

**Ocean Energy Task Force
Regulatory Subcommittee
Summary of August 11, 2009 Meeting
Held 2 p.m. to 5 p.m. at MaineDOT in Augusta, Maine**

Attendees: subcommittee members - Kathleen Leyden (SPO) (subcommittee chair), Rep. Stacey Fitts, Angus King, Don Perkins (OETF co-chair), Brian Swan (DMR) (for George Lapointe), and Samantha Horn-Olsen (DOC/LURC) (for Pat McGowan); interested parties - Steve Wallace (TRC), Mary McCann (Devine Tarbell), Chip Ahrens (Pierce Atwood), Sarah Verville (Pierce Atwood), Glen Marquis (ORPC), Emily Walsh (Stantec), Jeff Thaler (Berstein Shur), and Des Fitzgerald (Principle Power); interested parties (by telephone) - Elizabeth Butler (Pierce Atwood), Rita Heimes (UM law school), Marcia Bowen (Normandeau Assoc.), Bob West (consultant), and Melinda Lawrence; federal agency personnel - Jay Clement (ACOE); state agency personnel - David Littell (DEP), Beth Nagusky (DEP (OETF co-chair), Dan Prichard (DOC/BPL), Jim Cassida (DEP), Dana Murch (DEP), and Todd Burrowes (SPO) (subcommittee and OETF staff).

1. Introductions. Chair Kathleen Leyden welcomed those in attendance, both in person and by telephone, who at her request introduced themselves.
2. Presentation; Discussion - State Decision Making Framework for Commercial Scale Wind Power Projects in Maine's Coastal Waters

Ms. Leyden noted that the meeting's main purpose was to provide an opportunity for the subcommittee to consider Jeff Pidot's presentation of the main points of his policy research paper prepared under contract with SPO and titled *An Independent Study of Submerged Lands Leasing and Regulatory Issues Affecting Wind Power Development in Maine's Coastal Water*. Ms. Leyden explained that the paper is intended to inform and stimulate the subcommittee's discussion and development of recommendations regarding changes to Maine's decision making framework for offshore wind energy projects. Ms. Leyden proposed that, following discussion of the paper and its proposals, the subcommittee identify any concepts on which it is in general agreement and follow up steps to advance development of recommendations for consideration by the full task force whose work is scheduled to be completed on October 31, 2009. It was further proposed that, as suggested when scheduling the meeting, discussion focus on the regulatory as opposed to submerged lands leasing aspects of the paper, with the intention of providing for discussion of the latter at a later date.

Jeff Pidot provided a brief overview of his pertinent qualifications regarding topics addressed in the paper, and outlined the nature and scope of his research. Mr. Pidot emphasized that the paper presents the results of his policy research and reflects his own independent assessment of the key issues and related policy options, including a proposed option for addressing each of them. Mr. Pidot summarized his proposals and the related underlying reasoning on the following topics as detailed in his paper:

- compatibility of the Public Trust Doctrine and use of state submerged lands for wind power development;
- merit in maintaining distinct as opposed to consolidated, "one-stop" state regulatory (permitting) and proprietary (leasing) functions;
- conceptual, legal, and practical difficulties regarding potential LURC and municipal regulatory authority as opposed to an advisory role regarding offshore wind projects;
- value of well-targeted planning to guide and direct wind energy development to places where natural resources and human use-related conflicts are anticipated to be manageable;
- need to clarify the Site Law's jurisdictional trigger and standards as applied to offshore wind energy development;
- need for close federal-state cooperation in planning for and regulating offshore wind energy in state and federal waters; and
- efficacy of the State's coastal management program authorities as applied to offshore wind energy development in federal waters

In general, very positive reaction was expressed concerning the paper, its analysis, extent of research and recommendations. Major observations made and questions raised by subcommittee members and interested parties in discussion regarding Mr. Pidot's presentation and paper included the following:

Scope and focus of the research

- Research was informed by interviewing only one wind industry representative and would have benefited from additional industry input. Mr. Pidot responded that while that was so, interviews were necessarily limited by budgetary constraints and that all those interviewed were chosen for their public policy backgrounds.
- Further consideration of whether the Public Trust Doctrine would allow the Legislature to authorize use of State owned submerged lands for wind energy development is appropriate. Mr. Pidot responded that the Public Trust Doctrine is not a barrier to ocean energy development in Maine any more than nationally, but that a well articulated basis for inclusion of wind power as a use of public trust resources was needed from the Legislature, as recommended in the paper.
- Greater clarification of the limitations of the paper would be useful.
- The need for extensively revising state regulatory framework to address wind development in state waters was questioned if most foreseeable commercial development is anticipated to occur in federal waters.

Submerged lands leasing

- A 30-year lease submerged lands lease term may be too short for offshore wind development. FERC hydro licenses, for example, which involve use of public trust resources, have a 30-50 year term. Mr. Pidot pointed out that 30 years is the term used by the federal government as well as Texas, the two jurisdictions with the most experience on the subject.
- The paper's proposals regarding submerged lands leasing should also be considered as applied to tidal power development.

Planning

- Map-based identification of "no-build" or, conversely, preferred areas for offshore wind energy development, using data and information gathered to date regarding natural resources related constraints and siting-related factors, for example, could help facilitate development.
- Consideration should be given to the extent to which commercial fishing may occur in areas used by wind energy development facilities.
- If preferred development areas are identified, the term "expedited areas" should not be - use of this term in the land-based wind law has fueled misperceptions about state regulation of wind energy.
- The State should seek federal funding, perhaps in concert with the University of Maine, adequate to develop EIS-quality information for select offshore areas, ideally adjoining federal as well as state waters.
- The time, complexity, and cost of map-based planning adequate to inform regulatory or investment decisions present many challenges - if development must await completion of such work, opportunities may be lost. Scenic issues may be particularly difficult to assess and weigh.
- In developing plans for potential use of ocean areas for energy development, the State should consider potential, foreseeable future as well as current uses.

State-federal coordination

- Given the regulatory role of the federal government in state waters, as well as the potential for development in federal waters off Maine, identifying steps to closely coordinate federal and state planning, regulatory, and leasing actions may be among the most important contributions the task force makes.
- Initial focus should be on appropriate changes to the state regulatory framework, with subsequent attention paid to related changes to the state coastal management program for CZMA consistency review purposes.

LURC's role

- Further consideration should be given regulatory jurisdiction over community-scale (2-3 turbines) wind projects serving island communities in LURC jurisdiction.

Municipalities' role

- The prospect of municipal regulatory authority over offshore wind development on state owned submerged lands may have a chilling effect on growth of the industry in Maine, due in part to uncertainty and ambiguity regarding municipal boundaries.
- Assurance of benefits to local communities, through sharing of leasing revenues for example, may be an important consideration in ensuring recognition of public benefits from offshore wind energy development. Comparably to MMS' rules for leasing OCS lands, a municipality's eligibility for revenue sharing should be based on the proximity of its onshore land area to the offshore wind project.

Consolidated review process

- A one-stop regulatory process, such as that under the state hydropower law, is desirable. The Land and Water Resources Council or a comparable entity may serve to coordinate and harmonize agency review and comment on offshore wind projects.

Following discussion of the above and related issues, Jim Cassida presented a memo outlining DEP's preliminary assessment of the efficacy of its rules implementing the Site Law as applied to offshore wind energy development. Mr. Cassida noted issues, such as groundwater, that appeared inapplicable as well as others, such as noise and wildlife-related effects, which may present different issues and require different types of analysis and information for offshore as opposed to onshore wind power. Mr. Cassida suggested that, with legislative direction, DEP could amend its Site Law rules to ensure sound review of issues that may arise under the Site Law and that such a fine-tuning of the Site Law rules would be appropriate.

In his presentation, Mr. Cassida noted that, based on DEP's experience to date with land-based wind, offshore wind development proposals may generate public concerns regarding scenic impacts. Mr. Cassida explained the Site Law's current approach to assessment of scenic impacts associated with grid-scale wind development as contrasted with the broader assessment of such issues under the Site Law and Natural Resources Protection Act for other activities. Mr. Cassida noted that this difference is attributable to law enacted last year in response to recommendations of the Governor's Wind Power Task Force to facilitate development of grid-scale wind energy. He further explained that the broader approach, under which there is the potential that, coastwide, any view from the ocean may be considered scenic, currently applies to wind and other development that may be proposed in offshore areas other than coastal islands.

In discussing the potential efficacy of the approach to scenic assessment for land-based grid-scale wind development as applied to offshore wind, the subcommittee considered the following:

- Limiting regulatory consideration to views from public areas, potentially those of statewide significance;
- Limiting the area (distance from development) within which scenic impacts may need to be assessed; and
- Sources and efficacy of current information and methods for identifying significant scenic resources on along the coast. Ms. Leyden noted that there coastal scenic inventories prepared for SPO in the late 1980s and early 1990s which cover all but Washington and Hancock counties; that SPO has contracted for preparation of a coastal scenic inventory of those counties, using a methodology adopted by rule as directed by wind energy legislation enacted last year; and that that legislation's definition of scenic resources of state or national significance includes scenic viewpoints identified in these SPO inventories.

Subcommittee members generally acknowledged the importance of ensuring a well-reasoned approach to scenic assessment and regulation of scenic effects that is compatible with offshore wind energy development to the future growth and development of the State's offshore wind industry.

3. Next steps. Notwithstanding general recognition that most commercial scale wind energy development may be more foreseeable in federal than state waters off Maine's shores, there was general agreement on the utility of refining the state decision-making framework, in part to ensure that the State is prepared to address in-shore commercial-scale proposals that utilize existing shallow water technologies and have been proposed in federal waters elsewhere on the East Coast. Although the subcommittee did not formally endorse proposals outlined in Mr. Pidot's paper, there was general agreement that they merited further, more detailed consideration. Accordingly, the subcommittee identified the following next steps aimed development of recommendations:

- Develop straw proposal, detailing proposals resulting from Mr. Pidot's research as further refined by the subcommittee's discussion, for consideration at and distribution prior to the next regulatory subcommittee meeting in early September (staff);
- Coordinate with tidal power subcommittee regarding development of submerged lands leasing proposals (staff);
- Further explore with industry representatives prospects for proposal of commercial-scale wind energy development in Maine's coastal water using existing, shallow-water technologies (Beth Nagusky, Don Perkins); and
- Initiate dialogue among task force as a whole on key concepts to be considered via the above straw proposal to lay groundwork for discussion and development of the task force's final recommendations (Don Perkins; staff)