC jurisdiction only if the development is an approved use in the applicable subdistrict. Accordingly, DEP cannot permit wind farm projects in LURC jurisdiction; it can, however, permit the entirety of a transmission line associated with a wind power project because transmission lines are an approved use in almost all LURC subdistricts. Currently, there is no mechanism for LURC to permit the entirety of a transmission line located partially in LURC and partially in DEP jurisdiction.

### **4. Utilities regulation (Public Utilities Commission)**

PUC approval, through issuance of its "certificate public convenience and necessity", is required for transmission lines greater than 100kV in organized and unorganized areas. 35-A M.R.S.A. § 3132, sub-§2. PUC approval is not required for generator leads (power lines that simply connect the project to the grid), provided that if a utility builds and owns a line whose purpose is to connect the generator to the grid PUC would be needed. *See* P.L. 2007, ch. 148 § 2 (enacting 35-A M.R.S.A. § 3132, sub-§1-B).

PUC's decision on whether to issue such a certificate involves a public interest test centered on determination that there is a need (typically involving a system reliability issue) for the proposed transmission line and that the proposed project is the most economic means to address the need. PUC's decision "establishes that, as of the date of issuance of the certificate, the decision by the utility to erect or construct was prudent." 35-A M.R.S.A. § 3132, sub-§6. Municipal and/or state land use approval (e.g., DEP permit) of the transmission line may be required in addition to PUC's approval.

<http://janus.state.me.us/legis/statutes/35-A/title35-Asec3132.html>

**B. Federal Regulatory Framework (same in organized and unorganized areas)**

**1. Army Corps of Engineers**

Under Section 404 of the Clean Water Act, 33 U.S.C. § 1344 and Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403 (as applicable), a permit is required for the discharge of dredged or fill material into waters of the United States, including wetlands. Section 10 approval is required for discharge of dredged or fill material or placement of structures or other alterations below the mean low water line in navigable waters of the United States. The Army Corps of Engineers (“Army Corps”) is the federal agency primarily responsible for permitting under Section 404 and Section 10. A Section 404 and/or Section 10 permit may be required for placement of temporary or permanent structures, such as towers, platforms, or cables, in state or federal waters.

In general, in order to obtain a 404 permit, the applicant must demonstrate that the proposed discharge would not significantly degrade waters of the United States, that there is no less damaging practicable alternative to the proposed discharge, and that steps have been taken to avoid, minimize and in some cases mitigate for unavoidable adverse effects. In general, in order to obtain a Section 10 approval (administered jointly with the 404 permit as applicable), the applicant basically must show that the proposed activity will not significantly obstruct or alter navigable waters.

**2. Department of Energy (“DOE”) /Federal Energy Regulatory Commission (“FERC”)**

Unless power is being exported to Canada, DOE approval is not required for transmission lines or infrastructure. *See* Executive Order 10485 of September 3, 1953 as amended by Executive Order 12038 of February 3, 1978 (requiring executive permission for the construction and maintenance of border facilities, including electric lines).

FERC has jurisdiction over: 1) minimum interconnection standards (MIS) (the costs required to upgrade the interconnection system in a manner that will not interfere with existing usage); and 2) relieving transmission congestion (if necessary, the applicant will incur costs associated with expansion of the existing system to accommodate additional supply.)

**3. Federal Aviation Administration (“FAA”)**

The Secretary of Transportation has the authority to require adequate public notice of the construction of a structure when the notice will promote safety in air commerce and the efficient use and preservation of navigable airspace. *See* 49 U.S.C. § 44718(a). Pursuant to 14 C.F.R. § 77.13(a), written notice must be provided to the FAA for any structure that (1) rises more than 200 feet above the ground; or (2) bisects a plane extending outward and upward at a slope of 100 to 1 for a distance of 20,000 feet for

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large airports, 50 to 1 for a distance of 10,000 feet from smaller airports, or 25 to 1 for 5,000 feet from any heliport.

FAA guidance on aviation lighting for wind projects issued on or about February 1, 2007 calls for synchronized flashing red light (FAA L-864) on turbines along the project perimeter with unlighted gaps not to exceed ½ mile. Not all towers must be lit and day time lighting is not called for provided towers are painted white or off-white (as is common with wind turbines). See FAA Advisory Circular 70/7460-1K.

**4. Coastal Zone Management Act (“CZMA”)**

The federal Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.*, provides the state with the authority to ensure that federal approvals of projects that may affect coastal resources or uses are consistent with the enforceable policies of a state's approved coastal zone management program. In Maine, land use and environmental laws administered by DEP and LURC serve as Maine's enforceable policies for CZMA purposes.

<http://www.maine.gov/spo/mcp/resources/regulations.php>

**5. Review Agency Issues**

Where federal permits are required, agencies such as U.S. Fish & Wildlife Service (“FWS”) and the Environmental Protection Agency (“EPA”) will have an opportunity to review and comment on federal permit applications and may impose additional requirements on a project. In addition, the State Historic Preservation Office (“SHPO”) must provide clearance as part of the federal permitting scheme.

a. Federal Endangered Species Act

The Federal Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, prohibits the taking of any federally listed species. A prohibited take is broadly defined and includes to harass or harm, as well as to wound or kill, and harm in turn may include habitat modification or degradation. 50 C.F.R. § 17.3. The Act provides for an incidental take permit for activities, otherwise lawful, that may result in an incidental taking.

The Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668, *et seq.*, also prohibits the taking of bald and golden eagles.

b. Migratory Bird Treaty Act

The Migratory Bird Treaty Act, which is administered by FWS, includes a federal prohibition against the taking, trading in, or transporting migratory birds. 16 U.S.C. §§ 703, *et seq.* The definition of take includes “to pursue, hunt, shoot, wound, kill, trap, capture, or collect.” 50 C.F.R. § 10.12. The Act provides for protection of all common songbirds, waterfowl, shorebirds, raptors (eagles and hawks), owls ravens, crows, native doves and pigeons, swifts, martins, swallows and species. See 50 C.F.R. 10.13 (list of

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protected species). Protection extends to species' feathers, plumes and other body parts, as well as nests and eggs. Unlike the Endangered Species Act, there is no mechanism under the Migratory Bird Treaty Act to obtain an incidental take permit for activities that may result in unintended death or harm to covered species.

**C. Additional Requirements for Projects Located in Near-shore Waters (mean low water line to three mile limit of state ownership)**

1. State Approvals

Near-shore projects located on state-owned submerged lands (from mean low water to the three mile limit) require a state lease or easement from the Department of Conservation's Bureau of Public Lands ("BPL"). A lease or easement would be required for occupancy of state-owned submerged lands for placement of a wind tower and turbine and/or related transmission lines.

<http://www.maine.gov/doc/parks/programs/sublands/index.html>

See also [http://janus.state.me.us/legis/ros/lom/LOM122nd/4Pub101-150/Pub101-150-42.htm#P668\\_108983](http://janus.state.me.us/legis/ros/lom/LOM122nd/4Pub101-150/Pub101-150-42.htm#P668_108983) (rulemaking and interim authority regarding a "large scale project")

2. Federal Approvals

Each of these approvals applies potentially to activities involving placement of both tower/turbine and/or transmission related facilities:

- a. United States Coast Guard - permit for private aid to navigation on fixed structure in waters of the United States (14 U.S.C. § 85; 33 C.F.R. Parts 62-7); and
- b. Review agency consultation with National Marine Fisheries for "essential fish habitat."

**D. Additional Requirements for Projects Located in Off-shore Waters (federally owned lands from the three mile limit to the extent of the U.S. Exclusive Economic Zone (200 nm))**

The Energy Policy Act of 2005 makes the Minerals Management Service ("MMS") the lead federal agency for off-shore wind projects, although other federal authorizations are required. Accordingly, MMS will be responsible for issuing a lease, permit, and/or ROW under OCS alternative energy program (rules pending); it will also likely be the lead NEPA agency responsible for the EIS supporting its decision and that of cooperating federal agencies.

State regulatory jurisdiction remains over project elements located within the state (3nm shoreward); see Item C, Near-shore project requirements, above. Federal agency

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actions by MMS and other federal agencies regarding offshore wind power development would also be subject to state review under the CZMA for consistency with applicable state enforceable policies. *See* section II, B(4), above.