BROWN & BURKE
ATTORNEYS AT LAW
152 SPRING STREET - P. O. BOX 7530
PORTLAND, MAINE 04112
www.brownburkelaw.com

TELEPHONE (207) 775-0265
FACSIMILE (207) 775-0266

RUFUS E. BROWN
M. THOMASINE BURKE

January 24, 2013

VIA FEDERAL EXPRESS

Michele Lumbert, Clerk
Kennebec County Courthouse
95 State Street
Augusta, ME 04330-5680

Re: *Fox Islands Wind Neighbors v. Maine Department of Environmental Protection*
Civil Docket No. AP-11-42

Dear Michele:

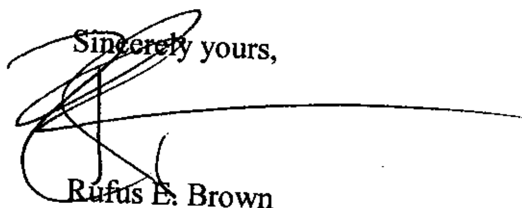
I am attaching for filing the following three motions:

1. Petitioners' Rule 80C Brief and;

2. Petitioners' Rule 80C Brief Appendix.

Thank you for your assistance.

Sincerely yours,



Rufus E. Brown

REB/

cc. Amy Mills, AAG/ Jerry Reid, AAG, with enclosures via U.S. Mail and E-mail
Catherine Connors, Esq. with enclosures via U.S. Mail and E-mail

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-AP-11-42

FOX ISLANDS WIND NEIGHBORS, LLC, et al., PETITIONERS v. MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al, RESPONDENTS	))))))))))	**PETITIONERS' RULE 80C BRIEF**

Petitioners, through counsel, submit the following brief on the merits of their claims in the Amended Petition for Review.[1]

INTRODUCTION

In this case residents living near the wind energy project (the "Project") of Fox Islands Wind ("FIW") on Vinalhaven and an organization they formed to protect their respective interests, Fox Islands Wind Neighbors ("FIWN"), challenge the Condition Compliance Order issued by the Department of Environmental Protection (the "DEP") on June 30, 2011, Department of Environmental Protection ("DEP") Administrative Record, as revised April 20, 2012 ("AR"), 142, Petitioners' Rule 80C Brief Appendix ("Pet. App.") 124, following earlier findings by the DEP on November 23, 2010, AR 46, Pet. App. 59, that FIW was not operating in compliance with 06-096 CMR 375 §10 (the "Noise Rule"), AR 143, Pet. App. 133, as required by statute, 35-A M.R.S.A. §3456.1.A, and its operating license issued on June 5, 2009 (the "License"). AR 3, Pet. App. 10.

[1] Pursuant to the Consent Order in this case dated November 27, 2012, Petitioners are briefing their claims under the First Amendment and the Equal Protection Clause, as set forth in Counts III and IV of the Amended Petition, under Rule 80C, subject to this Court's ruling on Petitioners' Motion for Clarification and/or Reconsideration, which has been deferred by consent of the parties for consideration by the Court as part of its ruling on the merits.

SUMMARY OF THE ARGUMENT

A core issue this case raises is whether the Commissioner of the DEP may lawfully deny citizens of this State protection from exposure to excessive noise from a wind project licensed by the DEP. The Wind Energy Act, P.L. 2007, Ch. 661 enacted legislation that included the requirement for certification of small-scale wind energy projects. 35-A M.R.S.A. §3456.1. The statute requires small-scale projects to comply with the Noise Rule to the same extent as grid-scale projects.

In the pages that follow we will show that both the DEP and FIW knew from the outset that it was likely that the Project would exceed the applicable 45 dBA nighttime noise limits required by the Noise Rule whenever there is significant vertical and directional wind shear. Once the Project began operations in the Fall of 2009, adjoining residents immediately complained about the extent of the noise. After multiple complaints were filed by Petitioners over the next several months, the DEP's noise consultant finally concluded in September 2010 that the very conditions flagged in the application caused the Project to exceed the applicable noise limits. FIW belligerently refused to acknowledge non-compliance and refused to provide operational, sound and meteorological data requested by the DEP so that it could design corrective action to assure the Project would operate lawfully in the future. FIW's combative posture led the DEP to issue a formal Determination of Non-Compliance on November 23, 2010, finding that the Project was operating in violation of the Noise Rule based on a complaint made for the evening of July 17-18, 2010. It further ruled that the Project was likely to exceed the applicable sound limits whenever there is significant vertical and directional wind shear, regardless of wind direction. Based on these findings, the Determination of Non-Compliance mandated that FIW take corrective action.

As a standoff between the DEP professional staff and FIW developed on what corrections should be made to operations and reporting to account for the non-compliance of the Project, FIW seized on the opportunity presented by the election of a Governor, with known hostilities to environmental regulations, to launch a political campaign to force the professional DEP staff to back away from its regulatory demands for effective corrective action. Eventually, Acting Commissioner Aho terminated the efforts of her professional staff and the DEP's consultant to draft new protocols that would adequately address the wind shear issues plaguing this Project. She did so without any background or history on the technical aspects of those issues, over the strong objections of her senior regulator, James Cassida, the Director of the DEP Division of Land Resource Regulation. Before leaving state employment in the Summer of 2011, Cassida had the most depth of professional knowledge of wind projects of any person at the DEP. He had overseen the licensing of every wind project in the State of Maine, representing the DEP in all appeals to the BEP from licensing decisions, representing the DEP in the rulemaking hearings for the Noise Rule Amendments, and was the principal liaison with the DEP's expert acoustical consultant, Warren Brown. Instead she gave FIW free reign to design the framework of noise regulation going forward in the Condition Compliance Order.

Based on this record, as further described below, Petitioners will show that the Condition Compliance Order itself is unlawful because it exceeds the authority of the DEP to allow a small-scale wind project to operate in violation of the Noise Rule. Petitioners will also show that the protocols adopted in that Order have the practical effect of exempting the Project from regulation and are unlawful for that reason. Finally, Petitioners will show that such protocols are also the product of an arbitrary and capricious decisionmaking and an abuse of discretion. Finally, we will demonstrate that the Condition Compliance Order is unlawful as the product of political

bias, and violated rights of the Petitioners protected by the First Amendment and the Equal Protection Clause.

FACTUAL BACKGROUND

A. Issues about Excessive Noise in Connection with the Licensing of the Project.

From the outset, FIW was aware of the likelihood that the Project would create excessive noise affecting neighbors to the Project, even absent wind shear conditions. FIW's parent company[2] commissioned the engineering firm, Woodard & Curran, to assess the feasibility of a wind project, which issued its Report in September 2008. Petitioners' Additional Administrative Record ("Pet. AR") 1, Pet. App. 1.[3] In Section 5 of the Report, Pet. App. 2, the consultants explained that it had engaged Resources Systems Engineering ("RSE"), one of the foremost authorities on acoustical analysis, with the most experience of any firm with wind projects in Maine, to perform a noise impact analysis. The analysis concluded that noise mitigation would be necessary because of the compact nature of the proposed project site located close to residents. Report at 5-1.[4] FIW responded by replacing the sound engineer delivering the bad news with Acentech, an out of state company having less (if any) experience with wind projects in Maine, it assured neighbors that noise would not be an issue, and then persuaded the Town of

[2] The parent company is a local utility on Vinalhaven, Fox Island Electric Cooperative. In the following discussion, no distinction will be made between the coop and FIW.

[3] The report was sent to the DEP by the only abutter who had researched the sound issues, Michele Puryear. See Pet. AR 7 and Pet. AR 262-4.

[4] The steps suggested by Woodard & Curran to deal with the noise issue included approaching adjacent property owners to gauge their willingness to work with FIW, arrange for tours of other wind projects in operation so that affected neighbors "could gauge for themselves whether the sound at certain distances is a concern," approach neighbors for noise easements, and approach the Town of Vinalhaven to alter the local sound ordinance that was more restrictive then the DEP Noise Rule. Id. As shall be seen below, FIW chose not to follow most of these recommendations.

Vinalhaven to eliminate its local sound restrictions in favor of the less restrictive Noise Rule. [5] In combination with these strategies, FIW put political pressure on the DEP to rush through the application it filed on March 24, 2009, Pet. AR 2, without a public hearing. Pet. ARs 267-8 and 270. [6]

At the time of FIW's application,[7] the Noise Rule required nighttime sound level at protected locations to be no greater than 45 dBA in a "quiet area" (an area where the pre-development ambient sound levels at night are less than 35 dBA). Noise Rule, Section 10.C (1) (a) (v), Pet. App. 133 at 136. The first noise report prepared by Acentech for FIW in support of the license application in March 2009 claimed that the "quiet area" limits did not apply, making nighttime noise limit of 50 dBA applicable. Pet. AR 3 at 5-6. [8] The DEP flatly rejected FIW's claim. Pet. ARs 10, 32.[9] The position of the DEP was worrisome to FIW, which feared that the

---

[5] The Wind Ordinance in effect as of March 27, 2007, required compliance with state noise regulations and limited sound levels at a neighboring property line to be no more than 45 dBA (day or night) and also required a lowering of sound by 5 dBA for "repetitive impulsive sounds" and also regulated low frequency noise. *See, Exhibit L* to Petitioners' Objection to Respondent Fox Islands Wind's Motion to Dismiss, dated September 21, 2011, at B.3, page 12 of 20. This Ordinance was amended on December 15, 2008, to simply incorporate the DEP Noise Rule. Id. at *Exhibit M* at F. 3, page 12 of 19. *See also*, Pet.AR 263.

[6] Commissioner David Littell received a call from the President of Cianbro on April 28, 2009, explaining the need to rush because financing has a "drop dead date" of May 15, 2009; Pet. AR 270 (James Cassida, Acting and later appointed Director of the DEP Division of Land Resource Regulation, does not recommend a public hearing for the licensing of the Project, which would "hamper our ability to move through this process quickly"); Pet. AR 274 (Speaker Hannah Pingree thanks Commissioner Littell for his "quick work" as the Project is "a big deal for us.").

[7] Subsequently, during the course of these proceedings, the Board of Environmental Protection (the "BEP") considered amendments to the Noise Rule, eventually adopted, to require all wind projects to meet "quiet area" nighttime sound limits and lowered those limits, in part because of this case, to 42 dBA. *See*, Noise Rule, Section 10.I (2) (b), Pet. App. 151 at 152.

[8] In an update to this Report in April, Pet. AR 3, 2009, Acentech stated that some neighbors to wind projects express annoyance about the sound of wind turbines, but asserted that there is no credible evidence of this, nor has the BEP found that wind turbine sound poses a threat to the health of nearby neighbors. Id. at Addendum 1 at 3. Later, the BEP did make such findings when amending the Noise Rule, in part based on the experience of Petitioners in this case. *See* discussion at 23, *infra*.

[9] As later explained by James Cassida to one of the neighbors impacted by the Project, FIW had attempted to justify higher nighttime noise limits by exclusion of ambient data of 3 dBA or lower, which "skewed" the analysis

quiet time limits might jeopardize the ability of the Project to operate in compliance with the Noise Rule. *See,* discussion at 8, *infra*. However, FIW agreed to re-model the Project sound impact to meet the 45 dBA nighttime limits based on the deployment of Noise Reduction Operations ("NRO") for Turbine No. 1 during normal operations (essentially by lowering power levels). Pet. AR 12-13, Pet. AR 273. In doing so, it reserved the right to argue for the higher limits later. Pet. ARs 14 and 18.[10]

The nighttime limits were not the only concern of the DEP. The DEP's expert consultant on the acoustics of wind projects, Warren Brown, was concerned about known reports that significant vertical and directional wind shear in the Gulf of Maine causes noise to exceed noise predictions using standard assessment methods by 10-12 dBA. Pet. AR 10. *See also*, Pet. AR 271 and AR 2, Pet. App. 2.[11] "Wind shear" occurs when there is a significant degree of difference in speed or direction of wind in the atmosphere over a short distance. Wind shear causes turbulence, increasing sound as the turbine blade rotates through different wind layers. *See* Pet. AR 172 at 7 and *also see*, Pet. AR 32 at 6.[12] To address this issue, Warren Brown recommended

---

required by the DEP Noise Rule. Pet. AR 97. "We did not buy this and told them [as much] straight up during the review…." Id.

[10] In early March, 2010, it was discovered that FIW's original sound report by Acentech had misinterpreted the Noise Rule by modeling the 45 dBA sound limit at the residence of the nearest abutting neighbor (Arthur Farnham) rather than at his property line. Pet. AR 102 (March 5, 2010 email from the undersigned). After review by the DEP's sound consultant, FIW was required to deploy additional curtailment so that all 3 turbines would be required to operate in NRO mode at night in order to comply with the Noise Rule, with no margin for error or wind shear conditions anticipated when the Project was licensed. Pet. ARs 104, 296, 297, and 298 (FIW update).

[11] Vinalhaven is particularly susceptible to vertical wind shear from wind coming across the water and hitting land and then vectoring to higher levels. Anthony Rogers, et al., *Wind Shear Over Forested Lands.* This study can be found at *www.umass.edu/windenergy/.../2005/ASME2005ForestShear.pdf*, Pet. App. 227. It is part of the administrative record in this case, although not previously copied in Petitioners' submissions. In any event it is a published work resulting from a study of wind shear on Vinalhaven by the *Renewable Energy Research Laboratory* of the University of Massachusetts in 2004.

[12] The DEP consultant explained that "wind turbine noise is most noticeable when surface winds are light or calm (little or no wind masking) and wind at the turbine hub is sufficient to result in operational sounds greater than predicted …. ". Pet. AR 32 at 3. According to Warren Brown, this occurs in temperature inversions during the summer months when the cold water in the Gulf of Maine causes a surface boundary layer with "substantial wind

that the DEP put in place compliance requirements to evaluate this phenomenon. Id. In June 2009, Warren Brown conducted a formal Peer Review of FIW 's noise report, concluding that in NRO mode the Project technically predicted compliance with the 45 dBA nighttime noise limit (with no cushion), but repeated his concern about potential sound levels in excess of those modeled in conditions of "[s]ignificant vertical and directional wind shear in the Gulf of Maine." AR 2, Pet. App. 4, at 5 (Section 9).

Based on the Peer Review, the DEP issued an operating license for the Project on June 5, 2009. AR 3, Pet. App. 10. The License incorporated provisions addressing Warren Brown's concern about excess noise during periods of wind shear, requiring compliance measurements in the first year of operation pursuant to an operational compliance measurement assessment methodology to be approved by the DEP prior to commence of operations (Condition No. 7). Id. at 13. The License was also conditioned on the requirement that a revised operation protocol be submitted and approved "within 60 days of a determination of non-compliance by the Department" with the noise limits applicable to the Project. (Condition No. 8). Id. at 14.

Immediately after the License was issued, on June 8, 2009, George Baker of FIW wrote James Cassida at the DEP seeking to reopen issues that FIW objected to about the License: the quiet area" sound limits and other issues FIW had with the License, including the retention of jurisdiction by the DEP over enforcement. Pet. AR 18. Then, after recognizing the unwillingness

---

shear above," causing increased sound levels of concern for residents nearby the FIW project. Id. This is so, according to the Peer Review, because [s]table atmospheric conditions (inversions) are associated with increased upper level wind shear which when occurring at turbine levels can produce increased blade turbulence and sound levels exceeding manufacturer specifications." Id. at 6. Warren Brown further stated that he had talked with a sound consultant who had experience with this phenomenon at the Nova Scotia Publico Point project and learned that this consultant now designs wind projects to account for these wind shear conditions. Id. The problem, Warren Brown concludes, is that the FIW Project lacked site specific data correlating surface and hub level speeds and direction under expected wind shear conditions to plan for operational adjustments to prevent the wind shear from causing excessive noise. He expressed hope that this information could be developed through implementation of the compliance measurement protocol as yet drafted for the Project. Id.

of the DEP to give in on the "quiet area" sound limits, Baker approached House Speaker Hannah Pingree to apply political pressure on the DEP to back down on this issue. On June 25, 2009, Baker wrote Commissioner Littell,[13] complaining that "the DEP requirements [to operate at night with a 45 dBA sound limit] will force us to curtail or even shut down the operation of the wind farm for noise reasons." Pet. AR 19, Pet. App. 31, at 5. Baker assured the Commissioner that the Project would not disturb neighbors, adding "[a]s I think you know, this project enjoys overwhelming community support and enthusiasm. No one in the community has complained or showed any concern with the DEP's permit, except to express concern that it is overly restrictive." Id. Baker's letter was coordinated with an email sent by Speaker Pingree to Commissioner Littell, Jane Lincoln and Karin Tilberg (policy advisors to the Governor) on June 25, 2009, noting the strong backing of the Project by the Governor. She threatened to "file legislation next session to retroactively change the standard," if the issue was not resolved by the DEP. Pet. AR 275. [14]

On June 26, 2009, Commissioner Littell responded to George Baker's letter, pointing out that the licensing application had "received very favorable treatment," having been processed "at breakneck speed" in part based on "Speaker Pingree's strong interest" in the Project and that he had previously been involved to help resolve issues with the DEP's licensing staff "to get this permit done at the Speaker's request." Pet. AR 20, Pet. App. 37. But the Commissioner chided Baker on his claims about the noise limits, stating firmly that "the DEP is charged with [the responsibility of] applying our laws and rules ... based on the best scientific understanding and

[13] The letter began ,with the statement that "Hannah Pingree asked me to write you," showing cc.s to Jane Lincoln, Governor Baldacci's Chief of Staff, and Karen Tilberg, the Governor's Senior Policy Advisor. Id.

[14] The same day, Commissioner Littell was "called into a meeting to explain these noise issues." Id. In advance of the meeting, Commissioner Littell asked his staff for background on the issue. Pet. AR 275. Cassida was on vacation, but the Project Manager, Kristen Chamberlain, wrote an email explaining to the Commissioner that this issue had not been resolved in the review process because of the compressed timing of the review. Pet. AR 276.

evidence." Id. With regard to FIW's proposed appeal of the License to the BEP on the quiet area noise issue, the Commissioner "doubt[ed]" that the BEP "would be willing to ignore or overrule our outside noise expert consultant's advice and my staff's determination but you have every right to appeal." Id. FIW did appeal the License to the DEP on the "quiet area" noise limitation on July 7, 2009, Pet. AR 21, and, alternatively, filed an application with the DEP to modify the License on the same issue on September 14, 2009. Pet. AR 278, [15] both of which were later abandoned. [16]

On November 30, 2009, the DEP issued a Condition Compliance Order approving the Project Operational Sound Measurement Compliance Protocol, as required by Condition No. 7 of the License. AR 4, Pet. App. 39. The Compliance Protocol, in general terms, required FIW to measure sound, with accompanying meteorological measurements of wind speed and direction, between May 1 and August 31 of the first year of operation during an inversion period when the turbines are generating maximum continuous sound power and file a compliance report in the first year of operations. Id.

[15] The DEP's initial response to the amendment was unfavorable. Commissioner Littell felt that the amendment was an attempt to encourage the DEP to " interpret our noise rules in a less protective way," which he did not think was "appropriate." Pet. AR 279. Later, on October 26, 2009, Commissioner Littell informed Baker that the amendment application was a "waste of time as the department is charged with protecting abutters from unreasonable noise impacts. The interpretation you have been advocating would affect a significant relaxation of the noise standards for all projects and we simply cannot approve of that massive relaxation." Pet. AR 282. James Cassida echoed the Commissioner's sentiments two days later on October 28, 2009, expressing dismay to Baker that there were so many post-licensing issues, which could have been "avoided had the department been afforded adequate time to review the original application" and making it clear to Baker (and FIW) that "our immediate responsibility is to ensure that the project meets the permitting standards" required by law." Pet. AR 31. Cassida ended the email to Baker by expressing how he was "deeply disturbed by the manner with which you are treating the project managers assigned to the project." Cassida explained that he had already lost one manager for this reason and did not want to lose another, which did occur later. He implored Baker to "strike a more conciliatory posture" in dealing with Project issues. Id.

[16] Warren Brown conducted a formal "Peer Review" of FIW's proposed amendment, dated November 2, 2009, concluding that FIW's arguments for increasing the nighttime sound limits was based on general wind conditions, without assessment of the complicating factor of wind shear. Pet. AR 32. *See also*, Pet. AR 34 ("My language is direct and strong in this review.") Based on this assessment, the DEP rejected the application in January 22010, Pet. AR 93, causing FIW to with draw the application. Pet.AR 94-95. Earlier, FIW withdrew its appeal on the issue as well. Pet.AR 83.)

B. Noise Complaints Following Commencement of Operations.

The Project commenced operations at the end of October or early November 1, 2009. Complaints about noise were made by affected neighbors to the DEP almost immediately. *See*, Pet. AR 36, complaint of Ethan Hall on November 10, 2009 ("I was misled (sic) (to put it kindly) by the promoters of the project" who said that 50 dBA would be like a conversation in a quiet room; the reality is different, "they are loud and persistent and they give of[f] a vibration that pulses steadily," I'm afraid "I will be unable to live in [my] home"); Pet. AR 37, report of a DEP field enforcement officer on November 10, 2009 ("Local residents are very concerned about the noise levels.... [W]hat they are experiencing for noise does not coincide with what they were told."); Pet. AR 38, complaint of Sally Wylie dated November 10, 2009:

> Like everyone else on the island, we were in support of the project. We had been told (and have it in writing) that noise would not be an issue and that the ambient noise would drown out the sound of the windmills.... However, when they turned the switch on several days ago and giant windmills started to move, our lives changed in an instant... Even with the windows and doors closed, we can hear the constant grinding noise inside our house. It brings on headaches and causes constant irritation and anxiety, completely changing our quality of life on the island. [17]

[17] *See also*, Pet. ARs 39 and 42, complaints of Cheryl Lindgren on November 10 and 11, 2009 (we were initially supportive of the project, until it began operating; the "sound includes whooshing of the blades and an incessant noise like a jet overhead that never lands. The sound seems to have almost a pressure feeling to it that echoes off the front of the house."); Pet. AR 41, complaint of Colleen Colan on November 10, 2009 ("neighbors were led to believe by FIW we would hear no sound outside of 1000 feet"); Pet. AR 44 at 2, notes of James Cassida meeting with interested parties on November 12, 2009 ("Told that the ambient noise would drown out wind turbines."); Pet. AR 86, email by Sally Wylie on January 5, 2010 ("[m]ore families are impacted by the noise levels than the DEP realizes. Islanders are having a very difficult time living with the noise and many of them are frightened by the resulting health concerns."); Pet. AR 92, DEP meeting notes of January 12, 2010 at AR 371 (Baker-"Abutters surprised at how noticeable the turbines are"); Pet. AR 294 ("Art and Cheryl as well as other neighbors are struggling with the sound and have trouble sleeping at night."); AR 73, letter of Rufus Brown to Susan LoGiudice dated March 8, 2011 ("The stress of the excessive noise from the Project, coupled with the frustration he has experienced from the unwillingness of FIW and FIEC to acknowledge excessive noise and take concrete steps to mitigate it, caused or contributed to [Art Lindgren's] heart attack at a recent FIEC meeting. Another neighbor has experienced a neurological event that caused his health care providers to recommend that he vacate his residence.").

Last year a peer reviewed epidemiological study confirmed that residents living near FIW and Mars Hill suffer a statistically significant degree of poor sleep, worse mental health, with diagnoses of depression or anxiety, and greater new psychotropic medications attributable to exposure of noise from the Project. M. Nissenbaum, J. Aramini, & C. Hanning, "Effects of Industrial Wind Turbine Noise on Sleep and Health," 14 *Noise & Health* 237, 239-242 (2012), Pet. App. 219.

Between March 18 and May 31, 2010, Petitioners filed 20 noise complaints with the DEP. *See* AR 163, Pet. ARs 107, 111-15, 121-25, 127, 130-33, 298 and 301.[18] In response, DEP requested FIW to furnish sound, operational and meteorological data for the dates of the complaints. Pet. ARs 299, 302 and 303. However, FIW refused, claiming that it had no obligation to monitor operations or submit data except as part of a compliance measurement protocol. Pet. AR 109 (email from Becky Blais to the Attorney General's Office dated April 15, 2010). *See also,* AR 5, Pet. App. 49 (May 3 letter of Becky Blais to Thomas Doyle) and AR 6, Pet. App. 51, (Doyle's response on May 10, 2010). It never did produce enough data that would allow the DEP's expert consultant to determine whether the Project was in violation of the noise limits. Pet. ARs 116, 117, 120, 305 and 307.[19]

Because of the difficulty in obtaining technical data on noise from FIW, *see, e.g.,* Pet. ARs 307 and 308, the DEP, in consultation with Warren Brown, issued Project Compliance and Noise Complaint Protocols dated June 23, 2010, as revised July 8, 2010 and August 11, 2010.

---

[18] Except for the first complaint, all the data was collected by one of Petitioners, Art Lindgren, using a hand held sound meter after being trained in its use by an acoustical expert from Michigan, Rick James. Pet. AR 313.

[19] After the DEP rejected FIW's legal position, FIW gave excuses for not providing the data requested, such as the problem with data that George Baker (a business school professor) was collecting himself to save costs, Pet. AR 116, or because there were problems with the equipment, Pet. AR 134-5, or that it was too time consuming to extract and analyze the data. Pet. AR 116.

AR 7, 8, and 15 and Pet. AR 147. The protocols provided that interested parties were required to submit noise complaints in accordance with the technical specifications for permit holders in the Noise Rule, including collection of data by a "qualified assistant" supervised by a professional acoustical expert, using professional grade equipment with data that must be analyzed by an expert.[20] On July 16, 2010, Petitioners' counsel complained to the DEP that the complaint protocol "sets up procedures and requirements that are unfair, burdensome and contrary to the licensing requirements in the Siting Certification for FIW" by improperly shifting the burden on citizens to establish the technical validity of their complaints. AR 9. *See also*, Pet. AR 136. The DEP replied by explaining that the rationale for the technical requirements for filing a complaint was that the only record of actual conditions occurring during the complaint period might be what the complainant submits in the absence of data recorded by FIW. AR 10, July 26, 2010 letter from Becky Blais to Rufus Brown. This rationale was later disowned by the DEP as improperly putting the burden for proving noise complaints on complainants. *See*, 31 *infra*.

On July 27, 2010, Petitioners' expert, Rick James, filed a complaint on behalf of the Petitioners for the evening of July 17-18, 2010, forwarding to the DEP data collected by Petitioner Art Lindgren. AR 11-12, Pet. ARs 137 and 140. It took FIW over a month to provide data to the DEP that was required by the complaint protocol to be submitted in 7 days. ARs 13, 15, 18-20, 22-5 and 36-8 and Pet. ARs 147, 149, 151, 152-3, 154, 156-57, 160, 314, 315, 316 and 317.[21]

C. <u>DEP's Finding of Non-Compliance and FIW's Refusal to Cooperate.</u>

---

[20] As applied by the DEP, the complaint protocol applied only to Petitioners, and not others affected by noise from the Project on Vinalhaven. Pet. ARs 159 and 161-66.

[21] FIW's initial response to the complaint to the DEP was that Art Lindgren's sound measurements did not meet the technicalities of the Complaint Protocol. Pet. ARs 141, 144 and 145

After 10 months of operations with multiple noise complaints, the DEP's consultant finally determined on September 8, 2010 that FIW was in fact out of compliance with the noise limits based on a complaint for the evening of July 17- 18, 2010. AR 26, Pet. App. 53. The findings were not limited to that one night, nor limited to wind coming from a particular direction. Id. Warren Brown found that the "July 17 & 18 complaint conditions were very similar with regard to surface wind speeds and [wind turbine] output" as FIWN complaints previously submitted for May 1, 4, 5, & 6, all of which reported sound levels between 46-48 dBA.[22] Although these complaints were prior to the "FIW compliance protocol [May 30 to August 30] in timing, nonetheless there exists a significant body of consistent meteorological and sound data indicating sound levels greater than the applicable limit." The report concluded with the statement that "[s]ubstantial changes are recommended for FIW nighttime operations, limiting [wind turbine] sound levels at [protected locations] to 45 dBA." Id. In a follow up meeting between the DEP and FIW, Warren Brown explained again, as he had from the outset, that "wind turbine sounds under wind shear conditions is known to produce an exceeding amount of sound." Pet. AR 172 at 6.

FIW disputed Warren Brown's conclusions. AR 28; Pet. AR 172 at 3. It then filed a compliance report purporting to show that under the original compliance protocol approved in November 2009, the Project was in compliance on dates FIW selected for analysis in July and August, 2010. and AR 43, AR 74 and Pet. ARs 192 and 327. FIW then took the position that such submissions relieved it of the responsibility to make any further compliance filings even with respect to an outstanding complaint. Pet. AR 195 (meeting notes) . The DEP disagreed, insisting that FIW was not in compliance and had an obligation to fix the problem. Id.

---

[22] All but one of the May complaints involved wind direction outside of the SSW 200°-250° that FIW claimed to be the only conditions creating non-compliance. Compare Pet. ARs 30, 113, 130, 131 with Pet. AR 305.

Then, after confirming that the Town of Vinalhaven had no interest in enforcing the noise limits for the Project, AR 45 and 46, the DEP issued a formal Determination of Non-Compliance to FIW on November 23, 2010. AR 46, Pet. App. 59. The letter was reviewed and approved by then Acting Commissioner of the DEP, Beth Nagusky, the Bureau Director of the DEP Land Division, the Attorney General's Office and Warren Brown. *See,* Pet. ARs 331-32. It stated that the DEP's analysis of operational, sound and meteorological data from the complaint period and other data collected for the period of May 1 to August 31, 2010 indicate that "*the facility is likely to exceed the required sound compliance level of 45 dBA [at any time] when there is significant vertical and directional wind shear.*" [Emphasis added.] AR 46, Pet. App. 59. In order to resolve the matter, the DEP demanded that FIW submit within 60 days a revised operation protocol "that demonstrates that the development will be in compliance at all protected locations surrounding the development *at all times.*" [Emphasis added.] Id.

On December 3, 2010, FIW wrote to the DEP disputing the Determination of Non-Compliance. AR 47. However, to demonstrate "good faith," FIW submitted a proposal to address the issue by modifying its nighttime operating protocol to reduce sound levels by 2 dBA at the protected location nearest the Project, but only for the precise meteorological conditions that existed during the night of the July 17-18 (winds from the SSW between 200° and 250°) and no others. Id. [23]

DEP was willing to accept FIW's proposed corrective action only if linked with a calculation of a "coefficient" (the degree of difference at the intersection) of significant wind shear that would trigger NRO mode in the future *regardless* of the direction of the wind. AR 50

[23] FIW linked this proposal to another proposal to allow FIW to *increase* the sound levels for the Project when ground wind speeds are above 10 mph. Id. The DEP stated that any such proposal would have to be made in a separate application. AR 50.

(email of James Cassida to George Baker dated December 22, 2010). As explained by Warren Brown to James Cassida the day before, Pet. AR 333, Pet. App. 61, the consultant's analysis of the data related to the complaints "indicates consistent increased wind shear … with winds ranging from the SSE-NW" (not just SSW between 200° and 250°), necessitating the calculation of a formula for corrective action in the future. Id. This point was emphasized to FIW in an email dated January 10, 2011 from James Cassida to George Baker (AR 53, Pet. App. 63), which explained further the basis of the DEP's Determination of Non-Compliance:

> While a lot of our discussions focused on the complaint period where the winds were out of the south/southwest it was always and remains the DEP determination that it is the presence of vertical and directional wind shear that caused the non-compliance determination. This is why the formal letter of determination did not reference wind direction.

Id. *See also*, AR 50, December 22, 2010 email from James Cassida to George Baker. FIW nevertheless refused to provide data requested by the DEP for Warren Brown to calculate a wind shear coefficient, even after it collected the data. AR 53, Pet. App. 63, January 10, 2011 email from George Baker to James Cassida, Pet. ARs. 215 and 225 and ARs 63, 64, 68 and 70. Eventually, on March 7, 2011, in an internal email DEP regulators concluded it was "fruitless to continue discussions with [FIW] about submitting data to us for further analysis." AR 71, Pet. App. 67. According to Cassida, "they [FIW] have clearly demonstrated a less than cooperative stance and I see nothing further to be gained at this point in trying to convince them to work with us to resolve their compliance issues." Id.

D. Political Interference Leading to the Challenged Condition Compliance Order.

In January 2011, after the election of Paul LePage as Governor, Darryl Brown was appointed Commissioner of the DEP. Affidavit of James Cassida ("Cassida Aff."), Pet. App.

184, at ¶13. [24] In February 2011, Commissioner Brown met with FIW and its attorney about the compliance issues without notifying staff, Pet. ARs 228, and 261,[25] contrary to usual procedures. DEP Commissioners usually take great pains to avoid meeting directly with regulated entities on pending enforcement issues to avoid the appearance of political influence. Cassida Aff., Pet. App. 184, at ¶15. In the meeting Baker provided one-sided and misleading information to Commissioner Brown. Pet. AR 228.[26]

In the meantime, DEP staff responded to the impasse with FIW by demanding that FIW perform its own calculations of wind shear conditions that would trigger NRO operations. AR 71, Pet. App. 67, James Cassida email dated March 7, 2011 ("I am simply putting the ball squarely in their court" to demonstrate adequate measures to respond to the formal determination of non-compliance with a draft email to FIW.).[27] Commissioner Brown verbally instructed staff not to send the letter and that he would instead talk to George Baker and FIW's attorney with the "thrust of the message." Cassida Aff., Pet. App. 184, at ¶16; Pet. AR 231. However, after James Cassida documented these instructions for the record, Cassida Aff., Pet. App. 184, at ¶16; Pet. AR 340, Commissioner Brown authorized Cassida to send the letter, Pet. AR 231, which was

---

[24] Upon his appointment, Commissioner Brown made a point of informing his staff that he believed that the DEP's regulations were too burdensome and that the DEP needed to be more business friendly and assist business. Cassida Aff., Pet. App. 184, at ¶14.

[25] As a follow up to this meeting, FIW's attorney sent Commissioner Brown the same proposal to respond to the determination of non-compliance that the DEP had rejected in December 2010. AR 74 and Pet. AR 261.

[26] In the meeting, George Baker offered to do "a little more curtailment" in exchanged for permission to exceed the noise limits when the wind is heavy on the ground. Pet. AR 228, Commissioner Brown meeting notes at pages 4 and 5.

[27] The draft email made it clear that FIW's previous submissions of data purporting to demonstrate compliance for other dates where there was wind shear did not substitute for the requirement that FIW take corrective actions for days when the wind shear caused excessive noise. Id. The letter demanded a revised operation protocol application by March 23, 2011. Id. Warren Brown agreed with the draft letter, commenting that it was "worthless to review carefully selected [by FIW] periods [of data] that only reflect a biased conclusion." Pet. AR 230.

sent out on March 9, 2011. AR 72, Pet. App. 70; Cassida Aff., Pet. App. 184, at ¶16. The letter emphasized again FIW's duty to correct for all conditions causing non-compliance and that a remedial order that did less than that "would be inconsistent with the Department's statutory and regulatory authority." AR 72, Pet. App. 70.

Instead of submitting the requested revised operational protocol, FIW scheduled another meeting with Commissioner Brown on March 24, 2011, this time including staff. Pet. AR 357. [28] During the meeting, which was contentious, the Commissioner, Deputy Commissioner Aho and Director of the Land Bureau, Teco Brown, stepped out of the room to confer privately and after a while came back and said, "this is what is going to happen"; FIW is only required to address the limited conditions that existed on the night of July 17-18 in its revised protocol and then it would have to demonstrate compliance under the new protocol. Cassida Aff., Pet. App. 184, at ¶17; *see also*, AR79, March 25, 2011 letter from Cassida to FIW.[29]

On April 11, FIW submitted a revised operation protocol application. AR 82, Pet. App. 72. It included an operational sound measurement protocol that was substantively the same as that adopted for the original License, under which FIW had staked out a position that it was not required to furnish the DEP all data needed by the DEP to assure compliance. It also proposed that the DEP formally adopt the complaint protocol that was previously issued in the Summer of 2010, creating burdensome, technical requirements on citizens filing noise complaints.

---

[28] Prior to this meeting, Petitioners' counsel and representatives of those affected by noise on Vinalhaven traveled to a meeting in Augusta scheduled with Commissioner Brown, who had "other business" and did not attend. ARs 76-78. In a letter to Commissioner Brown, Petitioners' counsel explained, apparently to deaf ears, that "my clients have suffered night after night from the excessive noise from the Project without any abatement. It has disrupted their lives, robbed them of the enjoyment of living on the Island and, for many, caused sleep disturbance and in some cases more serious health impacts. At the same time it has trapped them from moving away because the exposure to excessive noise has greatly reduced the value of their property." AR 76.

[29] Two days after this meeting, James Cassida complained about "being left out of the fox island conclusion." Pet. AR 359.

The DEP determined that FIW's submission was inadequate, Cassida Aff., Pet. App. 184, at ¶20, and drafted a counterproposal, id; AR 110 (April 28, 2011), setting forth provisions that the DEP staff, working with Assistant Attorney General Amy Mills and Warren Brown, considered necessary to ensure that the future operations of the Project would be compliant with the Noise Rule. Cassida Aff., Pet. App. 184, at ¶21; AR 83 and 95; Pet. ARs 344 -46. It consisted of a Condition Compliance Order requiring FIW to modify its operates by putting in place additional NRO of 2 dBA only during times when the wind was blowing from the SSW between 200° and 250°, as Commissioner Brown had specified in the earlier meeting with FIW. However, as a fallback position to that decision, the draft added an "Appendix A," modeled after another small scale wind project that the DEP was working on at Pisgah Mountain. Pet. ARs 88 and 91. "Appendix A," further addressed at 28-32, *infra*, created an Operational Sound Measurement Compliance Assessment Plan (a "Compliance Plan") to assure that the FIW collected and submitted compliance data on a regular basis of the kind that the DEP had previously requested and been refused by FIW. In addition, "Appendix A" included a Complaint Response and Resolution Protocol (a "Complaint Response Protocol") allowing noise complaints to be filed by any means without technical data and putting the burden on FIW to maintain public reporting on the status of the complaints. In addition, it detailed requirements for technical assessments and corrective measures when necessary, in a manner that FIW previously refused to do. Both the proposed Compliance Plan and the Complaint Response Protocol required FIW to shut down if the DEP determined from a consistent pattern of complaints that the Project was out of compliance, until FIW identified the cause of the non-compliance and submitted for approval a plan to bring the Project into compliance. Id. at ¶7. Pg. 10 of 12. Before the DEP proposal was sent to FIW, on or about April 27, 2011, Darryl Brown resigned as Commissioner

and was replaced by Acting Commissioner James Brooks, a longtime head of DEP's Air Bureau. Cassida Aff., Pet. App. 184, at ¶22. On April 28, 2011, the DEP sent out a draft of a Condition Compliance Order with the proposed "Appendix A" attached. Id. at ¶23, AR 110.

FIW objected to "Appendix A" in its entirety. AR 119; Pet. AR 363. In response to the DEP's proposed protocols,[30] George Baker approached Governor LePage' s Office through John Butera, Senior Economic Advisor for the Office of the Governor, to complain about developments following the departure of Commissioner Brown. Response to Freedom of Access Request ("FOA"), Pet. App. 190 at 1.[31] Butera offered to help FIW and forwarded Baker's email to Carlisle McLean, Senior Natural Resources Policy Advisor in the Office of the Governor.[32] When Baker did not hear back from the Governor's Office, he inquired with Butera on May 12, 2011 about progress on his request for political intervention and was informed that the Governor's staff had initiated discussions with the DEP and would keep Baker informed. FOA 3, Pet. App. 192. Becoming more impatient, Baker contacted Senate President Kevin Raye sometime before May 20, 2011 to seek his influence in the matter, which John Butera passed on to Carlisle McLean on May 20, 2011. FOA 22, Pet. App. 211. McLean reported back to Butera on May 22, 2011 that the Governor was planning to meet personally with Acting Commissioner Brooks on the matter. FOA 24. After meeting with the Governor, Acting Commissioner Brooks instructed James Cassida to modify the proposed protocols in order to reach a compromise plan

---

[30] Another response was an approach by FIW to the Town of Vinalhaven to consider taking back enforcement power from the DEP. Pet. AR 348. *See also*, FIW AR 143.

[31] This is an email from Baker to Butera dated May 5, 2011, giving a one sided and false and misleading background information in an effort to encourage the Governor's Office to intervene by exercising political influence in the regulatory dispute.

[32] Months earlier, McLean had been employed by the law firm of Preti Flaherty with a practice of advocating for development permits before the Department. The law firm of Preti Flaherty, at all relevant times, has acted as counsel for the Fox Islands Electrical Cooperative, which owns a controlling interest in FIW.

that FIW would accept. Cassida Aff., Pet. App. 184 at ¶25. In response, Cassida revised "Appendix A" to make several changes that FIW objected to, including the elimination of the shutdown provisions. Id.; ARs 122 and 140.[33] FIW refused to accept the revised "Appendix A", AR 140, pg. 2; AR 128, continuing its posture of stonewalling. FIW additions to the record ("FIW AR") 142, Pet. App. 101.

In early June, 2011, Acting Commissioner Brooks resigned from the DEP for a job in the private sector and was replaced by Acting (now Commissioner) Patricia Aho, Cassida Aff., Pet. App. 184, at ¶27, who months earlier had been employed as a lobbyist by Pierce Atwood, FIW's attorneys through this case. At the time, Acting Commissioner Aho had only been following the FIW enforcement issues to some degree. Cassida Aff., Pet. App. 184, at ¶28. James Cassida urged Acting Commissioner Aho to finalize the Condition Compliance Order and, before leaving on vacation on June 17, 2011, sent her the draft Condition Compliance Order with "Appendix A", strongly recommending that it be approved and issued. AR 135; Pet. AR 369, Pet. App. 102. In response, Acting Commissioner Aho simply wished Cassida to have a nice vacation, id, informing staff soon thereafter (June 21) that she wanted to issue a compliance order without "Appendix A" FIW AR No. 154.[34]

Before she took final action, Acting Commissioner Aho received a memorandum from former Acting Commissioner and departing James Brooks, who documented the belief of DEP staff that "Appendix A" was necessary because of the documented non-compliance of the Project

[33] Cassida did not want to change these provisions because he felt they were "the teeth that will keep [FIW] working diligently to maintain compliance." Pet. AR 367, 1391 (marginal comment). However, he felt that Appendix A, as revised, did not sacrifice the important requirement that FIW effectively demonstrate future compliance through procedures that would allow the Department to meaningfully assess compliance. Cassida Aff., Pet. App. 184, at ¶25.

[34] When Cassida learned that Acting Commissioner issued the Condition Compliance Order without Appendix A, he considered it an "abdication of the [DEP's] responsibilities" to affected residents. Cassida Aff., Pet. App., at ¶29.

and FIW's refusal to provide the DEP with necessary data and because "Appendix A" "brought licensing requirements for the FIW facility nearly on par with other small wind facilities in Maine." AR 140 (James Brooks' memo dated June 24, 2011). On the same day, Acting Commissioner Aho met with Carlisle McLean in the Governor's Office on the compliance issues for FIW, Pet. ARs 368 and 371. [35]

The Condition Compliance Order was issued June 30, 2009. AR 142, Pet. App. 124. It consists of the Order itself, requiring minimally increased NRO only for the exact conditions that prevailed on the evening of July 17-18, 2010. Id. In addition, the Order formally incorporated a revised sound measurement compliance protocol, previously submitted by FIW (AR82, Pet. App. 72) and rejected twice by the DEP (in December, 2010 and April 2011) and the complaint response protocol, id., which the DEP had issued informally but later disavowed as being "patently unfair and inappropriate." *See* 31, *infra.* [36]

ARGUMENT

1. The Condition Compliance Order Allowing FIW to Continue Operations without full Compliance with the DEP Noise Rules is Unlawful.

Section 11007.4.C(2) of the Maine Administrative Procedure Act, 5 M.R.S.A. §8001, et seq. (the "Maine APA") authorizes the Superior Court to reverse or modify a decision by an administrative agency that is "in excess of the statutory authority of the agency." The Compliance Condition Order at issue in this case should be reversed and appropriate remedies

[35] In advance of the meeting, McLean complimented Aho for "listen[ing] hard to the Governor's position" on legislative issues. Later Aho was rewarded by being appointed as Commissioner of the Department. Pet. AR---

[36] After the Condition Compliance Order was issued, on February 3, 2012, Britta Lindgren, the daughter of a named Petitioner in this case, filed a complaint with the DEP about excessive noise and its adverse effect on her and others. Pet. AR 243, Pet. App. 131. Daniel Courtemanch, the Project Manager for the Project, relied informing Ms. Lindgren that the DEP could not open an investigation because the complaint did not comply with the technical requirements for citizen complaints. Id.

granted because it allows FIW to continue operations without full compliance with the Noise Rule, which the DEP has no authority to do.

Section 11007.4.C(6) of the Maine APA authorizes the Superior Court to a reverse or modify a decision by an administrative agency that is "[a]rbitrary or capricious or characterized by abuse of discretion." An action is arbitrary and capricious when it is "unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence "or is "willful and unreasoning ... without consideration of the facts or circumstances. *Central Maine Power co. v. Waterville Urban Renewal Authority*, 281 A.2d 233, 242 (Me. 1971); *Carl L. Cutler Co. v State Purchasing Agent,* 472 A.2d 913, 916 (Me. 1984); *Help-U-Sell, Inc. v. Maine Real Estate Comm.*, 611 A.2d 981, 984 (Me. 1992); *Kroeger v. Bd. of Envtl. Prot.*, 2005 ME 50, ¶8, 870 A.2d 566, 569. "An abuse of discretion may be found where an appellant demonstrates that the decisionmaker exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and governing law." *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567, 570, *Forest Ecology Network v. LURC*, 2012 ME. 36, ¶28, 39 A.3d 74, 84. To the extent that Commissioner Aho had any discretion in how the DEP should act in response to the findings of non-compliance of FIW, she acted in an arbitrary and capricious manner and abused that discretion.

A. Small Scale Wind Projects are Required to Comply with The DEP Noise Rules.

The small scale certification statute, 35-A M.R.S.A. §3456.1A under which FIW's Project was licensed, allows certification only if the project will meet the requirements of the Noise Rule. The Noise Rule, AR 143, Pet. App. 133, Chapter 375.10. C. (1) (a) (v), prohibits a wind project from generating noise in routine operations in the nighttime (between 7 p.m. and 7 a.m.) in a "quiet area" in excess of 45 dBA. This requirement, as well as other provisions of the

Noise Rule, is designed to protect the health of nearby residents. Id. at Chapter 375.10.A (Preamble) (The Noise Rule "recognizes that the ... operation ... of developments may cause excessive noise that could degrade the health and welfare of nearby neighbors.") Acting on these health considerations, the BEP provisionally adopted Noise Rule Amendments in September 2011 (finalized in 2012 without change after legislative review) lowering nighttime sound levels to 42 dBA for all future wind projects, based on the rulemaking record, including testimony of the Petitioners. Pet. App. 151, 152, Section I(2)(b). The *Supplemental Basis Statement* for the Noise Rule Amendments states that the record before the Board "demonstrates that persons living near existing wind energy developments with actual sound level measurements near the 45 dBA limit as at Vinalhaven are experiencing adverse effects." *Supplemental Basis Statement* at 6-7, Pet. App. 163, 168-9.[37]

There is nothing in the small scale certification statute or the Noise Rule or the License issued to FIW that allows the DEP to treat residents from a project like FIW any differently from those living next to grid scale projects in terms of the protection from exposure to excessive noise. To the contrary, the mandatory limit for nighttime sound levels were specifically incorporated into the original License granted to the Project.AR 3, Pet. App. 101, at 4-5. The mechanism used in the License pursuant to which the DEP retained jurisdiction to enforce compliance with these protective noise limits is Condition No. 7 of the License, id. at 13, requiring approval by the DEP of an Operational Compliance Assessment Methodology, and Condition No. 8, which requires, upon a determination of non-compliance, that the applicant

---

[37] The Basis Statement pointed to the testimony from several residents living near wind projects, including that of Petitioner Cheryl Lindgren. It noted that "Ms. Lindgren testified that much of her experience with compromised sleep and other adverse impacts occurred when the sound level was below 45 dBA." *Supplemental Basis Statement* at 4, Pet. App. 166. It also recognized that the Vinalhaven project had a documented incidence of non-compliance, id., but nevertheless the experience of the Petitioners at Vinalhaven informed the Board "regarding [sound] levels that are clearly demonstrated to be causing a problem at wind energy sites in Maine." Id. at 6.

submit for approval a Revised Operating Protocol "that demonstrates that the project will be in compliance at all the protected locations surrounding the development." Id. at 14. Indeed, the very Condition Compliance Order challenged in this suit, AR 142, Pet. App. 124, also explicitly states that "the certification requires the facility to comply with the Department's noise standards under all conditions and at all times." Id. at Paragraph 2. There is no discretion given the Commissioner of the DEP in any part of this regulatory scheme to allow operations that are not in compliance with the Noise Rule nighttime sound level limits.

B. The DEP Determined that FIW was not Operating in Compliance with the Noise Rule.

The record in this case establishes that FIW was not operating in compliance with the nighttime noise limits as a result of significant vertical and directional wind shear, the very reason that was known and gave concern to the DEP during the licensing of the Project. The September 8, 2010 finding of non-compliance by the DEP's expert consultant (ranging from 46-48dBA) during the evening of July 17-18, 2010 was not limited to any specific wind direction and was not limited to conditions that prevailed on that one evening. AR 26, Pet. App. 53. Warren Brown explained that the wind shear conditions that existed on that evening were similar to conditions for May 1, 4-6, "all of which reported sound levels between 46-48 dBA." Id. The formal Determination of Non-Compliance issued by the DEP on November 23, 2010 likewise stated clearly that the DEP had determined that non-compliance was likely "when there is "significant vertical and directional wind shear," regardless of the time of year or wind direction. AR46, Pet. App. 59.[38]

[38] Warren Brown later explained to James Cassida on December 21, 2010 that the data analyzed by him in connection with the finding on non-compliance indicated wind shear with winds ranging from SSE to NW, namely from 90° to 360°. Pet.AR 333, Pet. App.61. Soon thereafter Cassida informed FIW in January 2011 that the DEP Determination of Non-compliance concluded that non-compliance would occur during periods of significant wind shear without regard to wind direction. Pet. AR 71, Pet. App. 63.

C. Acting Commissioner Aho Exceeded her Statutory Authority when she Authorized a Condition Compliance Order which did not Require Corrective Action for all the Causes of Non-compliance.

The Condition Compliance Order under review, AR 142, Pet. App. 124, did not require FIW to make operational modifications to address all the causes of non-compliance as found by the Land Bureau's senior staff and expert consultant and as formalized in the DEP's formal Determination of Non-Compliance dated November 23, 2010. AR 46, Pet. App. 59. It limited corrective action for only the conditions existing on the evening of July 17-18, 2010 for wind shear when the wind is blowing from the SSW, id., without any modification for wind shear from different wind directions and providing inadequate modifications for conditions it did address.[39] The origins of this limitation go back to a decision by former Commissioner Darryl Brown. *See* 17, *supra.*

During the drafting of the Condition Compliance Order challenged in this case, the Attorney General's Office was aware of the flaws in the decision made by former Commissioner Brown. Assistant Attorney General Amy Mills edited a draft of the proposed Condition Compliance Order, without "Appendix A". Pet. AR 376; Pet. AR 353, Pet. App. 114. She inserted language quoting the formal November 2010 determination of the DEP that the Project was expected to be out of compliance whenever there is significant wind shear, regardless of wind direction, based on analysis of data collected from May 1 to August 31, 2010.Id. at paragraph 3. She drafted provisions making it clear that the Condition Compliance Order, by its terms, was only "partial" and she inserted two sentence in paragraph 5 of the draft Order explaining why. First she added language in paragraph 5 of the draft Order that the revised

[39] The findings of Warren Brown, adopted by the DEP, that there was consistent evidence that the Project was generating excessive noise at 46-48 dBA during wind shear conditions, which is 3 dBA over the legal limits, but the corrective action by the DEP was for NRO of only 2 dBA.

operation protocol approved by the Department "satisfactorily modifies operations of the facility [by an additional 2 dBA NRO] when there are wind shear conditions and the wind is blowing in the south southwesterly direction (200°-250°)." Second, she added a statement in paragraph 5 of the draft Order that the "revised operating protocol *does not satisfactorily modify operation of the facility when there are wind shear conditions and the wind is blowing in any other direction.*" *Id,* Emphasis added. Acting Commissioner Aho objected to the draft language about "partial approval," in response to which AAG Mills still wanted to retain the reservation at the end of paragraph 5. Pet. AR 355, Pet. App. 123. Teco Brown, who signed the Condition Compliance Order on behalf of the Commissioner as Director of the DEP's Land Bureau, agreed with Amy Mills and informed Acting Commissioner of this. Id. He explained that Amy Mills was concerned that "we don't write a CC that prevents us from acting if a problem develops from any other wind direction." Id. He approved Amy Mills' draft as a "balancing act ... so both sides are covered." Id. Acting Commissioner disagreed and approved the draft order after removing the last sentence of paragraph 5. Id.

On its face, this Condition Compliance Order, AR 142, Pet. App. 124, is unlawful. Paragraph 2 of the Order correctly states that the Project must comply with the DEP's noise standards at all times; paragraph 3 states that the DEP formally determined that the Project will not operate in compliance whenever there is significant vertical or directional wind shear; yet paragraph 4 of the Order and its conclusion[40] authorizes FIW to continue to operate without making modifications for *all* the conditions that the DEP determined would cause non-compliance. Id. The record establishes that Acting Commissioner Aho authorized the Order to be issued knowing that it provided for only partial corrections, deliberately refusing to follow the

[40] "Based on the facts set forth above, the Department concludes that [FIW] has complied with Special Condition #8 of Department Certification #L-24564-ES-A-N with respect to the conditions present during the July complaint period."

advice of her Assistant Attorney General and the Director of the Land Bureau to preserve the DEP's authority to act when wind shears conditions occurred from wind blowing in other directions. For these reasons, she acted in excess of her legal authority when she authorized the issuance of this Order.

D. As a Practical Matter, the Protocols Approved in the Condition Compliance Order Exempt FIW from Future Noise Regulation

The harm created by the unlawful Condition Compliance Order extends far beyond the Order itself. What makes the Order so enormously pernicious is that, for the future, Acting Commissioner Aho approved protocols making it unlikely, if not impossible, for FIW to be held accountable for operating out of compliance with the Noise Rule during wind conditions addressed by the Order as well as conditions not addressed. She did this by accepting a compliance protocol advanced by FIW, twice rejected by the DEP earlier, which for all practical purposes reaffirmed the original compliance protocol under which the DEP was unable to obtain FIW's cooperation to rectify its operations in violation of the Noise Rule. She also accepted FIW's request to formalize the complaint protocol, informally issued by the DEP in the Summer of 2010 which the DEP subsequently came to view as grossly unfair to Petitioners and inappropriate. Condition Compliance Order, AR 142, Pet. App. 124, paragraph 3 at 3 of 7 incorporating by reference protocols proposed by FIW on April 11, 2011. AR 82, Pet. App. 72. In taking this action, Acting Commissioner Aho rejected the advice of her senior regulator, James Cassida and the DEP's expert acoustical expert, Warren Brown, who had correctly identified the consequences of adopting FIW's proposed protocols and, in response, drafted instead "Appendix A" (Pet. AR 369, Pet. App. 102).

"Appendix A" was drafted by James Cassida and Warren Brown in April and May 2011 after former Commissioner Brown decided to narrow the scope of modifications of the

operations of FIW as a fallback position. It was designed to assure that, in the future, the DEP would have in place effective tools to require compliance for noise violations under all conditions, including those not addressed by the Condition Compliance Order. It was designed to overcome FIW's combative behavior in the past and effectively regulating FIW in the future. James Cassida summarized the behavior "Appendix A" was designed to prevent in a description of a meeting with FIW at the DEP on June 9, 2011, days before the Condition Compliance Order was issued. FIW AR 142, Pet. App. 101. In the meeting

> we hit the same old wall with Fox Islands that we have hit so many times before. They do not believe they are in violation, do not like the analysis methods nor determination of compliance that we have made, do not want to give us more data to take a more in depth look at compliance, do not want to be required to demonstrate compliance in the future and do not want to in any way be responsible for responding to citizen complaints. Id.

If key provisions in "Appendix A" had been adopted by the DEP, the harm caused by the unlawful Condition Compliance Order itself would have been mitigated because, in the future, compliance could be effectively monitored and enforced. Correspondingly, without provisions of the kind set out in "Appendix A" incorporated into the Condition Compliance Order, as a practical matter, FIW is empowered to operate shielded from regulation for noise, regardless of the scope of the remedial provisions in the Order itself.. Acting Commissioner Aho's adoption of the status quo in terms of protocols for compliance and complaints essentially rewarded and encouraged FIW to continue the same behavior summarized by Cassida.

1. The Compliance Protocol Approved in the Condition Compliance Order under Review does not Assure Effective Compliance Monitoring.

"Appendix A" had two parts. First, it would have repealed the compliance protocol originally adopted for the Project on November 30, 2009, which had been proven to be

ineffective, and rejected FIW's proposed, minimal revisions of that protocol, which Acting Commissioner accepted in the Condition Compliance Order. Pet. AR 369, Pet. App. 102, ¶4. The original compliance protocol was ineffective because FIW claimed that it had demonstrated compliance based on unverified and unverifiable compliance data submitted to the DEP in October and November, 2010 while an unresolved valid noise complaint was outstanding, taking the position that it was not required to provide any other data to the DEP, even after a complaint for non-compliance was validated.

So "Appendix A" proposed a Compliance Plan that would require FIW to "monitor and report the noise generated by the facility in such a manner as to accurately and effectively measure wind turbine sound levels under all operational and meteorological conditions." Id. at 5 of 11. It did this by declaring, in rebuttal to the position FIW had taken earlier, that the designation of May 1 through August 31 as a compliance measurement period "shall in no way absolve FIW from the responsibility of maintaining compliance with the MDEP regulations for the control of noise (060-96-CMR 375.10) under all routine operating conditions regardless of the meteorological conditions or the time of year." Id.at ¶ 3. It then required compliance testing 3 different times during the compliance measurement period of May 1 through August 31, id. at ¶s 5 and 6 of 11, rather than just once as originally provided. Then, critically, it would require FIW to maintain measurement equipment and "collect continuous [sound, power and meteorological] data 24 hours per day, 7 days a week during all periods when the facility's turbines are turning and generating electricity." Id. at 6 of 11 ¶ 6.a. This provision was critical because there was no such requirement under the original compliance protocol (or in the revised protocol submitted to and adopted by Commissioner Aho) and FIW either did not record the data or refused to provide it to the DEP even after a finding of non-compliance. Thus under the

original compliance protocol reaffirmed by the Condition Compliance Order challenged there are no provisions assuring the DEP has the means to assess the accuracy of data reported by FIW. Because compliance measurement data typically is submitted for short intervals of time (10 minute segments), it is essential that the DEP have access to complete data from a project so that the DEP can assure the integrity of the submittals and prevent a licensee from cherry picking the days and the hours of the day to report to the DEP to demonstrate compliance.

In addition the Compliance Protocol proposed in "Appendix A" required an analysis of wind shear conditions, not required in the original compliance protocol and which FIW refused to provide the DEP even after a validated complaint. Id. ¶ 6.d, 6 of 11. It also set forth details of the kind and format of data submittals necessary for the DEP to accurately assess compliance submittals, id.¶ 6.e, 6 of 11, also lacking from the original compliance protocol. In addition, "Appendix A" clarified that the DEP reserved the right to engage an outside expert to assess a compliance submittal, to be paid for by FIW, id. paragraph 7, 7 of 11, also missing from the original compliance protocol under which FIW refused to agree to pay. Finally, it provided that if the DEP were to find non-compliance it would issue a notice of violation (NOV) if FIW does not agree to adequate modifications in 30 days. Id. ¶ 10.[41]

Days before she authorized the Condition Compliance Order, on June 17, 2011, James Cassida explained to Acting Commissioner Aho that that these terms of "Appendix A" were a "necessary" response to the DEP's finding of non-compliance. Pet. AR 369, Pet. App. 102. Cassida emphasized that it was essential to spell out how FIW should document compliance, given the tortured history of FIW's combativeness. Id.

2. The Complaint Protocol Approved in the Condition Compliance Order under Review Obstructs Petitioners' Right To Make Noise Complaints.

[41] A NOV is the enforcement step that precedes the filing of a civil action against a violator.

The second part of "Appendix A" formulated a fair and effective Complaint Response Protocol as an alternative to what FIW proposed. FIW had proposed that the DEP formalize the complaint protocol issued by the DEP informally in the Summer of 2010. AR 7, 8 and 9 and AR 82, Pet. App. 72. As explained above, this protocol imposed burdensome, technical requirements on Petitioners filing a noise complaint. James Cassida, who oversaw the drafting of this protocol, came to recognize that it was totally inappropriate, as Petitioners counsel pointed out when it was first drafted. On Jun 17, 2011, in his email to Acting Commissioner Aho, he explained that, "given the complaint history of this facility, it is absolutely necessary" that the DEP create a new Complaint Response Protocol. Pet. AR 369, Pet. App. 102. The history he referred to was the months of contentious refusal of FIW to cooperatively work with the DEP to resolve a validated complaint, including the refusal of FIW to even provide data to the DEP (or Petitioners) so that it could formulate an adequate modification to the operations of FIW to avoid non-compliance. Addressing the unfairness of the prior protocol on Petitioners, Cassida explained that "the existing complaint procedure puts all the burden to document potential violations on the neighbors to the project, which is patently unfair and inappropriate. The revised Appendix A simply requires the licensee to receive and resolve complaints, a responsibility that is routinely accepted by EVERY other wind power project in the State of Maine." Id.

So the second subpart of "Appendix A" set forth a Complaint Response Protocol designed to provide transparency in the reporting and resolution of noise complaints, including, when necessary, cessation of the operations of FIW so that further revised operation protocols

could be put in place. Pet. AR 369, Pet. App. 102, at 8 of 11 (introduction). [42] The Protocol relieved the burden on Petitioners to submit technical complaints, allowing a complaint to be made in any manner, specifically including 24 hour "hotlines" to be maintained by FIW. Id. at ¶1. Upon such a complaint, FIW would be required to gather information from the complainant in a standardized format, record basic data collected at the facility for the time of the complaint, and record steps being taken by FIW to resolve the complaint, all to be maintained and updated on a "complaint log" accessible by the DEP and the complainant via the Internet. Id. at ¶s 2 and 3. The Protocol further specified the steps to be taken by FIW to address a complaint, including a formal compliance assessment following the procedures set forth in the first part of "Appendix A" when there are a "consistent pattern of complains" suggesting non-compliance. Id. at ¶s 4 and 5.[43]

Cassida concluded his June 17, 2011 email to Acting Commissioner Aho with the statement that the entire "DLRR staff strongly encourages you to authorize the issuance of the attached draft permit [with Appendix A] in its entirety." Pet. AR 369, Pet. App. 102. As stated, Acting Commissioner Aho refused to do so, giving no reason on the record her decision.

The combined, practical effect of the decision of Acting Commissioner Aho to limit corrective operating protocols by FIW only minimally and only during limited wind directions that prevailed on July 17-18, 2010, with the reaffirmation of a the original compliance protocol that proved to be ineffective in assuring appropriate and reliable compliance reporting and the formalization of a citizen complaint protocol burdening Petitioners ability to make noise

[42] James Cassida thought "this [was] the most important part of the compliance plan." Pet. AR 346 at AR 1223 (marginal comment).

[43] As in the case of the Compliance Protocol in the first part of "Appendix A," the Complaint Protocol requires FIW to pay for peer review ordered by the DEP and for the issuance of a NOV if the DEP determines there is non-compliance. Id. at ¶s 6 and 7.

complaints, is to exempt FIW from any further noise regulation. By reaffirming the original compliance protocol in the Condition Compliance Order, Acting Commissioner Aho essentially rendered any future complaints by the Petitioners futile, even if they could afford to follow the technical requirements of the Complaint Protocol. The Order appealed herein is therefore unlawful because it exceeds the statutory authority of the DEP to allow a wind project to operate without accountability for excess noise. Commissioner Aho has no lawful right to grant FIW a regulatory pass. To the extent she had discretion, she acted arbitrarily and capriciously and she abused her discretion.

I1. The Condition Compliance Order is Unlawful because it is the Product of Political Bias.

Section 11007.4.C(4) of the Maine APA authorizes the Superior Court to reverse or modify a decision by an administrative agency that is "[a]ffected by bias." Bias is defined by *Black's Law Dictionary* (2d. ed. online version) as an "inclination, bent, prepossession, a preconceived opinion, a predisposition to decide a cause in a certain way, which does not leave the mind open..." The consequences of this Order have real and substantial effects on the lives of the Petitioners. It affects their health, their right to enjoy wellbeing in their homes and the value of their property. They have a right to insist that decisions of this kind will be made fairly, by an administrator who has an open mind, who will follow the path laid out by the evidence, the science and the objective circumstances. That did not occur here.

Anyone familiar with discrimination cases understands that direct evidence of bias is rarely available, requiring courts to look to conduct and statements that give inferences as to a decisionmaker's state of mind. *See* cases discussed at 38, *infra*. There is substantial indirect evidence in this case from which this Court should find that the decision to issue the Condition Compliance Order challenged in this case was affected by bias.

From the outset on this case, even before licensing, FIW, through George Baker, engaged in a pattern of seeking political influence to sway DEP decisions adversely affecting FIW. As explained above, Baker sought the aid of House Speaker Hannah Pingree and the President of Cianbro to pressure DEP Commissioner David Littell to rush through the licensing of the Project without a public hearing and without resolving troublesome compliance issues related to wind shear. However, under the prior Administration there was a line that the DEP Commissioner would not cross, which was drawn when Baker went to Speaker Pingree again to try to force the DEP to allow the Project to operate above the noise levels for "quiet areas." On this issue the DEP Commissioner was firm that he would not allow the integrity of the DEP to be compromised; he would make core regulatory decisions based on the evidence as determined by his professional staff.

It is apparent that Commissioner Littell reasonably interpreted George Baker's political maneuvering to be directed at compromising the DEP's responsibilities for protecting the public. It is therefore reasonable to infer that George Baker had the same objectives in mind when he approached new DEP Commissioner Darryl Brown in February 2011 to call off the demands of DEP regulators following a formal finding by the DEP of non-compliance. After all, Brown was an early appointee of newly elected Governor LePage who pledged to "roll back environmental protections." *See* Pet. App. 263 ("Maine Governor Paul LePage to Roll Back Environmental Protections"). Brown immediately informed his staff that DEP regulations were too burdensome upon assuming office. Giving the appearance of political bias, and contrary to the traditions of integrity at the DEP, he met privately with Baker and his attorneys, without even informing his professional staff, at a time when FIW was flatly refusing to cooperate with staff to bring the Project into compliance. In March, 2011, Commissioner Brown decided in a private caucus with

his newly appointed aides, who had no history or technical knowledge of the regulatory dispute, to limit the requirements of corrective action by FIW to only the conditions that existed on the evening of the complaint, without addressing non-compliance from other conditions.

Then, after Commissioner Brown was forced to resign, George Baker once again solicited the aid of Senate President Kevin Raye and the senior policy advisors of Governor LePage' s Office to thwart DEP staff's efforts to formulate effective compliance and complaint protocols through "Appendix A" to the proposed Condition Compliance Order. This initiative crossed the line drawn by the former Administration refused to allow. The LePage Administration and its political appointees were only too willing to cross that line to allow FIW to dictate the terms under which it could operate the Project without being accountable to excess noise. The Condition Compliance Order challenged deprived Petitioners of the protections of the Noise Rule and it did so without any explanation or rationale on the record on the part of Acting Commissioner Aho as to why she would disregard the professional judgment of her senior staff and expert consultant. The substance of the Condition Compliance Order is so irresponsible in the context of the history of non-compliance and combative behavior of FIW, together with the suffering of the Petitioners that the law is designed to protect, as to negate the notion that the decision to adopt it was made by a fair, open minded person. Under all the circumstances there is more than enough evidence for this Court to conclude that the Condition Compliance Order is unlawful as a product of political bias. Based on these grounds, the Condition Compliance Order should be vacated.

III. The Condition Compliance Order Violates the Petitioners' First Amendment Rights.

Section 11007.4.C(1) of the Maine APA authorizes the Superior Court to reverse or modify a decision by an administrative agency that is "[i]n violation of constitutional or statutory

provisions."[44] Count III of the Amended Petition alleges retaliation for the exercise by Petitioners of their right to petition their government for the redress of grievances. This First Amendment right has been described as a "fundamental right protected by the First Amendment," a right that is "essential to freedom," and a right that is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *Nader v. The Maine Democratic Party*, 2012 ME 57, ¶21, 41 A.3d 551, 558, citing *Borough of Duryea v. Guarnieri*, 131 S.Ct. 2488, 2491, 2494 (2011) and *United Mine Workers v. Illinois Bar Ass'n*, 389 US 217, 222 (1967). Any restriction on this right is "subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest." *Wyman v. Secretary of State*, 625 A.2d 307, 311 (Me. 1993). Where, as here, there is a drastic limitation on protected conduct, the burden on the DEP is "well-nigh insurmountable." *Id.*, citing *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

The elements of a First Amendment retaliation case are that Petitioners show (1) that their conduct was protected by the First Amendment (2) that a public official took adverse action against the Petitioners and (3) the adverse action was motivated by or substantially caused by the exercise of the protected conduct. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2d Cir. 1994); *Zherka v. Amicone*, 634 F.3d 642, 644-48 (2d Cir. 2011); *Gill v. Pidlypchak*, 389 F.3d 379, 380 (2d Cir. 2004); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 40-43 (1st Cir. 1992); *Puckett v. City of Glen Cove,* 631 F.Supp. 2d 226, 239 (E.D.N.Y. 209). All three elements are established in the record of this case.

[44] Before the Court for decision in tandem with its ruling on the merits is Petitioners' Motion for Clarification and/or Reconsideration of Order Dismissing Counts III and IV, dated November 12, 2012. Petitioner relies upon its argument in that Motion. As noted above, the parties have agreed that Petitioners may argue their constitutional claims herein as part of an Rule 80C appeal, subject to the Court's ultimate ruling on the outstanding Motion.

First, the right to petition the DEP with a grievance in the form of a noise complaint seeking enforcement of Noise Rule against FIW is protected by the First Amendment. *Gagliardi v. Village of Pawling, supra,* 18 F.3d at 194; *Dougherty v. Town of North Hempstead Board of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002); *see also, Schubert v. City of Rye*, 775 F.Supp.2d 689, 711 (S.D.N.Y. 2011); *Puckett v. City of Glen Cover, supra*, 631 F. Supp. 2d at 240. The DEP freely acknowledges that this element of the claim is satisfied in this case.

Second, at the urging of FIW, the DEP took adverse action against Petitioners by refusing to require FIW to take corrective action under all conditions, formally adopting a complaint protocol putting the burden on Petitioners to prove noise violations through technical submissions and by reaffirming a compliance protocol under which the DEP was unable to require FIW to affirmatively and effectively demonstrate compliance under conditions expected by the DEP to produce excessive noise. As previously explained, the combined effect of these actions has been to exempt FIW from noise regulation, causing Petitioners to suffer from the effects of excessive noise that the Noise Rule was designed to prevent, including adverse health effects, sleep deprivation and secondary effects from sleep deprivation, the inability to enjoy the use of their property, the loss of value to their property, and a sense of betrayal at the hands of the DEP. These forms of adverse actions are precisely the kind that the Second Circuit in *Gagliardi* ruled satisfy the elements of a First Amendment retaliation claim. *Id.* at 195.

It is not necessary to prove chill for this kind of retaliation claim. In *Creamer v. Sceviour*, 652 A.2d 110, 114 (Me. 1995), the Law Court stated that chill was an element for a First Amendment "in the context of private citizens claiming retaliation for the criticism of public officials." Our case is not about political speech; it is about tangible harm suffered by the Petitioners in response to their conduct, their petitions to the DEP to protect them from excessive

noise. In this context, the Second Circuit explained just last year, *Zherka v. Amicone, supra,* 634 F.3d at 645, that the requirement for alleging chill for " private citizens claiming retaliation for their criticism of public officials" does not apply where other concrete harm is alleged, such as harm that occurs from continuing exposure to excessive noise by reason of the government's refusal to enforce zoning laws, citing *Gagliardi* and *Dougherty, supra*; "[w]here chilling is not alleged, other forms of tangible harm will satisfy the injury requirement, since 'standing is no issue whenever the plaintiff has clearly alleged a concrete harm independent of First Amendment chilling.'" *Id.* at 646, citing *Gill v. Pidlypchak, supra*, 389 F.3d at 383. *Accord, Schubert v. City of Rye, supra*, 775 F.Supp. 2d at 711. But even if it were necessary to prove chill, it exists in this case. The burdens of making a noise complaint under the protocol formalized by the Condition Compliance Order, in combination with the absence of any effective regulatory tools to require FIW to responsibly respond to and resolve a complaint, renders the act of complaining difficult and futile.

Third, the "ultimate question" in First Amendment retaliation is the "requisite nexus between the exercise of [plaintiffs] First Amendment rights and subsequent retaliatory conduct." *Gagliardi, supra,* 18 F.3d at 195. The motivations and intent of governmental officials in a case like this are "critical because otherwise constitutional government actions 'lose their legitimacy if designed to punish or deter an exercise of constitutional freedoms.'" *Welsh v. Paicos*, 66 F.Supp. 2d 138, 169 (D. Ma. 1999), quoting *Ferranti v. Moran*, 618 F.2d 888, 892 (1st Cit. 1979).[45] The courts have found that the requisite nexus for the failure of government to enforce land use regulations can be proved by (1) a detailed chronology of events supportive of a causal

[45] The Second Circuit observed in *Gagliardi* that motive and intent are difficult to plead with specificity, as recognized in Rule 9(b) of the Federal Rules of Civil Procedure, and therefore it is sufficient to allege circumstantial facts from which retaliatory intent may be inferred. Id.; *See also, Dougherty v. Town of North Hempstead Board of Zoning Appeals, supra,* 282 F.3d at 91; *Tomlins v. Village of Wappinger Falls Board of Zoning Appeals*, 2011 U.S. Dist. LEXIS 73909, *35 (S.D.N.Y. 2011).

connection between the protected activity and the claimed retaliation, (2) when the complainants have suffered disparate treatment at the hands of the government entity, or (3) when there has been a departure from normal procedures in connection with enforcement. *Gagliardi, supra,* 18 F.3d at 195; *Dougherty, supra,* 282 F.3d at 92; *Tomlins, supra,* 2011 U.S. Dist. LEXIS 73909 at *40-47; *Nestor Colon, supra*, 964 F.2d at 41 (disparate treatment "is key because it indicates the possibility of an illegal motive"); *Schubert v. City of Rye, supra*, 775 F.Supp.2d at 712; and *Puckett v. City of Glen Cove, supra*, 631 F.Supp. 2d at 240.

All three forms of corroborative allegations are present in this case. First, the chronology of events described above provides compelling evidence of the motivation behind the Condition Compliance Order challenged in this case. The relentless complaints by Petitioners suffering from excessive noise caused the DEP, under a prior Administration, to take initial enforcement steps that FIW was unwilling to accept. In response to demands by the DEP that FIW take action to bring the operation of the Project into compliance, FIW persuaded the new Administration of Governor LePage to require only token and incomplete modifications and put in place protocols for the future effectively muzzling the Petitioners, rendering future noise complaints burdensome and futile. The effect of the Order issued in this case is to prevent more complaints by the Petitioners in the future. It is therefore not a leap to infer that this was the intent of the Order as well. Second, the disparate treatment of Petitioners in comparison to citizens living near other wind projects in Maine is evidence of retaliation. No other wind projects in the State of Maine has complaint and compliance protocols so pointedly burdensome and ineffective as those adopted for FIW, as explained further *infra* at 41-2. Third, the politicization of the DEP after the LePage Administration appointees took control of the DEP, involving direct and private conferences with an entity under enforcement review, without the presence or in some cases

even the knowledge of the professional staff, and the willingness of the DEP to do the bidding of FIW on technical matters without input of its professional staff or contrary to their recommendations all smacks of retaliation against Petitioners for their efforts to seek enforcement of the Noise Rules.

Ultimately, however, it is not necessary to rely on indirect evidence of retaliation in this case because this is one of the rare cases where there is *direct evidence* of retaliation. The intent of the burdensome complaint protocol formalized in the Condition Compliance Order can only be attributed to desire to create obstacles to the exercise by the Petitioners of their right to make grievances to the DEP for redress against excessive noise. James Cassida forcefully made this point to Acting Commissioner Aho before she acted. This direct evidence of retaliation colors the entire Condition Compliance Order, which should be invalidated based on the violation of the Petitioners' First Amendment rights.

IV. The Condition Compliance Order Violates the Equal Protection Clause.

While discriminatory action constitutes *evidence* of retaliatory intent in a First Amendment Retaliation case, disparate treatment lies at the heart of an Equal Protections claim in this case. The elements of an Equal Protections claim were recently explained in *Friends of Lincoln Lakes v. Bd. of Envtl. Prot.*, 2010 ME 18, 989 A.2d 1128. The Law Court applies a two-step test for Equal Protection claims: "First, the party challenging the statute must show that similarly situated persons are not treated equally under the law.'" *Id.* at 1136, quoting *Town of Frye Island v. State,* 2008 ME 27, ¶14, 940 A.2d 1065, 1069. "If this step is met, we then determine what level of scrutiny to apply." *Id.* If the challenge does not involve a fundamental right, "the test is whether the statute is rationally related to a legitimate state purpose." *Id. See also, Anderson v. Town of Durham*, 2006 ME 39, ¶29, 895 A.2d 944, 953.

In this case there is a challenge on Equal Protection grounds of the abridgement of Petitioners' fundamental rights, the First Amendment right to petition grievances. The level of scrutiny is therefore strict scrutiny. *Anderson v. Town of Durham, supra,* 895 A.2d at 953:

> If a government action that is challenged on equal protection grounds infringes on a fundamental constitutional right ... it is subject to analysis under the strict scrutiny standard..... Strict scrutiny requires that the challenged action be narrowly tailored to achieve a compelling governmental interest. See, Butler v. Supreme Judicial Court, 611 A.2d 987, 992 (Me.1992).

See also, State of Maine v. Poole, 2012 ME 92, ¶9, 46 A.3d 1129, 1133; *School Administrative Dist, No. 1 v. Comm'r, Dept. of Ed.,* 659 A.2d 854,857 (Me. 1995); *In re Dustin C.*, 2008 ME 89,¶8, 952 A.2d 993, 995; and *Wyman, supra*, 625 A.2d at 311. There is no compelling state interest that can possibly justify the onerous, unfair and discriminatory complaint protocol challenged by Petitioners in this case.

The Condition Compliance Order with its FIW- dictated protocols stands in sharp contrast to protocols approved by the DEP in licenses issued for the Oakfield Wind Project, Pet. App. 237, approved in October 2010 (prior to the Condition Compliance Order in this case), the Saddleback Ridge Project, Pet. App. 243, approved in October 2011 (after the Condition Compliance Order), and for the Pisgah Mountain small-scale wind project, Pet. App. 248, on May 25, 2011 (a month before the Condition Compliance Order). It also stands in contrast to the complaint response provisions provisionally adopted by the BEP in September 2011, later adopted after legislative review. Pet. App. 151 at 155-160. Key provisions in these licenses and the Noise Rule Amendments, which also track with key provisions in "Appendix A" described *supra*, at 28-32, are the following:

- Annual compliance submissions for the first 5 years and then every 5 years thereafter. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License,

Pet. App. 246-7 at ¶f; Pisgah Mountain License, Pet. App. 255at ¶j; Noise Rule Amendments, Section I(8)(e)(5), Pet. App. 158; "Appendix A", ¶5, Pet. App. 108.

- Collection of compliance data 24 hours a day, 7 days a week for the life of the project for each compliance monitoring location. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247 at ¶g (retained for 1 year from collection); Pisgah Mountain License, Pet. App. 259-60; Noise Rule Amendments, Section I(8)(e)(2)-(3), Pet. App. 157; "Appendix A", ¶6a, Pet. App. 108.

- Toll free complaint hotlines allowing complaints to be made 24 hours a day. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247 at ¶G; Pisgah Mountain License, Pet App. 257, 260; Noise Rule Amendments, Section I(7)(j), Pet. App. 155; "Appendix A", ¶1, Pet. App. 110.

- Collection of complaint information in a uniform manner. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247 at ¶G; Pisgah Mountain License, Pet. App. 258-9; Noise Rule Amendments, Section I(7)(j)(3), Pet. App. 155; "Appendix A", ¶2, Pet. App. 110.

- For each complaint, the license shall send file recorded sound, meteorological and operational data to the DEP for analysis. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247 at ¶g; Noise Rule Amendments, Section I(8)(e)(2)-(3), Pet. App. 157 (available for inspection at request of the DEP).

- Analysis of power, sound and meteorological data relating to a complaint by the licensee . Noise Rule Amendments, Section I(7)(j)(3), Pet. App. 155; "Appendix A", ¶6.d, Pet. App. 108 (for wind shear in compliance reports); "Appendix A", ¶5, Pet. App. 111.

- Maintenance of a complaint logs to be filed with the DEP. Pisgah Mountain License, Pet. App. 259; Noise Rule Amendments, Section I(7)(j)(2), Pet. App. 155; "Appendix A", ¶3, Pet. App. 111.

- When appropriate, review of the complaint by a third party sound consultant arranged for by the DEP. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247; Pisgah Mountain License, Pet. App. 260; "Appendix A", ¶8, Pet. App. 109; "Appendix A", ¶6, Pet. App. 111.

- Paid for by the licensee. Spruce Mountain License, Pet. App. 241; Saddleback Ridge License, Pet. App. 247; Pisgah Mountain License, Pet. App. 260; "Appendix A", ¶8, Pet. App. 109; "Appendix A", ¶6, Pet. App. 111.

- Upon a finding of non-compliance, the licensee must take short term action immediately to adjust operations to reduce sound output to acceptable levels. Spruce Mountain License, Pet. App. 241.

None of these provisions were incorporated into the Condition Compliance Order.

In the case of the complaint response provisions of the Spruce Mountain License, approved by the DEP while it was struggling with non-compliance at FIW, it was stated that the detailed requirements were necessary "[i]n light of concerns regarding the investigation of sound related complaints at similar facilities," Pet. App. 241, meaning at FIW, the only other wind project where there were concerns about the investigation of sound complaints. In the case of the Noise Rule Amendments, the BEP explained in the *Supplemental Basis Statement* that the specifics concerning a licensee's response to complaints were incorporated based, in part, by the arguments about "difficulties encountered at some of the development sites, *most notably Vinalhaven.*" Pet. App. 163 at 16-7 (Pet. App. 178-9).

How in the world, we ask, could Acting Commissioner Aho possibly justify the FIW-dictated Condition Compliance Order at issue here, when months earlier the DEP had mandated comprehensive complaint response protocols for Spruce Mountain to rectify the very type of problems the DEP was experiencing with FIW and when the DEP participated in rulemaking for the Noise Rule Amendments that added specific protocols responding to abuses by FIW and when the key provisions of both were reflected in "Appendix A," prepared and recommended by the DEP staff? Why did she do this if not to retaliate against Petitioners seeking redress from the DEP, to rid the DEP and FIW of the thorn in their sides, under the directions from the Governor's Office, in a manner that treats Petitioners disparately? To repeat, Acting Commissioner gave no explanation on the record for her actions and there can be none other than explained in this Brief. Whatever her reason, the effect of the Order is to treat Petitioners disparately, in violation of the Equal Protection Clause of the Maine and U.S. Constitutions.

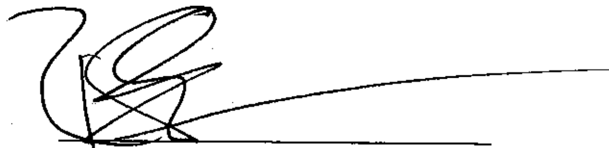
V. Relief Requested.

Based on the foregoing, Petitioners request that the Condition Compliance Order issued by the DEP be invalidated and that the DEP be directed to formulate a new order that requires FIW to put in place NRO, with a cushion, under all conditions of significant vertical or directional wind shear. Petitioners further request such protocols include, as a minimum, all the features listed *supra* at 41-2 for the Spruce Mountain, Saddleback Ridge and Pisgah Mountain licenses plus the key provisions in "Appendix A" as described *supra* at 30-33. In addition, to address the prior uncooperative behavior of FIW and the prior abdication of responsibility of the DEP with regard to FIW's non-compliant operations, Petitioners consider it essential that FIW be required to make the sound, operational and meteorological data it collects on a 24 hour basis reasonably available to Petitioners so they can monitor the actions of both FIW and the DEP. Petitioners also ask the Court to retain jurisdiction over the case to review the adequacy of the DEP's response to its order and continue to retain jurisdiction thereafter for a limited time to monitor DEP implementation of the Court's order. Finally, Petitioners request an award of attorney's fees for the constitutional violations under 42 U.S.C. §1988 pursuant to M.R.Civ. P.54(b)(2).

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Condition Compliance Order be invalidated and that Petitioners be granted the relief they request.

Dated: January 24, 2013



Rufus E. Brown, Esq.
State Bar No. 1898
BROWN & BURKE
152 Spring Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775-0265
rbrown@brownburkelaw.com

Attorney for the Fox Islands Wind Neighbors and the Individual Aggrieved Parties