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RUFUS E. BROWN
M. THOMASINE BURKE

March 20, 2013

Michele Lumbert, Clerk
Kennebec County Courthouse
95 State Street
Augusta, ME 043301

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

Dear Michele:

Please find attached for filing Petitioners' Rule 80C Reply Brief and Petitioners' Rule 80C Brief Supplemental Appendix.

Thank you for your assistance.

Sincerely yours,

Rufus E. Brown

REB/encl.

cc. Jerry Reid, AAG
Catherine Connors, Esq.

STATE OF MAINE
KENNEBEC, ss

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

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

Petitioners, through counsel, submit the following Reply Brief in response to the briefs of Respondent Department of Environmental Protection (the "DEP Brief") and Party in Interest Fox Islands Wind (the "FIW Brief").[1]

INTRODUCTION

The DEP acknowledges, as it must, that FIW is required to operate its wind project in compliance with the Noise Rules at all times, DEP Brief at 8, which means that the Commissioner has no discretion to allow FIW to operate out of compliance. But then it advances the stunning position at 8-13 of its Brief that the Condition Compliance Order (the "CCO") is lawful, even though it limits corrective action for excessive noise only when the wind blows from the SSW (200°-250°),[2] because of the "uncertainty" about the need for corrective action for winds from other directions-- uncertainty attributable solely to FIW's refusal to provide data that would have allowed the DEP to calculate corrective action for all wind directions. This position, together with other positions taken by the DEP in its Brief, has

[1] Accompanying this Reply Brief is Petitioners' Rule 80C Brief Supplemental Appendix ("Pet. App ---"), which continues the numbering from Petitioners' original Appendix.

[2] For the convenience of the Court, Petitioners append a standard Wind Rose to this Reply Brief.

profound implications on the legality of the CCO. It demonstrates more than anything else why there are compelling reasons for this Court to strike down the CCO.

The decision not to require compliance for all wind directions was a political decision by Acting Commissioner Aho's predecessor. *See* N.3 at 3, *infra*. In response, the DEP staff drafted "Appendix A," consisting of a new Compliance Assessment Protocol and a new Complaint Protocol, to mitigate the consequences of this decision. When Acting Commissioner Aho then struck down these proposed protocols, issuing the CCO without them, the deconstruction of compliance requirements for FIW was complete. She acted under political pressure, against the advice of her professional staff and expert consultant and rejecting her attorney's advice to be transparent. If this Court affirms the legality of this CCO, it will leave FIW in the position to unilaterally control the extent of its accountability for compliance, with no practical redress for Petitioners to secure the protections against excessive noise that the law created for their benefit.

ARGUMENT

I. The CCO Allowing FIW to Continue Operations without Full Compliance with the DEP Noise Rule is Unlawful.

The DEP Brief argues that then Acting Commissioner Aho justifiably limited the requirement for FIW to operate in Noise Reduction Operation ("NRO") mode only for SSW winds because of "uncertainties" about whether wind shear would cause non-compliance from other directions. DEP Brief at 8-16. The heart of this argument, which is advanced as critical to the legality of the CCO, is that there was "no actual documentation" about non-compliance from other wind directions, that at most the DEP's expert "suspected" a problem. *Id.* at 10. The DEP

Brief asserts, "[a]s to the effect of non-SSW winds, the record is ambiguous, which is a critical point for understanding why the Department acted as it did." DEP Brief at 10.[3]

The DEP Brief's rationale for the legality of the CCO is not based on any reasoning in the CCO itself or any explanation by then Acting Commissioner Aho on the record when the CCO was issued. It is simply made up by the DEP's attorney and should be disregarded for this reason: "The courts may not accept appellate counsel's post hoc rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). *See also, Michael Shane Christopher v. Smithkline Beecham, Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference to an agency interpretation is unwarranted when it is advanced by an agency as a *post hoc* rationalization to defend against agency action under attack). The legality of the CCO must be measured against the basis articulated in the Order itself. *Burlington Truck Lines, supra,* at 168-9.

There is no mention of "uncertainties" or "ambiguities" in the CCO, Pet. App. 124, approved by Acting Commissioner Aho.[4] The CCO, examined on its own terms, simply states

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[3] No argument is advanced by DEP about prosecutorial discretion. Curiously, it is only FIW that raises the issue now. FIW Brief at 14 in a footnote, N.8. FIW's argument, however, ignores settled law that prosecutorial discretion only applies to "an agency's refusal to take requested enforcement action," not when the agency does act to enforce. *Heckler v. Chaney*, 470 U.S. 821, 831-2 (1985). *Accord, Port of Seattle, Washington v. FERC*, 499 F.3d 1016, 1027 (9th Cir. 2007); c*f., Pike Industries v. City of Westbrook*, 2012 ME 78, ¶23, 45 A.3d 707, 716, which holds that consent decrees (which is what the DEP and FIW essentially ask the Court to sanction in this case) "that affect public rights should be subject to closer scrutiny than those that resolve purely private disputes." No Maine case has ruled that prosecutorial discretion applies when an enforcement action is undertaken.

[4] Indeed the decision to limit corrective action to the SSW winds was not even made by Acting Commissioner Aho; it was political decision made by former Commissioner Brown, who also gave no rationale at all for his decision. *See* Petitioners' Rule 80C Brief at 17. *Also see,* Pet. AR 249, Pet. App. 320, email from Thomas Doyle, FIW's attorney, to Daniel Courtemanch, the DEP Project Manager for FIW, dated June 10, 2011, forwarded to Acting Commissioner Aho ("in a meeting at the Department on March 24, 2011, which you, other DEP Staff and the Deputy Commissioner attended, the Commissioner [Brown] decided very firmly what information needed to be in the application for FIW's revised operating protocol and that it would deal only with the meteorological conditions extant on July 17-18, 2010 (that is, winds out of the Southwest and wind shear (higher aloft than at the surface.")) Certainly Acting Commissioner Aho could have reconsidered that decision before issuing the CCO, but there is no evidence that she did so or was even asked to by DEP staff and she is ultimately accountable for its legality. As neither former Commissioner Brown nor then Acting Commissioner Aho gave any rationale for the limitation on corrective action, there is nothing for this Court to defer to as invited by the DEP Brief at 13.

that, while significant wind shear causes excessive noise, the DEP decided to require NRO only for SSW winds, period. The CCO begins in paragraph 2 by declaring that FIW must "comply with the Department's noise standards under all conditions and at all times," a point readily acknowledged by the DEP in its Brief at 8 and 15. Paragraph 3 of the CCO then states that FIW exceeded the applicable noise limits during the July complaint period, which is accurate. The same paragraph then explains that the November 23, 2010 Letter of Determination, Pet. App. 59, found that the FIW facility is expected to exceed the applicable limits "when[ever] there is significant vertical and directional wind shear." This is critical. The Letter of Determination incorporated into the CCO makes no reference to wind direction; it concludes that there will be non-compliance whenever there is significant wind shear, regardless of wind direction.[5] Paragraph 4 of the CCO then describes the willingness of FIW to operate the wind turbines in additional NRO mode when the wind comes from the SSW, which is the first mention in the CCO about wind direction and the only explanation of why the Acting Commissioner accepted this limitation. In the last sentence of that paragraph and in the last sentence of paragraph 5 of the CCO, the Acting Commissioner states that this approval is limited to operations when there is wind shear from the SSW, without explanation.

The only suggestion of why the CCO was limited is a statement in paragraph 5 that, in addition to a review of information about wind shear present during the complaint period, the "Department has also reviewed, *to the extent the Department has obtained it*, other data collected

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Ironically, the DEP argues that deference is particularly appropriate where, as here, the issue is "highly technical." *Id.* The DEP is right about the issue being technical, which is why decisions by former Commissioner Brown and then Acting Commissioner Aho, neither of whom have technical expertise or even much involvement at all in the development of the dispute with FIW, are so suspect when they overrode its technical staff and expert consultant's judgment.

[5] The Letter of Determination was a formal decision by the DEP. While it was signed by James Cassida, it was approved as an official determination of the DEP by all levels of management, including the then Acting Commissioner Nagusky. Petitioners' Rule 80C Brief at 14.

by the licensee during the period of May 1, 2010 to August 31, 2010." [Emphasis added.] As will be explained next below, this sentence alludes to the refusal of FIW to provide data that would have allowed the DEP to calculate a trigger for NRO whenever there are significant wind conditions, regardless of wind direction.

Not only does the CCO fail to offer any legitimate reason for its limitations, but there is no substantial evidence in the record to support the DEP's *post hoc* rationalization even if it had been adopted in the CCO itself.[6] What the record clearly reveals is that any uncertainty about the conditions leading to non-compliance was not the direction of the wind but *the extent of the wind shear,* regardless of wind direction, and the only reason for uncertainty on this point is attributable solely to FIW's refusal to provide data requested of it by the DEP.

In his original findings on September 8, 2010, AR 26 and Pet. App. 53, the DEP consultant Warren Brown stated the "July 17-18 complaint conditions were very similar with regards to surface winds and WTG output [at] 80m wind speeds (May data) as FIWN complaints previously submitted for May 1, 4, 5, & 6, all of which reported sound levels between 46-48 dBA." The DEP Brief at 11 cites this finding, but not the following sentence: "Although these complaints were prior to the 'FIW compliance protocol' in timing[7] nonetheless *there exists a significant body of consistent meteorological and sound data indicating sound levels greater than the applicable limits.*" [Emphasis added.]

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[6] Both the DEP Brief at 8-9 and N.4 at 9 and the FIW Brief at 12-13 assert that Petitioners attempt to avoid analysis under the "substantial evidence test." Indeed the DEP goes further to allege that the "Petitioners concede the factual record was sufficient for the Department to act," DEP Brief at 9, N.4, and FIW goes so far as to assert that "Petitioners appear to concede that the CCO is supported by substantial evidence." FIW Brief at 13. Petitioners do not and have not made any such concessions and do not seek to avoid analysis under the substantial evidence test to the extent applicable. Prior to the DEP's Brief, there was no substantial evidence argument to make because the CCO is simply illegal on its face, with no legitimate justification for its limitations. Now that DEP's counsel have disclosed the *post hoc* rationale for the CCO, Petitioners do ask the Court, to the extent it even considers the position made up by counsel, to find that there is no substantial evidence to support the DEP's belated justifications.

[7] Actually these complaints *were* made during the compliance period of May 1 to August 31st. *See,* Pet. App. 43 at paragraph b. FIW is wrong about this as well. FIW Brief at 16, N.11.

The DEP's assertion in its Brief at 11 that Warren Brown's findings "impl[y] that the May incidents also occurred during SSW winds" is not only untrue but is contradicted by the record. Petitioners made two complaints about excessive noise on May 1, 2010 (Complaint No. 5 and Complaint No. 8). The wind direction for the first May 1 complaint was from 188° to 198° (more southerly than the 200° to 250° SSW that the CCO is limited to) except for one ten minute period,[8]and the wind direction for the second May 1 complaint was from 253° to 262° (more northerly than the SSW parameters of the CCO).[9] The wind direction for the May 5, 2010 complaint (Complaint No. 14) was SSE 169° to 171°, again outside of the SSW parameters.[10] The wind direction for May 6, 2010 (Complaint No. 15) was 251° to 280°, more northerly of the SSW parameters of the CCO.[11] The wind direction for the complaint made for May 10, 2010 (Complaint No. 17) was NNW.[12] So the assertion in the DEP Brief that"[a]ll agreed that ....the only instance of non-compliance that the Department could document occurred with SSW winds," DEP Brief at 9, and there is "no actual documentation" of non-compliance outside of winds from the SSW, DEP Brief at 10, is simply wrong.

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[8] The first May 1 complaint was made for the period 9:14 PM to 10:40 PM. DEP AR 163, Pet. App. 266. FIW's records show that during this complaint period the wind was blowing from 188° to 198° except for 1 ten minute period. Pet. AR 305, Pet. App. 276, at pg. 1045 (5/1/2010 from 21:00 to 22:50).

[9] The second May 1 complaint was made for 2AM. DEP AR 163, Pet. App. 266, 269. FIW's data shows that the wind direction at this time was from 253° to 262.° Pet. AR 305, Pet. App. 276, pg. 1043 at 5/1/2010 2:00 to 2:50.

[10] The May 5 complaint was made for the period 9:44 PM to 10:56 PM. Pet. AR 115, Pet. App. 270. FIW's data shows the wind during this period was from the SSE 169° to 171.°Pet. AR 305, Pet. App. 276 at pg. 1057 (5/5/2010 21:40 to23:00).

[11] The May 6 complaint was for the period 6:59-9:19 PM. DEP AR 131, Pet. App. 272. FIW's data shows the wind from 251° to 280° during this period, to the North of the SSW parameters, except for 1 ten minute period. Pet. AR 305, Pet. App. 276, at pg. 1060 (5/6/2010 19:00 to 21:20).

[12] FIW AR 118, Pet. App. 274. No FIW data was furnished for this complaint.

Moreover, FIW itself admitted in 2010 that the wind project generated the most noise during wind directions other than SSW. FIW submitted two reports to the DEP in October and November 2010 purporting to show compliance under the original Operational Sound Measurement Compliance Protocol, DEP AR 4, Pet. App. 39, which required measurements to be taken "during weather conditions when wind turbine sound is most clearly noticeable", *id.* at Pet. App. 43, in other words under worst- case wind conditions. FIW submitted data for July 2, 2010, showing winds from the NW (261°- 288°) and for August 3, 2010, showing winds from the SE (141°to 170°). FIW AR 60, Pet. App. 295, 298 and FIW AR 64, Pet. App. 299, 302. By these submissions, FIW represented that noise from the Project should be loudest during winds from the SE and the NW, not the SSW.[13]

After the DEP's Letter of Determination of non-compliance was issued on November 23, 2010, and after FIW had proposed NRO only for winds from the SSW, Warren Brown advised the DEP on December 21, 2010 that the data he reviewed "indicates consistent increased wind shear ... with winds ranging from SSE-NW," not just SSW. Pet. AR 333, Pet. App.61. His findings were illustrated in a graph sent to FIW before a compliance meeting scheduled on January 19, 2001, plotting wind shear during the complaint period during May and July with wind directions from SSE-NW. DEP AR 55, Pet. App. 309, 310. However, the consultant needed further data from FIW to "establish[ ] future FIW operating condition parameters." Pet. AR 333, Pet. App.61. The DEP's Brief at 11 claims that this email only shows that the consultant did "not attempt to sort out the extent to which non-SSW winds could lead to compliance problems." But what this email actually states is the very opposite-- that the DEP needed data from FIW in order to sort the issue out.

[13] Understandably, the DEP never accepted these submissions as evidence that the project was operating in compliance with the Noise Rule and its license.

Following Warren Brown's request, James Cassida informed FIW of the data that the DEP's consultant needed in an email dated December 22, 2010. AR 50, Pet. App. 303, asking for data for the period May 1 to October 31, 2010 relating to wind shear and wind direction. Again, the purpose for the data request was to allow Warren Brown to calculate a "wind shear coefficient (the extent of wind shear) that can be used as the trigger mechanism" for NRO regardless of wind direction. *Id.* Over the next four months, FIW repeatedly refused to provide the data to the DEP, causing the DEP ultimately to conclude that it was "fruitless to continue discussions with [FIW] about submitting data to us for further analysis." Petitioners' Rule 80C Brief at 15.

This impasse caused the DEP to send another formal letter to FIW on March 9, 2011, AR 72, Pet. App. 70, begrudgingly approved by then Commissioner Darryl Brown, Petitioners' Rule 80C Brief at 16-17, again explaining that the data was necessary to identify a specific range of wind shear that causes non-compliance, given that not all wind shear causes excessive noise. Again, the issue was not wind direction, but wind shear regardless of wind direction. This point was hammered home to FIW by the DEP still again in an email dated January 10, 2001, from James Cassida to George Baker. DEP AR 53; Pet. App. 63. Cassida again explained the need for the data to provide complete remediation. In doing so, he explained that wind shear occurs most commonly from winds from the SSW, but that wind shear occurs from other wind directions as well. "As a result of this, it is not acceptable that the trigger simply be based on wind direction alone." *Id.* Cassida further emphasized that *"it was always and remains the DEP determination that it is the presence of vertical and directional wind shear that caused the non-compliance. This is why the formal letter of determination did not reference wind direction." Id.* [Emphasis added.]

FIW never did submit the data requested to the DEP, preventing the DEP from calculating when FIW should use NRO outside of the SSW parameters.[14] This data that was refused by FIW is what the CCO is referring to in the final paragraph 5 that states that the DEP reviewed data about wind shear "to the extent the Department has obtained it." It is this refusal by FIW that prevented the DEP from ordering full relief, not any "uncertainty" or "ambiguity" about excessive noise based on wind direction.

From the foregoing, it is evident that the DEP attempt to give a *post hoc* rationale to the CCO is based on a false reading of the record. The record reveals that the decision not to provide full corrective action was a political decision after a refusal by FIW to provide data that would have enabled the DEP to define a proper trigger from NRO to account for significant wind shear causing non-compliance, regardless of wind direction. This review of the record also explains what the CCO was referring to in paragraph 5 when it states the DEP reviewed data other than for July 17-18 "to the extent that the Department obtained it," in essence acknowledging that FIW limited the DEP's ability to require NRO form non-SSW winds.

The Acting Commissioner's advisor in the Attorney General's Office, Amy Mills, urged Acting Commissioner Aho to be even more forthright by suggesting that the CCO specifically state that it approves only "partial" compliance and an addition to paragraph 5 to say 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." *See,* Petitioners' Rule 80C

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[14] FIW asserts in its Brief at 9, that on April 11, James Cassida commended FIW for being "very responsive to the DEP requests for clarification, etc.," apparently for the purpose of showing the Court that FIW was being cooperative. If that is FIW's intent, it is misleading. The "requests for clarification" were questions that Warren Brown had about FIW's proposed condition compliance application, *see* Pet. AR 360, Pet. App. 311, that James Cassida and Warren Brown found inadequate. The submission of condition compliance application and the clarifications of the application by FIW, *id.*, were submitted after the DEP determined that it was "fruitless" for it to continue pressing FIW for data necessary to calculate a trigger for NRO during significant wind shear conditions, regardless of wind direction. *See* Petitioners' Rule 80C Brief at 15.

Brief at 25-26 and Pet. App. 114,19. The reason the DEP and FIW are so concerned about AAG Mills' proposed edit, *see* DEP Brief at 15-16 and FIW Brief at 16-17, is that it recognizes what the DEP had consistently stated on the record multiple times, namely, that excessive noise at FIW is caused by significant wind shear regardless of wind direction. [15] Clearly a "partial" compliance means that compliance was not complete and the added wording suggested for paragraph 5 would have explained that compliance was not complete because it addressed only part of the known causes of excessive noise.

The DEP argues that the Court should not consider this part of the administrative record because it claims that to do so would impermissibly intrude into the mental process of the decision maker, citing, inter alia, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). DEP Brief at 13-14. The DEP, however, misstates the legal principle in *Overton Park*. *Overton Park* explained that the restrictions on examining the mental process of the decision maker only apply where the decider explains her rationale on the record. Where, as here, the decider has not done so, *Overton Park* states that the courts *must* review *all* the record and may even go outside the record, to examine what factors were considered in order to determine whether the decider acted within the scope of her authority. *Id.* at 419-20. [16] The only insight we have into the Acting Commissioner's thinking on the subject is that she didn't think the proposed edits were necessary," Pet. AR 355, Pet. App. 123, which hardly explains anything except an

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[15] FIW apparently thinks that Petitioners are arguing that it was arbitrary and capricious for the DEP not to adopt the Amy Mills' edits. *Id.* That is not what Petitioners argue. The Mills' edits were important because they highlighted the illegality of the CCO and the motivation of then Acting Commissioner Aho to be less than transparent when she approved the CCO.

[16] Two of the three cases cited in the DEP Brief at 13-14 in addition to *Overton Park -- In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 156 F.2d 1279 (D.C. Cir. 1998) and *Cutler Co. v. State Purchasing Agent*, 472 A.2d 913 (Me. 1984) -- rely on *Overton Park*. The *Cutler* case, in turn, cites *Fyre v. Inhabitants of Cumberland*, 464 A.2d 195, 200 (Me. 1983), which specifically describes the limiting principle in *Overton Park* explained in the text above.

unwillingness to be forthright. [17] When the entire record is examined, including the strong objections of Cassida and the efforts by AAG Mills to be more transparent in the CCO, there can be no doubt about why then Acting Commissioner Aho limited the scope of the CCO; she was willing to order NRO only to the extent agreed to by FIW.

The CCO, for all these reasons, was arbitrary and capricious, willful and unreasoning and without consideration of the facts and circumstances and without any support in the record. By authorizing the CCO to be issued with only limited corrective action, Acting Commissioner did not act rationally. Most significantly, it was not within her discretion to refuse to mandate NRO to achieve full compliance when it was within her power to do so and when the only reason she did not do so was the failure of FIW to provide the necessary data.[18]

II. The Protocols Adopted by the Acting Commissioner in the CCO Exacerbate the Illegality of the Order.

The DEP's rationale for the legality of the CCO based on the "uncertainty" created by the refusal of FIW to provide data to the DEP has broader and more serious implications than the decision not immediately mandate complete corrective action. The CCO readopts for all practical purposes the same Compliance Assessment Protocol originally required for the FIW

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[17] Other statements in the CCO that FIW must always be in compliance do not substitute, as the DEP claims in its Brief at 15, for the recognition that there are other specific sources of excessive noise that the CCO does not address.

[18] In a final effort to justify the decision to require only partial corrective action, the DEP relies on cases that say that in some circumstances a regulator may be allowed to address a problem in an "incremental way." DEP Brief at 12-13. *See also*, FIW Brief at 14-15. The cases the DEP cites and the principles they articulate concern legislation or regulations addressing economic issues, *see Rhode Island Hospitality Ass'n v. City of Providence,* 667 F.3d 17, 40-1 (1st Cir. 2011) and *Medeiros v. Vincent*, 431 F.3d 25, 31-2 (1st Cir. 2005), citing *City of New Orleans v. Dukes*, 427 U.S. 297,303 (1976), not regulations designed to protect the health of citizens. The decision by the Acting Commissioner in this case not to protect the citizens of Vinalhaven from excessive noise from significant wind shear regardless of wind direction cannot be justified on any discretion to approach the problem in an incremental way, when the DEP has already acknowledged that the Commissioner has no discretion to allow a wind project to operate out of compliance with the Noise Rules, DEP Brief at 8, and where the only reason for not mandating full mitigation arises out of FIW's refusal to release data to the DEP. As explained further at 14-15, *infra*, the Commissioner of the DEP's discretion is significantly narrowed on issues affecting public health.

project. If, as was the case here, FIW is not required to collect and store data on a continuous basis under the original protocol and can get away with refusing to provide necessary data to the DEP under the original protocol, and if this refusal prevents the DEP from mandating adequate corrective action, as it did in this case, then the same can be expected in the future under a compliance protocol incorporated into the CCO that is essentially the same as the original. Worse yet, for the future, by reason of the Complaint Response Protocol formalized in the CCO, the burden going forward is shifted to Petitioners to come forward with technical data and analysis for any complaint filed, failing which their complaint may be discounted and considered non-actionable. As a consequence of this regulatory regime, putting all the burden on the Petitioners to prove complaints without access to data necessary to do so, FIW will remain free of accountability for excessive noise forever.[19]

A. The Reasons for "Appendix A."

The DEP technical staff, in consultation with the DEP's noise consultant and the Attorney General's Office, drafted new protocols for FIW in "Appendix A," Pet. AR 369, Pet. App. 103, precisely because of FIW's prior refusal to cooperate in furnishing data necessary to achieve full compliance under all conditions. In effect, "Appendix A" was drafted as a *quid pro quo* for not insisting on immediate corrective action for all conditions. *See* Pet. AR 369, Pet. App. 102 (the Compliance Assessment Protocol in "Appendix A" is a "necessary component" in view of the November 23, 2010 determination of non-compliance) and AR 140, Pet. App. 330,

[19] The DEP in its Brief at 3, N.1 and FIW in its Brief at 11, 17 and 22 argue that the protocols submitted in its compliance application adopted by the CCO originally came from the DEP and Warren Brown and therefore should not be found objectionable for this reason. This argument is nonsense. The professional staff and its consultant proposed "Appendix A" precisely because the original protocols proved inadequate, unfair and unworkable and that is why FIW urged the Commissioner to reaffirm them. The DEP and FIW are likewise setting up a strawman when they say that Petitioners argue that the CCO was illegal because it did not adopt "Appendix A" word for word. Again, this is not what we advocate for. Instead Petitioners argue that certain core principles in the two protocols in "Appendix A" should have been incorporated in some fashion in the CCO.

Memorandum of James Brooks to Acting Commissioner, dated June 24, 2011 ("Appendix A" necessary to bring FIW into line with other wind projects and is especially important because of the findings of non-compliance and the failure of FIW to comply with requests for data); *see also*, Petitioners' Rule 80C Brief at 41-2.

B. The Need for a New Compliance Assessment Protocol

The core of the new Compliance Assessment Protocol set forth in "Appendix A," Pet. App. 107, was to require FIW to furnish to the DEP periodic compliance reports, *id.* at paragraph 5, to collect ongoing meteorological, sound, and operational data on a 24/7 basis, *id.* at paragraph 6.a, and to include in the compliance reports an "analysis of all operating conditions that exhibit wind shear conditions." *Id.* at paragraph 6.d. The rationale for such a requirement was that, for any future complaint, the DEP would be assured access to the kind of data and analysis necessary to make operational corrections that previously FIW refused to provide to the DEP. [20]

In its Brief at 17-18, the DEP first argues that it was within the discretion of the Acting Commissioner to reject the new Compliance Assessment Protocol as unneeded because the original protocol (only slightly modified by the CCO) required FIW to give compliance data and because the DEP already has the statutory power to obtain such data. The problem with this argument is that, in this case, the DEP not only failed to exercise this authority, but through such failure seeks to justify only a partial corrective action based on the purported "uncertainty" about the need for complete corrective action. The proposed Compliance Protocol was designed to put an end to FIW's obstructive conduct. The CCO's adoption of the original sends FIW (and the Petitioners as well) the opposite message.

[20] Without this data, notwithstanding FIW's arguments in its Brief at 18, there is no way for the DEP to determine whether the 10 minute segments it submits to the DEP to show compliance in the worst case conditions actually represent the loudest periods for the FIW project, as opposed to cherry picked time segments.

The DEP's second argument in its Brief at 17 is that compliance with the staff proposed Compliance Protocol would be too expensive, accepting without any verification FIW's claims of financial burden, *see* FIW's Brief at 9, and ignoring that all other wind projects in Maine have some version of this requirement. *See* Petitioners' Rule 80C Brief at 41-2. It is particularly inappropriate for the DEP to give weight to the alleged burdens on FIW for demonstrating compliance when the FIW project was known from the outset to have a high risk of producing excessive noise, with no margin for error, *see* Petitioners Rule 80C Brief at 4-9. The DEP also asserts that the protocol is too burdensome because every single complaint would require a "technical analysis by acoustical experts." DEP Brief at 17. The irony of this argument is too much for Petitioners to ignore, as the formalization of the Complaint Response Protocol puts this burden on *Petitioners* if they want to avoid having their complaints "discounted" or ignored as "anecdotal." *See, infra at 16.* In any event, the DEP misstates the substance of the proposed Complaint Assessment Protocol in combination with the staff proposed Complaint Response Protocol, discussed next below, which would require technical analysis by FIW only when there is a "consistent pattern of complaints" suggesting non-compliance.

Finally, the DEP argues that it is within the discretion of the Commissioner to conclude that the burden on FIW from the Compliance Protocol outweighs the benefit of Appendix A's intended benefits. DEP Brief at 18. This is perhaps the most chilling of all the arguments made in the DEP's Brief because it asks the Court to sanction Commissioner Aho's callous disregard of the law and the suffering by Petitioners that the law was designed to prevent, when the DEP acquiesced in FIW's refusal to cooperate. The Law Court has just reminded the Board of Environmental Protection as well as the DEP that the Noise Rules as applied to wind projects are health based, which limit the discretion of governmental officials to ignore them. *Friends of*

Maine Mountains v. Board of Environmental Protection, 2013 ME 25, ¶s12-17, --- A.3d --- (March 5, 2013).[21]

C. The Need for a New Complaint Response Protocol.

The core goal of the new Complaint Protocol proposed by staff in "Appendix A" was to (1) remove the burden on Petitioners to accompany noise complaints with technical data, (2) replace the prior informal protocol with a requirement that FIW maintain a 24 hour telephone "hotline," email or website to receive complaints, *id.* at paragraph 1, (3) that it maintain a log of complaints and their status, *id.* at paragraph 3, and (4) that FIW undertake a formal compliance assessment in accordance with the new Compliance Assessment Protocol when the DEP determines that there is a consistent pattern of complaints suggesting non-compliance. *Id.* at paragraph 5. As Cassida explained to Acting Commissioner Aho, the existing protocol which was incorporated into the CCO put an unfair burden on Petitioners and the proposed protocol "simply requires the licensee to receive and resolve complaints, a responsibility that is routinely accepted by EVERY other wind project in the State of Maine." Pet.AR 369, Pet. App. 102.

The DEP demurs on the grounds that technical data is only required from Petitioners "to the extent possible." DEP Brief at 18. It is "possible" if someone with expert skills gets up in the middle of the night to take meter readings with expensive equipment and then sends out the data to an acoustic sound expert for analysis and if, in addition, FIW was collecting data and would share it with Petitioners, but it is never possible as a practical matter for Petitioners. Then

[21] Somehow, FIW got the impression that Petitioners are arguing that the new Noise Rule Amendments should be applied to FIW's project. FIW Brief at 15. Petitioners do not make such an argument. They look to the Noise Rule Amendments for two reasons. One, the Amendments recognize that excessive noise is a serious health issue and should be regarded as such by the Commissioner of the DEP. Second, the Noise Rule Amendments set the standard for compliance and complaint response protocols applicable to grid scale and small scale alike. It is true that the BEP did not provisionally adopt these amendments until September 2011, after the CCO was issued, but the DEP, through James Cassida and Warren Brown, was leading the discussion in workshops with the BEP on these subjects over the Summer of 2011 when the CCO was issued and had developed its position on compliance and complaint response protocols before the CCO was issued, as represented by Pisgah Mountain and Spruce Mountain wind project compliance requirements. *See,* Petitioners' Rule 80C Brief at 41-2.

the DEP acknowledges that a complaint without such data and analysis will be "discounted" and "difficult to analyze," DEP Brief at 18-19, which is especially true if FIW is not required to collect and analyze complaint data as required by the proposed Compliance Assessment Protocol. The DEP then adds that without the data Petitioners complaints "may not be actionable, *id.* at 19, "at least without significant additional investigation and analysis," *id.*, which the Commissioner has made plain in this case will not take place and cannot be expected without the staff proposed Condition Compliance Protocol. *See also*, FIW Brief at 7 (without technical data and analysis the "DEP might not be able to use the data to determine whether the project was out of compliance").[22] As a parting note, the DEP makes the argument that amounts to the proof of the pudding, by claiming that its refusal to consider a heartfelt complaint by Britta Lindgren in February 2012 was reasonable because Ms. Lindgren did not furnish technical data required by the CCO, rendering the complaint "anecdotal" and too burdensome for the DEP to address. DEP Brief at 19, N.12.

Putting all the DEP arguments together as articulated in its Brief, it is as plain as day that the DEP has no intention of protecting the neighbors to the FIW project from excessive noise in the future because the legal structure of noise regulation incorporated into the CCO provides too many layers of protection for FIW against accountability for compliance.[23]

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[22] FIW argues that, protocols aside, the DEP Noise Rule requires all measurements to be submitted in a certain technical format. It is unclear whether FIW is trying to say this applies to citizen complaints. If this is FIW's intention, it is wrong. The old Noise Rule (not cited by FIW) as well as the recent amendments to it provides that the technical measure requirements apply only to applications, compliance testing and enforcement, not citizen complaints. There are no technical requirements at all in the old Noise Rule or under the new amendments. See Pet. App. 155.

[23] Petitioners ask this Court to exclude and pay no attention to the DEP's approval of a request by FIW to install new technology on the wind turbines in August 2011, as set forth in the Condition Compliance Order attached as Attachment 1 of its Brief. Whether or not this technology has or will reduce the noise of the FIW project is a subject of on-going and uncompleted proceedings before the DEP. The Order, which approves a change that FIW requested, has no bearing on the issue of whether the DEP acted in good faith with regard to the matters under review in this case. It is totally improper for the DEP to attach to its brief non-record evidence making unproven claims.

III. The CCO is the Product of Political Bias.

The DEP argues that governmental officials are entitled to a presumption of good faith in the performance of their duties, DEP Brief at 6, 16, and that based on this presumption the Court should not entertain evidence about the thought process of Acting Commissioner Aho, *id,* or consider the Affidavit of James Cassida, *id.* at 10, N. 5, or give any weight to Petitioners' claims of political bias. DEP Brief at 16. On the political bias claim, the DEP complains that the argument is fact- based but presented without a "single citation to the record." DEP Brief at 16. *Also see, id.* at 5, N.3. *See also*, FIW Brief at 19.

Whatever presumption of good faith that DEP Commissioners are generally entitled to is not irrebuttable. In this case it is hard to justify such a presumption for Acting Commissioner Aho who was employed by the very same law firm representing FIW shortly before she acted to embrace FIW's position in this case over the objections of her professional staff. In fact Acting Commissioner Aho's prior employment was so recent that she had to inquire with Pierce Atwood to assure herself that she had not actually billed time to the FIW matter. *See* email from Acting Commissioner Aho to Thomas Doyle dated May 3, 2011. Pet. AR 362, Pet. App. 318. Her recent employment may not have been a technical violation of governmental conflict of interest law, but it surely gave a strong appearance of a conflict that should have caused her to recuse herself. The presumption also disappears in view of the extensive evidence of influence peddling revealed from Petitioners Freedom of Access request, addressed in detail with multiple citations to the record. Petitioners' Rule 80C Brief at 15-21. (It was unnecessary for Petitioners to repeat all these citations from the Fact section of the Brief again in the Argument portion of its Brief at 33-35.) The core point revealed by the emails in the record is the difference in how the Governor's Office and the DEP Commissioner responded to requests for influence in 2009 and

2010 (when a line was drawn between accommodation and requests that sought to undermine the law the DEP was charged with enforcing) and how the LePage Administration dealt with the issue (when such a line was not drawn). *See* Petitioners' Rule 80C Brief at 34-5. In addition, decisions were made by Acting Commissioner Aho that rejected judgments made by long time and respected professional staff and the DEP's expert consultant on a technical subject that she had absolutely no knowledge about, and was not even following in the short time she worked for state government after leaving Pierce Atwood. Finally, there was an absence of any credible rationale stated on the record for decisions that begged for an explanation. Evidence of bias is rarely available from direct evidence. It must be inferred through the exercise of common sense and experience. There is enough in this record to warrant such an inference.

III. Petitioners' Constitutional Claims were not Waived and are Valid.

A. Petitioners did not Waive their Constitutional Claims.[24]

The DEP Brief asserts at 20-21 that Petitioners did not preserve their constitutional claims, totally disregarding the administrative record relating to this issue. The CCO was issued on June 30, 2011. AR 142; Pet.App. 124 at 130. As late as June 20, 2011, it was assumed that the CCO would be issued with some form of "Appendix A." *See* email from AAG Amy Mills to James Cassida dated June 20, 2011 reminding Cassida that she would need to review the Draft Order with the revised "Appendix A" (see "re line") because it would be likely that FIW would appeal. Pet. AR 253, Pet. App. 319. Petitioners' counsel was not informed of the possibility that a CCO might be issued without "Appendix A" until June 22, 2011. Email from James Cassida to counsel dated June 22. AR 138, Pet. App. 322. *See also*, DEP AR 134, Pet. App.321 ("where do we stand on Vinalhaven?") Petitioners' counsel immediately contacted the DEP project

[24] Apparently the DEP does not challenge Petitioners right to litigate Section 1983 claims within the umbrella of Rule 80C as opposed to an independent claim.

manager, Daniel Courtemanch, to inquire as to who would make the final decision on the CCO and he could not say for certain. Emails of June 22-23, 2011, DEP AR 139, Pet. App.324. Petitioners' counsel tried to schedule a meeting with Acting Commissioner Aho before the CCO was issued. *See id.* and Pet.AR 240, Pet. App. 326, Pet. AR 374, Pet. App. 327, Pet. AR 375, and DEP AR 141, Pet. App. 343. Acting Commissioner Aho's only response was to express annoyance to her staff that Petitioners' counsel knew anything about the status of the CCO. Pet. App. 328. Neither she nor anyone in the DEP sent Petitioners' counsel a copy of the draft Order that the DEP intended to issue, although she personally sent a copy of the draft order to FIW's counsel for comment. *See* email exchange between Acting Commissioner Aho and Thomas Doyle, counsel for FIW dated June 27-28, 2011. FIW AR 149, Pet. App. 334 and FIW AR 150, Pet. App. 344. Under these circumstances, the DEP's claim that Petitioners denied the DEP the opportunity to address their constitutional claims, DEP Brief at 21, hardly seems credible.[25]

B. Petitioners have Established a First Amendment Retaliation Claim.

On the merits, the DEP Brief acknowledges that Petitioners' right to petition their government for redress of their grievances is protected by the First Amendment, DEP Brief at 22, but challenges (1) whether the CCO was adverse action as to Petitioners and (2) whether there was a causal connection between the exercise of Petitioners' rights and the adverse action claimed, and then asserts (3) a legitimate, non-retaliatory reason for the DEP's action. DEP Brief at 21-30. All of these arguments have been addressed in Petitioners' Rule 80C Brief at 35-40.

On the adverse action prong of a retaliation claim, the DEP continues to define Petitioners' claims on terms that suit it, rather than address Petitioners' actual claims. The DEP

[25] Moreover, the DEP bases its waiver claim on the failure of Petitioners to exhaust their administrative remedies. The Supreme Court long ago declared that it is unnecessary for a Section 1983 claimant to exhaust state administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Levesque v. Commissioner, Dept. of Human Services*, 508 A.2d 943, 948, N. 3 (Me. 1986) (" Moreover, since this matter arises under a complaint based on 42 U.S.C. § 1983, the plaintiff is not required to exhaust her administrative remedies," citing *Patsy*.)

continues to insist that Petitioners' claims are about "political *speech,*" even though Petitioners' have repeatedly explained that their actual claims are for retaliation for their *conduct* of making noise complaints. *See* DEP Brief at 22 (describing the retaliation claim as being based on "criticism of public officials"), 23 (Petitioners do not allege that the DEP caused them to "refrain from such criticism in the future"), 24 (the CCO does not "intimidate [Petitioners]from speaking out on this or similar issues in the future"), 28 ("it is not reasonable to infer that the Commissioner was motivated by dislike of Petitioners or a resentment of their criticisms"), 29 ("Petitioners do not allege the Governor perceived [Petitioners] as his political enemies or that he was in any way troubled by their criticism of the Department."). As explained in Petitioners' Rule 80C Brief at 37-38, chill does not need to be alleged in a conduct case and, even if it did, chill has been alleged and proved. Under the CCO, Petitioners were chilled from filing additional grievances, even putting aside the unconstitutional burden placed on them in order to do so, because it was fruitless to do so.

On the causation prong, Petitioners have shown direct evidence of retaliation based on the direct burden placed on their right to submit grievances by the requirement that they must be accompanied by technical data and analysis, failing which the DEP would regard the complaint as anecdotal. They have also shown an "outrageous and lengthy record of misconduct" of the kind addressed in *Gagliardi v. Village of Pawling,* 18 F.3d 188 (2d Cir. 1994). *See*, DEP Brief at 28. The *effect* of the CCO, in terms of its limited requirements for NRO caused by the unwillingness of FIW to cooperate and the impact of the burdensome complaint protocol and its toothless compliance assessment protocol is to immunize FIW from further accountability for excessive noise for reasons already explained. It requires little insight to conclude that the effect of the CCO is what the DEP intended.

Finally, the claim for non-retaliatory reasons for the DEP's action, DEP Brief at 30, fails for the same reasons as its arguments on the merits of the non-constitutional addressed above.

C. Petitioners have Established an Equal Protection Claim.

As Petitioners have already explained in their Rule 80C Brief at 40-41, the standard to be applied in this case for Petitioners' Equal Protection claim is "strict scrutiny" because the disparate treatment established on the record burdens the fundamental right of citizens to petition their grievances protected by the First Amendment. Petitioners' Equal Protection claims are valid under the "rational basis" test as well. The DEP does not challenge the disparity on the record between how the DEP regulates noise for FIW, effectively depriving Petitioners of the protections of the Noise Rule, and how it regulates other wind projects, both grid-scale and smaller scale. *See* Petitioners' Rule 80C Brief at 41-12. Instead the DEP simply repeats its arguments in defense of Petitioners' non-constitutional claims.

Both the DEP and FIW also cite First Circuit cases, such as *Cordi-Allen v. Colon*, 494 F.3d 245 (1st Cir. 2007) and *Torromeo v. Town of Fremont*, NH, 438 F.3d 113 (1st Cir. 2006), that describe higher thresholds for making Equal Protection claims in zoning cases. DEP Brief at 31; FIW Brief at 23. These cases all involve claims of disparate treatment by developers who are disappointed in a permitting decision, which always involves individual circumstance justifying the federal skepticism of elevating the dispute to constitutional dimensions. As explained by the seminal case in this area, *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822,833 (1st Cir. 1982), not cited by the DEP or FIW, these cases arise "within the framework of an admittedly valid [regulatory] scheme" which should apply to all alike. Here it is the regulatory scheme, not its application to a particular set of facts to a zoning application, that is challenged on Equal protection grounds and this removes the hostility to Equal Protection claims. *See, JSS Realty Co.,*

LLC v. Town of Kittery, 177 F.Supp. 2d 64, 69 (D.Me. 2001) (*Creative Environments* applies to zoning applications, not when a regulatory scheme is challenged). The extent to which Petitioners have been singled out for disparate treatment is established in Petitioners' Rule 80C Brief at 41-2, comparing the CCO with regulatory schemes in Spruce Mountain (mistakenly identified as Oakfield in Petitioners' Rule 80C Brief at 41[26]) and Pisgah Mountain[27] before the CCO and Saddleback after the CCO, "Appendix A" and the new Noise Rule Amendments provisionally adopted soon after the CCO. All the citizens of this State are entitled to the protections against excessive noise. Petitioners cannot be singled out for less protection.

IV. This Court has the Power to Grant Meaningful Relief.

Finally, the DEP argues that the Separation of Powers doctrine prevents the Court from ordering specific relief or retaining jurisdiction to determine whether the relief it orders is being properly carried out. DEP Brief at 19-20. It argues that the most the Court can do is to remand the case to the DEP "for such other proceedings as the Department may deem appropriate in light of the Court's decision." *Id.* at 20. There is no basis for such a limitation on the scope of remedies available to the Court upon a finding of illegal conduct by a governmental agency and the DEP cites none. *New England Outdoor Center v. Comm'r of Inland Fisheries and Wildlife,* 2000 ME 66, 748 A.2d 1009 had nothing to do with judicial remedies. That case concerned the issue of whether the court could force a governmental agency to undertake an investigation of possible statutory violations in the first instance. The only other case cited by the DEP is *Bates v. Dep't of Behavioral & Development Servs.*, 2004 ME 154, 863 A.2d 890. This case stands for

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[26] FIW's comments about "Oakbrook," which we assume was referring to Oakfield, in FIW Brief at 24 are therefore irrelevant.

[27] FIW complains that the Pisgah Mountain protocols are irrelevant because they come from a "different regulator." FIW Brief at 25. However, the Pisgah Mountain project, a small scale project, was certified by the DEP after review and approval of the applicant's compliance and complaint protocols. *See*, Department Order at Pet. App. 248.

the exact opposite proposition that the DEP attributes to it. It holds that a court has the discretion to order a receivership of a governmental agency when warranted, citing *Dep't of Envtl. Prot. V. Emerson,* 563 A.2d 762,767 (Me. 1989), but should first consider other remedies such as injunctive relief or contempt before doing so. *Id.* at 912.[28] There can be no question that this Court has the discretion to adopt and enforce any remedy that is necessary to correct the violations that it finds.[29]

Respectfully submitted.

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[28] In a footnote, *id.* at 912, N.13, the Law Court gave examples of less intrusive remedies, including setting deadlines for the agency to meet objectively measured goals, or use of a court master or consultants to establish objective measurements and standards for compliance, etc.

[29] There is also no basis for the assertion that Petitioners are not entitled to attorney's fees if they prevail on their constitutional claims as asserted in the DEP's Brief at 20, N.13. Even though Petitioners have been forced, over their objection, to litigate their constitutional claims under Rule 80C rather than as an independent action , the claims they so litigate are still pursued under 42 U.S.C. §1983 and therefore fees may be recovered under 42 U.S.C. §1988.

Compass Rose