

Note: This redline version is intended to reflect discussion at the regulatory subcommittee's 9.8.09 meeting,

## **Straw Proposal: State Decision-Making Framework for Offshore Wind Energy Development<sup>1</sup>**

### **Introduction**

The following straw proposal is intended to stimulate discussion on 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.<sup>2</sup> This proposal addresses both projects that propose use of turbines and support structures currently under development and designed for deep water (50 m or greater) and projects designed for shallow waters using existing, demonstrated technologies. This proposal is for discussion only and does 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 proposal outlined below. For some aspects of the proposal, an alternative consistent with the general policy direction provided at the most recent regulatory subcommittee meeting is also presented.

### **Straw Proposal**

#### **Public Trust Doctrine:**

- As foundation for submerged lands leasing and related permitting provisions below, make legislative findings, tied to offshore wind energy generation goals<sup>3</sup>, that:
  - 1) Maine's coastal waters and submerged lands areas 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

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<sup>1</sup> Submerged lands leasing and other related 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.

<sup>2</sup> 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.

<sup>3</sup> It is anticipated that the OETF will revisit and may recommend amendment of the Wind Energy Act's goal for offshore wind capacity. See 35-A M.R.S. § 3404.

- 3) with ~~due consideration to existing public trust related uses and resources, such as commercial fishing, navigation, and wildlife habitat, provision for avoidance, minimization and~~ mitigation of harms to existing public trust-related uses and resources, such as commercial fishing, navigation and wildlife habitat, those uses and resources and restoration of lands affected upon completion of authorized uses pursuant to permitting criteria; and with, adequate compensation to the public for use of its trust resources pursuant to state submerged lands leasing criteria, and ~~restoration of lands affected upon completion of authorized uses,~~ 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 (Note: If advised to do so by the Attorney General's office to address the Public Trust Doctrine-related concerns, clarify that wind power development on state submerged lands is a "water dependent use.")

**State environmental permitting:**

- Maintain current bifurcated permitting (DEP or LURC, under alternative below) and submerged lands leasing (BPL) approach 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 application.
- 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.<sup>4</sup> below the mean high water line (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

<sup>4</sup> "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 MRS sec. 480-B(2).

LURC and neighboring municipalities in exercising its decision-making authority)

Alternative: Provide for LURC land use permitting jurisdiction over a "community-based offshore wind energy development" that is "locally owned" [need to clarify meaning; could use definition similar to 35-A MRS §3602 ("community-based renewable energy project")]; used to generate electricity primarily for use by residents of<sup>5</sup> and employing generating facilities located no more than one nautical mile from a coastal island in LURC jurisdiction. DEP permitting only (LURC would play advisory role similar to municipality) in other areas. 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 above where LURC has permitting jurisdiction.

- 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: DEP makes initial permitting decision (no original BEP jurisdiction)<sup>[?]</sup>; BEP may hear appeal on the record (no de novo review); 185 day DEP review period; DEP 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.*) ~~and related rules to:~~

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, ~~and~~ 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 MRS §3451(1)<sup>6</sup>. (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 MRS §344(2-A)(A) below the mean high water line in waters of State subject to tidal influence.;

<sup>5</sup> Eligibility criteria for "net-billing" under PUC rules may provide pertinent criteria.

<sup>6</sup> ""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 MRS sec. 3451(1).

2) Require ~~as NRPA permit criteria,~~ DEP determination regarding noise, safety-related setbacks, and shadow flicker for "wind energy development" located in a coastal wetland that is ~~greater than 100 kw and~~ less than 3 MW, as per DEP certification for small wind facilities on land.<sup>7</sup> (Amend ~~See~~ 35-A M.R.S §3456 or NRPA, clarifying that noise, setback, and shadow flicker issues concern potential effects on persons as opposed to the "protected resource(s)");

*Alternative: No rulemaking—~~amend Site Law and NRPA to include needed specific statutory provisions to address issues presented by offshore wind energy development located on state-owned submerged lands in Maine's coastal waters~~[Note: DEP suggested option; related changes included in text]*

3) Clarify that scenic impact standard and analysis for "grid-scale wind energy development" ~~land-based wind~~ under NRPA and Site Law also applies to wind energy development proposed for location anywhere in a "coastal wetland" Maine's coastal waters 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), ~~provided that distance limitations in current law regarding land-based wind do not apply (3-mile limit in effect serves as distance limitation), i.e., scenic assessment would be required regardless of the distance from a "scenic resource of state or national significance";~~

*Alternative: Use distance limitations in 35-A M.R.S. §3452 (scenic assessment 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 communities in the project area in the manner that such benefits are required for land-based "grid-scale wind energy development" and direct DEP develop guidance on this issue ~~the fishing community~~; and

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

- Amend Site Law and NRPA to include Direct DEP to adopt by a date certain (1 year) amendments to DEP's Site Law rules (chapter 375(10)) and NRPA rules as necessary to approval criteria that address issues presented by offshore wind energy regarding potential noise, avian (bird and bat), marine resources and other

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<sup>7</sup> NRPA may be applicable regardless of generation capacity due to location within "coastal wetlands", which include submerged land areas.

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~~impacts; (unallocated section, including direction to consult in natural resources agencies in developing proposed rules) authorize DEP to adopt rules under Site Law rules and NPRA necessary to conform the rules with statutory the above-noted approval criteria (unallocated section, including direction to consult in natural resources agencies in developing proposed rules)~~

- Direct SPO to review coastal scenic inventories specified in the definition of "scenic resource of state or national significance" (35-A M.R.S. §3451(9) using methodology adopted by rule pursuant to PL 2007 c. 661 and update them as appropriate by a date certain (2 years, to provide funding flexibility) (unallocated section)

### Submerged Lands Leasing - See attachment 1

- ~~Maintain current bifurcated permitting (DEP) and submerged lands leasing (BPL) approach 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 as applicable; and 2) retains authority to require rent and compensation as discussed below. (amend 12 M.R.S. §1862)~~

~~Alternatives: 1) Use same approach as under test center legislation (P.L. 2009 c. 270, Sec. B 1) — require issuance of a submerged lands lease, on terms no stricter than DEP's, if DEP issues Site Law and/or NRPA permit, as applicable, subject to payment of negotiated lease fee (i.e., BPL would not consider and make findings on effects of lease on other uses or the environment); or 2) If "focus area" approach is adopted (see section below re: Federal state coordination: planning), use alternative 1 in "focus areas" and consolidated approach suggested above elsewhere.~~

- ~~For "offshore commercial wind energy development", require BPL to publish a 30-day notice on receipt of an application for a submerged lands lease for a wind energy development (to be filed contemporaneously with DEP permit application) and to initiate a competitive bidding process if another developer with demonstrated technical and financial capacity expresses a competing interest in the lease area for offshore wind energy development.~~
- ~~For "offshore commercial wind energy development", allow for 30 year lease (dating from completion of project construction, with provision for phased development)<sup>8</sup> and require rent and related compensation comprised of the following elements:~~

~~1) fixed rent based on the submerged land area physically occupied by the development (seafloor supports and cable) and the surface water area effectively occupied by the development (polygon formed by connecting the outermost~~

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<sup>8</sup> Maine law current allows a 30-year submerged lands lease.

~~points of proposed turbines, e.g., guy wire or comparable supports plus any cable and turbine-related exclusion areas;~~

~~2) variable rent (royalty) determined based on the projects generating capacity and wholesale energy prices as per MMS rules and due beginning the year in which energy production begins with lesser payments in the initial years to allow repayment of start-up costs (Texas model); and~~

~~3) an amount adequate to cover the administrative costs of BPL (and Office of the Public Advocate (OPA), as applicable). See below.~~

- ~~Allow the developer of an "offshore commercial wind energy development", in lieu of cash payment of the amount provided under item 2, above, to enter into a contract for sale or use of project generated power, negotiated with BPL and the Office of Public Advocate (see below), that through reduced rates or otherwise provides commensurate dollar value to the State and/or one of more municipalities in the project area~~

~~*Alternative:* Define projects that "substantially reduce Maine ratepayer costs" as those that sell X% of power at a favorable rate [OETF to determine through consultation with PUC and/or OPA] and allow such projects to obtain at submerged lands lease at a minimal rate (e.g., no variable rent component). All other projects may sell all power out of state for REC's and other benefits and must pay a royalty payment, e.g., 10% of gross revenue or royalty calculated as per MMS rules. These terms would apply for the life of the project and any subsequent project permitted for placement in the same footprint so Maine ratepayers/citizens continue to benefit from these facilities located on Maine's submerged lands. Both options should include phase in of rates over time to minimize costs during experimentation, development, and construction (prior to revenue generation). When revenues are generated from commercial sales, one of the two leasing options should apply subject to phase in provisions. Transmission through any state waters subjects the entire electrical flow to the above-described statutory provisions regarding reasonable lease payment consistent with the Public Trust Doctrine.~~

- ~~Direct BPL to consult with and adopt the recommendations of the Office of the Public Advocate regarding calculation of royalty payments, provision of energy as rent (see above) and related permit terms and conditions for a lease for an "offshore commercial wind energy development" (amend 12 M.R.S. §1862 and OPA authorizing legislation)~~
- ~~Clarify that in determining the need for and amount of "public compensation" that may be required under 12 M.R.S. §1862(9) in addition to rent, BPL shall, in consultation with DMR, consider potential adverse effects on the fishing industry, including loss or displacement of existing fishing opportunities and other existing uses~~

- ~~Establish a non-lapsing, dedicated fund, the Ocean Renewable Energy Trust Fund, into the following funds will be deposited: 1) rental payments (less portion to cover administrative costs); 2) state share of OCS revenues from alternative energy leasing on the OCS; and 3) any "public compensation" required case by case~~
  
- ~~Clarify that the Trust's funds will be used to protect and enhance the integrity of Public Trust related resources and uses and, accordingly, will be disbursed as follows:~~
  - 1) ~~X%: Energy conservation, innovation and infrastructure, administered by the Efficiency Maine program;~~
  
  - 2) ~~X%: For field research related to siting issues presented by offshore, tidal, and other ocean renewable energy resources, administered by the Maine Outdoor Heritage Fund;~~
  
  - 3) ~~X%: Development, enhancement and maintenance of the Coastal Atlas (map-based information resource to guide public and private decision making), administered by SPO and DMR;~~
  
  - 4) ~~X%: Shore and Harbor Management fund for public infrastructure and municipal planning for harbor protection (current use of submerged lands funds), administered by BPL;~~
  
  - 5) ~~X%: Revenue sharing (pro rata) with affected municipalities, meaning those with an upland area, including coastal islands, located within 3 miles of the geographic center of the proposed offshore commercial wind energy development for a development in state waters, or within 15 miles in the case of an OCS development, for coastal resources management and enhancement purposes, including but not limited to fisheries management and related assistance to the fishing industry, administered by Maine Revenue Services; and~~
  
  - 6) ~~"Public compensation", if required, would not subject to the shared distribution under items 1-5 above but expended to address the specific impacts for which it was required in accordance with the terms of the pertinent BPL lease decision, e.g., funds expended to support research and management relevant to the adversely affected fishery~~

*Alternative:*

- 1) ~~60%: development of residential, commercial, industrial infrastructure and innovative technologies to reduce dependence on fossil fuels, reduce GHG emissions, and reduce energy costs for Maine citizens such as geothermal systems, heat pumps, battery, thermal or mechanical electricity storage units, transformation to electrical car/battery based smart grid;~~

~~2) 20%: Mitigation for wildlife habitat, coastal resource impacts, particularly focused on populations impacted such as seabirds, shorebirds, migratory birds, non-commercial fisheries; and~~

~~3) 20%: Mitigation for commercial fishery impacts, fishery compensation funds.~~

- ~~• Direct BPL, by a date certain (1 year), to amend its rules as necessary to implement the above noted statutory changes to the submerged lands leasing program for "offshore commercial wind energy development" and other wind energy development, including administrative cost related rental fee, base, per acre portion of rent; and notice and competitive bidding process and qualifications.~~

### Local role:

#### Development review

- 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);

~~Alternative: Express state preemption of local regulatory authority over offshore commercial-scale wind energy development located on state-owned submerged lands in Maine's coastal waters~~

#### Taxation

- Clarify that wind energy development located on state-owned submerged lands will be exempt from state or local personal property tax and will be subject to an excise tax of @\$12,000/MW of generation capacity (an amount commensurate 12 mill tax rate). If the State Tax Assessor, based on information submitted by a municipality, determines that the project is located within the municipality, the municipality shall be reimbursed for at least 50% of its lost tax revenue as per the Maine constitution. If the same tax structure were to be applied to land-based and ocean-based wind, a municipality that utilizes more than 50% of the tax revenue for municipal general fund purposes prior to the effective date of this change pursuant to a TIF or otherwise would be reimbursed at the same percentage as is currently utilized for general fund purposes.<sup>9</sup>

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<sup>9</sup> Note: This may be an idea to refer to another subcommittee.

Reported values for wind turbines located thus far in Maine are about \$3,000,000 per 1.5 MW unit and almost \$6,000,000 for 3 MW unit. That includes site prep and some of their transmission lines. At a 12 mill tax rate (estimate statewide full value tax rate), this amounts to \$2,000,000 in value per MW or

**Federal-state coordination - 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.

- Direct SPO, in conjunction with DOC/BPL, DMR, and the University of Maine System, to develop and publish 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 criteria, 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 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: share of submerged lands leasing fee for offshore wind or other development utilizing state submerged lands for energy transmission or generation; portion of state share of OCS alternative energy development related revenue; and portion of state-assessed personal property tax on wind equipment. See above. (unallocated section; amendment of pertinent funding statutes)
- Recommend that the State seek congressional appropriation needed to undertake this 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

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\$24,000 in tax per MW. Since the constitutional reimbursement is at least 50% of the municipal tax lost, approximately \$12,000 in revenue per MW would be needed to cover reimbursement needs.

With the exception of the wind turbines located in the Town of Freedom, all commercial wind developments in Maine have been located in Tax Increment Financing Districts to date and are subject to a credit enhancement agreement which typically returns up to 60% of the property taxes paid to the taxpayer. If an exemption were created for commercial wind development, the taxpayer would not have to pay any property taxes. Because municipalities are typically already returning more than 50% of the tax revenue generated by the wind projects, an exemption which would result in a constitutional reimbursement of at least 50% of the tax to the municipality would actually result in a revenue increase to most municipalities.

The rationale basis for this distinction between taxation of land-based and offshore wind should be discussed with the AG's office.

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~~development as a model) regarding leasing and permitting of wind energy development in state waters and on the OCS. establish a task force under MMS rules to coordinate and facilitate federal, state, and local information sharing and other actions regarding alternative energy development on the OCS~~  
(recommended action; legislation not required)

*Alternatives:*

- ~~• Use map-based tool and best available information to: 1) identify and map "focus areas" within which the streamlined administrative and judicial review process described above (see 2<sup>nd</sup> bullet in "State Environmental Permitting section) would apply and state financial or other incentives (if any), such as above noted tax exemption, would be provided; or 2) identify and map resource and use protection areas where commercial offshore wind energy development would not be allowed due to anticipated significant conflicts with existing uses, such as shipping, or natural resources, such as major bird migration corridors or marine mammal feeding areas~~
- ~~• Differentiate between a "community wind energy development" (one by or for and of a size to meet the needs of a discrete coastal community or communities) and an "offshore commercial wind energy development" and require the latter to be sited at least 1 mile from the nearest land mass, including any inhabited island, to mitigate potential noise and visual effects~~

**Federal-state coordination - CZMA consistency:**

- Recommend that SPO submit for NOAA's review and approval amendments to the Maine Coastal Program needed to ensure that, in accordance with and to the extent provided by the federal consistency provision of the Coastal Zone Management Act, offshore wind energy development proposed on the OCS is subject to Site Law and NRPA (amended as proposed) and other pertinent state enforceable policies that are applicable to such projects in Maine's state waters. (recommend agency action under current authority; legislation not required)