

Subcommittee 2/Regulatory & Permitting Process: Recommendations on State Decision-Making Framework for Commercial-Scale Offshore Wind Energy Development¹

Introduction

The regulatory subcommittee has developed the draft recommendations detailed below for consideration by the full Ocean Energy Task Force ("OETF") for inclusion in its final report. Proposed changes to reflect discussion at the OETF's October 7, 2009, meeting are included.

Overall, these recommendations address how the State may use its regulatory and submerged lands leasing authorities, amended as described, to facilitate siting of offshore commercial-scale wind energy development located on state-owned submerged lands in Maine's coastal waters in a manner that addresses as appropriate other natural resources values and human uses.² The recommendations cover projects that propose use of turbines and support structures currently under development and designed for deep water (50 m or greater) as well as those designed for shallow waters using existing, demonstrated technologies. These recommendations are for discussion only and do not necessarily reflect agency or administration policy.

Initial thoughts on the manner in which the proposed public policies would be effected, such as proposed statutory amendments, are indicated in parentheses following each aspect of the recommendations outlined below. If accepted, these recommendations would be further detailed as appropriate in proposed legislation.

Recommendations

I. Public Trust Doctrine

Subcommittee Recommendations

- As foundation for submerged lands leasing and related permitting provisions below, make legislative findings, tied to offshore wind energy generation goals³, that:

¹ Submerged lands leasing and other provisions as noted would apply to proposed commercial and pilot tidal power facilities subject to permitting under the Maine Waterway Development and Conservation Act (MWDCA) and related authorities. The MWDCA provides a one-stop state permit (submerged lands lease, if required, is separately issued by BPL) for tidal power and other hydropower projects.

² There are some small areas of submerged lands that are privately owned. These are close in shore immediately adjacent to the shore and not relevant to this discussion.

³ ~~At its 10.7.09 meeting, The subcommittee notes that~~ the OETF expressed general agreement on may revisit and recommend amendment of the Wind Energy Act's goal to call for 5 GW of ~~for~~ deep-water offshore wind capacity by 2030. See 35-A M.R.S. § 3404.

- 1) Maine's coastal waters and submerged lands provide unique and valuable opportunities for development of wind, tidal, potentially other indigenous, renewable ocean energy resources;
 - 2) concerns regarding climate change and related degradation or loss of marine resources and related human uses make development of and transition to use of renewable ocean energy resources consistent with sound stewardship of trust resources; and
 - 3) with provision for avoidance, minimization, and mitigation of harms to existing public trust-related uses and resources, such as fishing, navigation and wildlife habitat; restoration of lands affected upon completion of authorized uses pursuant to permitting criteria; and adequate compensation to the public for use of its trust resources pursuant to state submerged lands leasing criteria, development of these renewable ocean energy resources promises significant trust-related benefits to Maine people for whom the State holds and manages submerged lands and their resources. (amend 35-A M.R.S. §3402, with cross reference in and to other pertinent provision in leasing and permitting laws; and/or amend 12 M.R.S. §571, *et seq.*, Public Trust in Intertidal Lands Act, to specify Public Trust Doctrine's applicability on submerged lands and make related changes)
- Address the water dependent use issue by amending BPL's leasing statute (12 M.R.S. §1862) to specify that, as per Public Trust Doctrine-related legislative findings outlined above, BPL may lease state submerged lands to facilitate development of offshore ocean wind energy resources and direct BPL to amend its rules accordingly.⁴

II. State Environmental Permitting

Subcommittee Recommendations

- Maintain current bifurcated approach, permitting by DEP (or LURC, see below) and submerged lands leasing by the Bureau of Parks and Lands (BPL) while clarifying that BPL:
 - 1) shall adopt (or may condition its leasing decision on) pertinent findings and conclusions in DEP's Site Law and/or NRPA permit (or LURC land use permit), as applicable; and
 - 2) retains authority to require rent and compensation as discussed below. (amend 12 M.R.S. §1862). Note: BPL lease application would be filed at same time as DEP or LURC application to further coordinate state review and decision making and address site banking and speculative leasing concerns.

⁴ ~~If the Attorney General's office so advised to address Public Trust Doctrine related concerns, Proposed legislation regarding this recommendation this amendment~~ would clarify, if and as necessary, ~~-that ocean energy wind power~~ development on state submerged lands is a "water dependent use."

- Except as otherwise provided below, DEP designated lead permitting agency (no LURC permitting or rezoning required for an "offshore commercial wind energy development" (see below re: proposed Site Law definition) or other wind energy development located in a "coastal wetland" as defined by the NRPA.⁵ (amend LURC authorizing legislation, Site Law and other pertinent DEP authorities, and potentially 35-A M.R.S. §3451(framework for regulation of grid-scale wind projects) (Note: DEP would consult with and consider comments of LURC and neighboring municipalities in exercising its decision-making authority.)
- Provide for LURC land use permitting jurisdiction over a "community-based offshore wind energy development" that is "locally owned" (as defined by 35-A M.R.S. §3602 ("community-based renewable energy project")); is used primarily to offset part or all of the electricity requirements of the local owners or community in or adjacent to which the project is located; employs generating facilities of a size commensurate with the pertinent community's need; and is located no more than one nautical mile from a coastal island in LURC jurisdiction. Such a "community-based offshore wind energy development" may also be connected to the ISONE grid. Direct LURC to amend its rules to clarify that a "community-based offshore wind energy development" is an allowable use in areas, described above, where LURC has permitting jurisdiction. Current law authorizing DEP to assume jurisdiction over projects located in both the organized and unorganized area would apply.
- Use same administrative and judicial review process for "offshore commercial wind energy development" as for land-based "grid-scale wind energy development" in DEP jurisdiction and LURC jurisdiction as applicable: DEP makes initial permitting decision (no original BEP jurisdiction); BEP may only hear an appeal on the record (no *de novo* review); 185 day permit review period; DEP or LURC able to contract, at applicant's expense, for expertise needed for timely review; and appeal direct to the Law Court (amend pertinent sections in Title 38) (Note: These same administrative procedures would be made applicable to tidal power development under the Maine Waterway Conservation and Development Act.)
- Amend Site Law (38 M.R.S. §481, *et seq.*), Natural Resources Protection Act (38 M.R.S. §480-A, *et seq.*)⁶:

⁵ "Coastal wetlands" means all tidal and subtidal lands; all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous lowland that is subject to tidal action during the highest tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes." 38 M.R.S. §480-B(2).

⁶ Amend LURC's permitting laws as appropriate to provide parallel provisions for community-scale [offshore wind energy](#) projects subject to LURC jurisdiction, [including consideration of cumulative effects, adaptive management and avoidance, minimization and mitigation of adverse effects as per subcommittee 1 recommendations](#). See above [re: subcommittee 1 recommendations](#)-.

1) Clarify Site Law permit required for an "offshore commercial wind energy development", meaning a "wind energy development" as defined by 35-A M.R.S. §3451(11), that has an aggregate generating capacity of 3 MW or more, is proposed to be located in whole or in part in a "coastal wetland", and includes transmission lines and other associated facilities as defined by 35-A M.R.S. §3451(1)⁷. (Note: In some cases, project-related transmission lines may include upland as well as submerged power lines.) Include provision allowing DEP discretion to address development of "associated facilities", including transmission lines, separately as provided for "grid-scale wind energy development." *See* 38 M.R.S. §344(2-A)(A);

2) Amend NRPA to include approval criteria ~~Require DEP determination~~ regarding noise, safety-related setbacks, and shadow flicker for "wind energy development" that is less than 3 MW and located in a coastal wetland ~~that is less than 3 MW~~, based on criteria for as per DEP certification for small wind facilities on land.⁸ (Amend 35-A M.R.S §3456 and/or NRPA, clarifying that noise, setback, and shadow flicker issues concern potential effects on persons as opposed to the "protected resource(s)");

3) Clarify that scenic impact standard and analysis for "grid-scale wind energy development" under NRPA and Site Law also applies to wind energy development proposed for location in a "coastal wetland" and use distance limitations in 35-A M.R.S. §3452 (scenic assessment based on proximity to a "scenic resource of state or national significance", required within 3 miles, at DEP's discretion 3-8 miles, and not required beyond 8 miles);

4) Require, as a Site Law approval criterion, demonstration that the proposed development would provide tangible benefits to one or more communities to which the project is adjacent or in which it is located in the manner that such benefits are required for land-based "grid-scale wind energy development" and direct DEP develop guidance on this issue; and

Note: Proposed legislation re: the above recommendation, to be developed in consultation with DEP, would clarify the manner in which project-related greenhouse gas emissions and related environmental benefits would be considered under this criterion.

5) Require project decommissioning and provision of related financial assurances for all wind energy development located in a "coastal wetland" in accordance with current the Site Law's current guidance for land-based "grid-scale wind energy development." (amend Site Law and NRPA).

⁷ ""Associated facilities" means elements of a wind energy development other than its generating facilities that are necessary to the proper operation and maintenance of the wind energy development, including but not limited to buildings, access roads, generator lead lines and substations. 35-A M.R.S. § 3451(1).

⁸ NRPA may be applicable regardless of generation capacity due to location within "coastal wetlands", which include submerged land areas.

- Amend Site Law and NRPA to include approval criteria that address issues presented by offshore wind energy regarding potential noise, avian (bird and bat), marine resources and other impacts; authorize DEP to adopt rules under Site Law and NPRPA necessary to incorporate the above-noted statutory approval criteria (unallocated section, including direction to consult in natural resources agencies in developing proposed rules)

Note: If recommendations of subcommittee 1, as presented on 10.7.09, are adopted, this recommendation needs to be clarified to provide that these statutory changes and related rules would address potential cumulative effects, adaptive management, and avoidance, minimization, and mitigation of adverse effects.

- Direct SPO to review the scenic resources of state or national significance identified in the coastal scenic inventories specified in the definition of "scenic resource of state or national significance" (35-A M.R.S. §3451(9) and, considering pertinent criteria in the methodology adopted by rule pursuant to PL 2007 c. 661, update them as appropriate by a date certain (2 years, to provide funding flexibility) (unallocated section)
- NEW - Amend the Maine Waterway Development and Conservation Act ("MWDCA") (38 M.R.S. §630, et seq.) to clarify the DEP has statewide jurisdiction over wave power projects, as per P.L. 2009 c. 270 (clarifying DEP's statewide jurisdiction under the MWDCA over tidal power projects)

Note - Both DEP and LURC are in agreement on this proposed change.

III. Submerged Lands Leasing

Subcommittee Recommendations

- Amend BPL's submerged lands leasing statute to specify that for ocean energy demonstration projects the annual rent for the requisite submerged lands shall be as follows, except as otherwise provided below:
 - 1) Wind energy demonstration project issued a general permit under 38 M.R.S. §480-HH: \$10,000 per year for the term of the general permit; and
 - 2) Tidal power pilot project issued a general permit under 38 M.R.S. §636-A: \$100/acre of submerged lands occupied by the project per year for the term of the general project. As used in this recommendation, the area "occupied" would include the sum of the area on which turbine(s), other testing and monitoring equipment, all anchoring or mooring lines or structures, and the connecting cable to shore are placed, and any other such areas where it is necessary to exclude transient Public Trust uses to avoid unreasonable interference with the project purposes.

- Exempt ocean energy demonstration projects located in the Maine Offshore Wind Energy Research Center, where non-commercial projects may only be tested by or in cooperation with the University of Maine, from the above noted rent obligations.
- Direct BPL, by a date certain (1 year), to amend its submerged lands leasing rules to include a rental fee schedule for leasing submerged lands for tidal power development, "offshore commercial wind energy development", and other wind energy development that is designed to balance state goals of assurance of fair compensation for use of and mitigation of potential adverse effects on or conflict with existing uses of state-owned submerged lands that are held in trust for the people of the State with related state goals of facilitating development of an in-state renewable ocean energy industry. Legislation mandating this rulemaking would specify that:
 - 1) Lease fees must be commercially reasonable and comparable to pertinent lease fees in other jurisdictions both in terms of the fee amounts and provision for a graduated fee schedule that reflects consideration of energy production levels and debt service obligations in the initial years of a development;
 - 2) In developing the rules BPL must consider ocean-energy related submerged lands leasing fees in other states; fees provided for by the Minerals Management Service's Alternative Energy Program for leasing OCS areas; current market practices in the wind power industry regarding lease arrangements; and other pertinent information;
 - 3) The fee structure shall include an amount adequate to cover BPL's pertinent administrative costs;
 - 4) The fee structure must allow the developer of a wind, tidal or other renewable ocean energy development, in lieu of cash payment of the pertinent rental fee for use of state submerged lands, to enter into a contract for sale or use of project-generated power, negotiated with BPL and Public Utilities Commission ("PUC"), that through reduced rates or otherwise provides equal or greater dollar value to the State or Maine electric consumers, and BPL must consult with PUC in developing rules regarding this energy as rent option;
 - 5) The rules shall require BPL to consult with and consider the recommendations of the PUC regarding provision of energy as rent (see item 3, above) and related permit terms and conditions for a lease for an "offshore commercial wind energy development", tidal power or other ocean energy development;
 - 6) The rules shall clarify that potential adverse effects on existing uses, such as fishing, are addressed through the rental fee structure and BPL may not

require case-by-case payment of an amount in addition to rent as mitigation for such project-specific effects; and

7) The rules must incorporate the statutorily established fees and exemption for ocean energy demonstration projects (see above).

(Amend 12 M.R.S. §1862; unallocated section directing BPL to amend submerged lands leasing rules)

- No competitive bidding process; as under current law, lease applications addressed as received in coordination with DEP process; submerged lands leasing statute amended to clarify lease to be filed at same time as DEP application
- For "offshore commercial wind energy development", allow for 30-year, renewable lease (dating from completion of project construction, with provision for phased development);⁹ and for tidal power authorize BPL to issue a longer lease (up to 50 years) equivalent with FERC license term
- Establish a non-lapsing, dedicated fund, the Ocean Renewable Energy Trust Fund ("Trust Fund"), into which the following funds would be deposited: 1) rental payments; and 2) state share of OCS revenues from alternative energy leasing on the OCS
- Clarify that the Trust's funds will be dedicated to protection and enhancement of the integrity of Public Trust related resources and uses, including renewable ocean energy development as per the legislative findings recommended above and accordingly will be used as follows:

See table of options for discussion

~~1) Cover pertinent administrative costs of BPL's submerged lands leasing program (administered by BPL);~~

~~2) \$[X] annually to support operations of the proposed Gulf of Maine Ocean Renewable Energy Foundation (cf. 9.23.09 draft Proposal to Form a Private/Public Foundation to Lead and Coordinate Ocean Wind Energy Development in the Gulf of Maine)¹⁰; and~~

~~3) Distribution of the remaining balance as follows:~~

~~A) 50%: A low or no interest loan fund to support development of residential, commercial, industrial infrastructure and innovative technologies to reduce~~

⁹ Maine law current allows a 30-year submerged lands lease.

¹⁰ The regulatory subcommittee suggests broadening the foundation's scope to include tidal power and other commercially and technically viable ocean renewable energy options.

~~dependence on fossil fuels, reduce greenhouse gas emissions, and reduce energy costs for Maine citizens such as geothermal systems, heat pumps, battery, thermal or mechanical electricity storage units, and transformation to an electric car/battery based smart grid (funds administered by Efficiency Maine);~~

~~B) 20%: Research, monitoring, and other efforts to avoid, minimize and mitigate potential adverse effects of ocean renewable energy development on non-commercial fisheries, seabirds, shorebirds, migratory birds, and other coastal and marine natural resources, including but not limited to development, enhancement and maintenance of the recommended Coastal Atlas (recommended map based information resource to guide public and private decision making; see below) and field research to provide baseline data or data to address siting issues presented by wind, tidal or other ocean energy development (funds administered by DMR, in consultation with SPO and DIFW);~~

~~C) 20%: Resource enhancement, research or other efforts to avoid, minimize, or mitigate potential adverse effects of ocean renewable energy development on commercial fishing and related activities (funds administered by DMR); and~~

~~D) 10%: Shore and Harbor Management fund for public infrastructure and municipal planning for harbor protection (current use of submerged lands funds) (administered by BPL)~~

- ~~● Lease term: 1) Provide for a 50-year lease (based on maximum term of a renewable federal hydropower license) for an "offshore commercial wind energy development" or tidal power development greater than 3MW to facilitate project financing; and 2) status quo (30 year renewable lease~~

~~Note: Proposed provision for municipal revenue sharing deleted as per 10.7.09 OETF discussion.~~

IV. Local Role

Subcommittee Recommendation

- ~~● Land use regulation. Municipality may not enact or enforce any standard or requirement that is stricter than DEP standards under Site Law or NRPA, as applicable (modeled after provision in wind energy demonstration project legislation, P.L. 2009 c. 270) and must act within date certain of state permitting decision (amend Wind Energy Act) (Note: This provision would apply to tidal power development as well. As under P.L. 2009 c. 270, a municipality would need to demonstrate that the project is located within its boundaries in order to exercise jurisdiction. As per the OETF's discussion on 10.7.09, this provision would apply to land-based "associated facilities", e.g., on-shore transmission line, as well as ocean-based facilities.);~~

Note: Personal property taxation issue under consideration by subcommittee 4 (economic development)

V. Federal-State Coordination - Siting-related Planning

Note: The following coordination efforts would be undertaken concurrently with implementation of proposed changes in state permitting and leasing laws and rules and not as precursors to such changes.

Subcommittee Recommendations

- Direct SPO, in conjunction with DOC/BPL, DMR, and the University of Maine System, to develop, publish, and maintain on the WWW, as detailed, non-regulatory guidance: 1) a user-friendly, map-based information resource (Coastal Atlas) to facilitate public (leasing and permitting) and private (site selection and investment) decision makers' use of the best available information regarding siting of "offshore commercial wind energy development" and other matters; and 2) guidance, developed in consultation with DEP, ACOE and state and federal natural resources agencies, on characteristics, such as presence of endangered species or shipping lanes, that may present difficult regulatory issues under applicable state and federal wind energy laws. In designing this resource, focused on Maine's coastal waters, the agencies would build on pertinent current efforts (including those of the UMaine System and the OETF) and consider options to address the information needs identified in the "Data and Information Needs Assessment" found in Appendix P of the December 2006 "Bay Management Study." Funding to support this effort would come from the following state sources: project-specific federal funding (see next bullet); and (over time) a portion of submerged lands leasing fee for offshore wind or other development utilizing state submerged lands for energy transmission or generation; a portion of state share of OCS alternative energy development related revenue; and a potentially a portion of state-assessed personal property tax on wind equipment. See above re: subcommittee 4 review. (unallocated section; amendment of pertinent funding statutes)
- Recommend that the State seek congressional appropriation needed to undertake the above-described Coastal Atlas-related work in coordination with related regional and national marine spatial planning efforts (recommended action; legislation not required)
- Recommend that SPO work with MMS, ACOE, USFWS, NMFS and other federal partners to develop an MOU (using the MOU with FERC on tidal power development as a model) regarding planning for and leasing and permitting of wind energy development in state waters and on the OCS. (recommended action; legislation not required)

VI. Federal-State Coordination - CZMA Consistency

Subcommittee Recommendation

Recommend that SPO submit for NOAA's review and approval amendments to the Maine Coastal Program, if any, needed to clarify that ocean renewable energy development activities proposed on the federal OCS are not be subject to review under Maine's coastal zone management program under provisions of the CZMA regarding listed federal activities, listed federal license or permit activities or OCS development activities but that the State would exercise its right to request CZMA consistency review of such any such OCS activity if it determined that the activity may have undue adverse effects on resources or related human uses in its coastal zone. (recommend agency action under current authority; legislation not required)