



STATE OF MAINE
DEPARTMENT OF CONSERVATION
MAINE LAND USE REGULATION COMMISSION
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AUGUSTA, MAINE
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WILLIAM H. BEARDSLEY
COMMISSIONER

Memorandum

To: LURC Commissioners
CC: Fred Todd, Don Murphy
From: Samantha Horn Olsen, Planning Division Manager
Date: August 30, 2011
Re: September meeting item: Evaluating Scenic Impacts Under the Wind Energy Act

At the August Commission meeting, the Commissioners deliberated on the Bull Hill wind energy development application decision. During the course of that discussion, the Commissioners indicated that they wanted staff to articulate a framework that would harmonize the Wind Energy Act visual impact evaluation provisions with the Commission's Comprehensive Land Use Plan and Chapter 10 standards. As a result, staff has conferred and consulted internally with the Commission's retained scenic expert, Dr. Palmer. This issue touches both the Bull Hill and Bowers Mountain projects, and so Fred is presenting to you a discussion paper that is couched in generic terms, but is in fact a deliberation discussion paper on legal issues that have bearing on both of those projects at once.

Fred also raises in his discussion paper a further issue regarding how the Commission will evaluate the impacts to a route or trail that is impacted in several locations within the 8 mile study area. This, again, is presented in a generic form, but has a direct bearing on the Bowers Mountain project, in particular.

Despite the generic nature of the memo, if Commissioners wish to discuss how these points may apply to the two applications, staff will be prepared to assist.



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DISCUSSION PAPER
For September 7, 2011 Commission Meeting
EVALUATING SCENIC IMPACTS UNDER WIND ENERGY ACT

This discussion paper has been prepared by the staff as a means to seek guidance from the Commission on three particular issues that have arisen in recent proposed developments under the wind energy act.

ISSUE 1. Inaccessibility of *regulated resources*¹ and evaluating scenic impact

Background: The wind energy act's scenic impact evaluation criterion, directing the Commission to consider the extent, nature and duration of a project's impact on public uses, *see* 35-A M.R.S.A. § 3452(3), may appear to contradict (under usual visual impact assessment methodologies) the Commission's long-standing policy, embodied in its CLUP² and regulatory standards, to value remoteness and related low levels of public use. This is most evident with regards to certain lakes (see reference to remote ponds and Management Class 1 lakes below) and land and water trails in the Commission's jurisdiction that, because of long-standing Commission policy, are valued because of their characteristic of remoteness and thus potentially a low level of use.

Overview of wind energy act:

Summary of *wind energy act criteria* regarding scenic character and level of use:

- 35-A, §3452, 1: *“the primary siting authority shall determine, in the manner provided in subsection 3, whether the development significantly compromises views ... such that the development has an unreasonable adverse effect on the scenic character or existing uses related to scenic character...”*
- 35-A, §3452, 3: *“the primary siting authority shall consider (among other criteria):*
 - A. *“The significance of the potentially affected scenic resource of state or national significance;”*
 - C. *“The expectations of the typical viewer;”*
 - E. *“The extent, nature, and duration of potentially affected public uses of the scenic resource ... and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource...”* (emphasis added).

¹ As defined under 35-A M.R.S.A. §3451(9), Expedited Permitting of Grid-Scale Wind Energy Development, most notably certain great ponds, and land and water trails.

² CLUP: 2010 Comprehensive Land Use Plan for Areas Within the Jurisdiction of the Maine Land Use Regulation Commission

KEY CONSIDERATION: Reference to extent above implies that low levels of public use of a particular area equates to an area where there should be lesser concern about impact to public use or, conversely, high levels of use equates to an area where there should be greater concern about impact to public use. While this implication may be consistent with routine visual impact assessments, this implied conclusion is inconsistent with the Commission's long-standing Comprehensive Land Use Plan and rule treatment of remoteness, and the Commission's clear intent to value and retain such remoteness or low level of use. See CLUP and rule references below.

Overview of Commission policies and rules:

Summary of CLUP consideration of remoteness or low level of use:

- CLUP goal: “maintain the natural character of certain areas within the jurisdiction having significant natural values and primitive recreational opportunities.” (p. 5 of CLUP)
- Primitive recreation is defined as “those types of recreational activities associated with non-motorized travel, including fishing, hiking,” (p. 258 of CLUP)
- CLUP policy: “...protect primitive recreational opportunities in certain locations.” (p. 17 of CLUP)
- CLUP discussion: “...the Commission has applied protection zoning to especially significant primitive recreational resources. The Recreation Protection (P-RR) Subdistrict has been applied to areas that support or have opportunities for unusually significant primitive recreational activities in order to protect them from incompatible development and other intensive land uses.” (p. 259 of CLUP)
- Previous plans: similar statements are found in each version of the Commission's Comprehensive Plans back to the original plan in 1976.

Summary of Commission's rules regarding protecting areas that provide primitive recreational activities:

- Purpose of Recreation Protection Subdistrict (P-RR)³: “.....to provide protection from development and intensive recreational uses to those areas that currently support, or have opportunities for, unusually significant primitive recreation activities. By so doing, the natural environment that is essential to the primitive recreational experience will be conserved.”
- Description of Areas to be designated P-RR (1.7% of jurisdiction has been so zoned): “Trails, and areas surrounding bodies of standing and flowing water..... Bodies of standing water so classified include ... those found to meet the definition on Management Class 1 or Management Class 6 Lakes. In the case of Management Class 1 Lakes, the Protection District shall extend ¼ mile out from and around the water body; in the case of Management Class 6 Lakes (so-called remote ponds), the protection district shall extend ½ mile out from and around the water body; and in the case of trails and flowing water, the Protection District shall extend 250 feet on each side of the trail or flowing water... ”.
- Uses Allowed Without a Permit in P-RR's: “Motorized vehicular traffic and snowmobiling with the following exceptions: in the instance of trails designated as P-RR, such traffic and snowmobiling is allowed on those portions of such trails which are located within the right-of-

³ The Recreation Protection Subdistrict (P-RR) is a zoning designation identified in Chapter 10 of the Commission's rules and which appears on the Commission's zoning maps to identify significant recreational resources warranting protection by the Commission – e.g. MC 1 and MC 6 lakes as noted in the text of this document.

way of a roadway or utility line;... within any P-RR subdistrict surrounding a body of standing water, such traffic is allowed only in connection with forest or agricultural management activities....” In other words, vehicle use is limited to protect the primitive recreational experience.

Staff suggestion on how to harmonize the wind energy act’s direction to consider the extent to which the public uses a jurisdictional resource with the Commission’s long standing practice of valuing remoteness and associated low levels of use as set forth in its Comprehensive Land Use Plan and rules:

OVERALL SUGGESTION REGARDING ISSUE 1: The Commission will consider the significance and nature of the resource, as well as the expectations of the typical viewer, in drawing any conclusions about the extent or level of public use in evaluating scenic impact. See 35-A M.R.S.A. § 3452(3)

Issue 1 regarding lakes:

Historical perspective of Commission’s lakes program regarding lakes accessibility

Remote ponds (Management Class 6 lakes): The Commission first recognized these types of water bodies as remote ponds under the Commission’s interim zoning in the 1970’s, and the Commission later classified them as Management Class 6 lakes in the Lakes Management Program of 1990 (see attached summary of program). These were relatively small bodies of water that were undeveloped and inaccessible with a cold water fishery that, according to the Department of Inland Fisheries and Wildlife, could be quickly fished out if access was not limited in some fashion. The Commission was persuaded that these bodies of water provided a primitive recreational experience that was worthy of protection and established a half-mile protection zone around them to limit road access. These lakes represent 5.7% of the lakes in the Commission’s jurisdiction but because of their small size represent less than 1% of the total lake surface area in the jurisdiction.

Management Class 1 lakes: This classification was established under the Lakes Management Program of 1990 and was intended to recognize and protect inaccessible, undeveloped, high value lakes for primitive recreational experiences other than their fishing value as was the case for remote ponds. As is also the case for remote ponds, road access for recreational purposes is not allowed. These lakes represent 1% of the total lakes in the Commission’s jurisdiction.

In the specific instance of lakes zoned by the Commission as P-RR zones (MC 1 Lakes, inaccessible, undeveloped, high value lakes; and MC 6 Lakes, remote ponds), the Commission has already determined, through its comprehensive planning process and regulatory authority, that remoteness and low levels of use are valuable, and thus it will consider low levels of public use as contributing to the value of the resource. (see table below for number of such lakes)

	<u>Total</u>	> 10 ac w/Outstanding or Significant <u>Scenic Rating</u>	% of Total 3000 <u>Lakes</u>	% of Total 284 ⁴ Scenic <u>Lakes</u>
MC 1 lakes:	29	16	.5%	5.6%
MC 6 lakes (remote ponds)	176	<u>24</u>	<u>.8%</u>	<u>8.5%</u>
		40 ⁵	1.3%	14.1%

The breakdown of all the lake management classes is contained within the attached summary of the Lakes Management Program.

Issue 1 regarding land and water trails:

Other areas designated as P-RR zones include land and water recreational trails valued for their primitive recreational experiences such as the Appalachian Trail and river segments identified under the Governor’s Executive Order on Maine Rivers Policy in 1982. The Commission will similarly consider low levels of use as contributing to the value of these resources.

Issue 1 regarding areas not zoned as P-RR subdistricts:

In areas not zoned as P-RR subdistricts, but where there is substantial evidence in the record that remoteness and associated low levels of use is integral to the experience of the “typical user,” low use may be judged to contribute to the value of the resource.

ISSUE 2: Changes to lake resource and/or management classifications as identified in the Commission’s Lake Management Program.

Background: Certain visual impact assessments (VIA’s) prepared for projects for review under the wind energy act have suggested that the resource and/or management classifications of lakes as identified in the Commission’s Lake Management Program may or should be changed as a result of development or accessibility changes that have or might occur (e.g. proposed wind turbines) since the Wildlands Lake Assessment⁶ was completed in the mid-1980’s.

Commission’s position: In adopting the various lake resource and management classification in 1990, the Commission articulated its position on such changes as follows:

“The Commission will consider reclassification of lakes within certain prescribed limitations. In cases where clear evidence of factual error indicates that a lake was misclassified, it will be reclassified to the appropriate class. Notwithstanding the above, changes in land use characteristics that occur after November 17, 1988, including without limitation, vehicle access and residential development will not be considered in future reclassifications.” (this statement

⁴ The Wildlands Lake Assessment identified 166 lakes with significant and 118 with outstanding scenic quality.

⁵ See attached map of location of these 40 lakes with 8 mile buffers in context of expedited area.

⁶ Wildlands Lake Assesment (WLA) was the data gathering effort that served as the basis for the Lakes Management Program lakes classifications.

appeared in the 1990 amendment to the CLUP which formalized the lakes classifications and is restated in the 2010 CLUP, p. C-11)

As set forth above, the Commission does recognize the importance of protecting its lake resources. Further, the Commission does recognize that there will be a periodic need to update its lake management program, including the possibility of updating resource and management ratings for specific lakes, but that will only occur as part of a wholesale review of the program. (2010 CLUP, p. C-12)

Therefore, hypothetical changes in lake resource or management classifications will not be considered in a decision under the wind energy act. Such proposed reclassifications will only occur under the above limitations and under a separate rulemaking proceeding.

ISSUE 3: How to evaluate the “traveling through the landscape” visual impact where there are multiple SRSNS⁷ views from a water or land trail within 8 miles of a proposed wind project?

Background: While most wind projects have some element of this consideration, it is more prevalent in certain projects and more problematic where there are not well defined points of view – e.g. a series of SRSNS lakes with recognized canoe trails through them.

Questions for consideration to give staff guidance:

- When evaluating scenic impacts from water or land trails (considered as or made up of SRSNS), is the overall impact greater than the sum of the parts?
 - If not, then we only need to consider the specific points of view usually identified in VIA's: e.g. areas from which there are common views such as campgrounds or boat launches or views from portions of the lakes where the greatest number of turbines are visible.
 - If the overall impact is greater than the sum of the parts, then how do we rate the significance of the experience?
 - Is the significance of the experience related to the public recognition given the water or land trail in the following order?
 - Is the water or land trail a SRSNS in its own right? e.g. the AT
 - Is the water or land trail noted in a municipal plan or the State Comprehensive Outdoor Recreation Plan?
 - Is the water or land trail noted in a commercially available guide to water or land trails such as those prepared by the Appalachian Mountain Club?
 - Is the water or land trail noted in public testimony?
 - Are there other water or land trails nearby that displaced users can go to? If not, does that heighten the significance of the water or land trail?
 - If there is a common direction of travel (e.g. the Attean Bow Trip which is a canoe trip which is only practical to travel in one direction because it is mostly comprised of travel down the Moose River) is the visual impact of lesser significance if the project views are predominately behind the viewer?

⁷ SRSNS: Scenic Resource of State or National Significance as defined in 35-A, §3451, 9

- Does the fact that a water trail has one or multiple portages over land decrease its significance?

Attachments: Summary of LURC's Lake Management Program
Map showing location of MC1 and MC6 lakes with outstanding or significant scenic values with 8 mile buffer

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THE LAND USE REGULATION COMMISSION'S LAKE MANAGEMENT PROGRAM

The unorganized territories are host to a wealth of lake resources unparalleled in most regions of the nation. In recent years, the demand for development on lake shoreland has reached unprecedented levels, leading the Commission to acknowledge that, even with minimum standards, lakes in its jurisdiction might, by attrition, lose the very character that makes them so unique. In response to this, LURC initiated a major planning effort to: 1) establish a systematic base of natural resource and land use information for lakes in its jurisdiction, and 2) develop policy and implementation measures that would protect important lakes and direct development toward those lakes or lake areas best suited to accommodate new development. In June, 1990, the Land Use Regulation Commission adopted Amendments to its Comprehensive Land Use Plan and Land Use Districts and Standards to implement its lake management program. The five principal elements of this program are outlined below.

1. LAKE POLICIES AND PROGRAM OBJECTIVES

The Comprehensive Plan Amendment outlines the issues that triggered the Commission's lake planning effort, then goes on to articulate the Commission's overall objectives with respect to shoreland development and protection of lake-related natural values. The Amendment includes a new policy designed to supplement its existing policies relating to lake resources and shoreland development. This Amendment provides the policy foundation for specific program elements, which were implemented through amendments to the Commission's Standards and zoning changes.

2. CRITERIA FOR REVIEWING SHORELAND PERMIT APPLICATIONS

The Commission reviews all permit applications to determine whether they meet statutory criteria designed to protect natural resource values and the public health, safety, and welfare. To guide its review process, and to provide greater predictability to the applicant, the Commission has identified seven factors that it will consider as a basis for determining whether a lake-related proposal meets these statutory criteria. Consideration of these factors is designed to ensure that natural and cultural values will be protected, water quality will not be impaired, traditional uses will not be unduly affected, regional diversity will be preserved, natural character will be maintained, actions will be consistent with lake management goals, and landowners will be treated equitably.

Incorporation of these seven factors into the review of lake-related proposals dramatically improves the review process by clearly articulating the Commission's principal concerns with respect to lake development in LURC jurisdiction. The Commission has a broad range of values to protect on the 1,500 great ponds within its jurisdiction. The identification and application of these seven review factors helps to focus the Commission's decision-making process on key issues, and informs applicants of issues that should be considered when development plans are being formulated.

3. LAKE CONCEPT PLANS

"Lake concept plans" provide a unique alternative to traditional regulation of shoreland development. They are long-range plans, initiated by the landowner, which outline development and conservation plans for a large block of shoreland on a lake or group of lakes. A concept plan sets forth a landowner's intent by showing where development is to be focused over a specified period of time, the relative density of proposed development, and the means by which significant natural and recreational resources are to be protected in the face of this development. The objective of each plan is to strike a balance between development and conservation on lakes, one which allows development in appropriate locations while providing for the protection of significant lake resources. The overall goal of concept plans is to encourage long-range planning, based on resource characteristics and suitability, as an alternative to haphazard, incremental development. Lake concept plans, once approved by the Commission, provide a blueprint for development and conservation activity in the subject area over the life of the plan, and enable expedited permitting of approved components of the plan. Both the Commission and the applicant benefit from the predictability created by an approved concept plan.

4. MANAGEMENT CLASSIFICATIONS

The Commission has created a lake classification system to implement its objectives for specific types of lakes in the unorganized territories. Lakes have been classified based on their natural resource values and land use characteristics, and specific planning and management objectives established for each management class. The classes are as follows:

MANAGEMENT CLASS 1: Lakes which are inaccessible to within 1/4 mile, undeveloped, and have high resource values. The Commission will preserve these pristine lakes in their natural state by prohibiting development and permanent vehicular access within 1/4 mile of their shores. Timber harvesting, primitive recreation, and comparable uses are permitted around these lakes. There are 29 lakes in Management Class 1, comprising 2.0% of the lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 2: Lakes which are accessible to within 1/4 mile, relatively undeveloped, and have especially high resource values. The Commission conserves the special values of these lakes by significantly restricting the density of development. No more than 1 development unit is allowed per mile of shorefront on these lakes, but timber harvesting, primitive recreation, and comparable uses are permitted around these lakes. There are 34 lakes in Management Class 2, comprising 9.3% of the lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 3: Lakes which are potentially suitable for development. The Commission recognizes the demand for lakeshore development, and has created this classification in order to direct this development toward those lakes best suited to accommodate additional development. The Commission supports responsible shoreland development on these lakes by easing existing impediments to development where it can be shown that soils are suitable and water quality will not be impaired, taking care to ensure that significant natural resource values will be conserved. There are 36 lakes in Management Class 3, comprising 10.2% of lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 4: Lakes with high resource values and more than 1 development unit per shore mile. The Commission allows shoreland development on these lakes, but seeks to conserve their high natural values and retain some undeveloped shoreland by requiring subdivisions to be clustered. There are 22 lakes in Management Class 4, comprising 4.6% of lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 5: Lakes with shorelands that are already heavily developed with more than 1 dwelling per 400 feet of shoreline or 1 dwelling per 10 acres of surface water. The Commission seeks to ensure that natural qualities and scenic values associated with these heavily developed lakes are maintained, and some portion of undeveloped shoreline retained by requiring subdivisions to be clustered. There are 45 lakes in Management Class 5, comprising 2.9% of lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 6: Remote ponds — lakes that are undeveloped, inaccessible to within 1/2 mile, and support a coldwater game fishery. The Commission allows no shoreline development and restricts permanent vehicular access on these ponds, but timber harvesting, primitive recreation, and comparable uses are permitted. There are 177 lakes in Management Class 6, comprising 2.9% of lake shore frontage in the jurisdiction.

MANAGEMENT CLASS 7: Lakes not otherwise included in one of the six other classifications. Lakes in Management Class 7 are managed for multiple use, including resource conservation, recreation, and timber production.

Every lake in LURC jurisdiction is included in one of these seven classifications. The following chart shows the number of lakes in each classification and the relative extent of each classification in terms of acreage and shore frontage (expressed as a percent of all lakes in LURC jurisdiction):

<u>Management Class</u>	<u># of lakes</u>	<u>% of total lakes</u>	<u>% of total acreage</u>	<u>% of total shorefrontage</u>
1. High Value, Least Accessible, Undeveloped	29	1.0%	1.5%	2.0%
2. Especially High Value, Accessible, Undeveloped	34	1.1%	13.3%	9.3%
3. Potentially Suitable for Development	36	1.2%	14.9%	10.2%
4. High Value, Developed	22	0.7%	5.3%	4.6%
5. Heavily Developed	45	1.5%	3.7%	2.9%
6. Remote Ponds	177	5.7%	0.8%	3.0%
7. All other	2,657	88.8%	60.5%	68.0%
TOTAL	<u>3,000</u>	<u>100%</u>	<u>100%</u>	<u>100%</u>

5. OTHER PUBLIC AND PRIVATE INITIATIVES

The Commission encourages state agencies, landowners, and others to undertake actions that are consistent with and complementary to the Commission's lake management goals.

For more information:

Land Use Regulation Commission
 Maine Department of Conservation
 State House Station #22, Augusta, Maine 04333
 (207)289-2631 or in-state toll free 1-800-452-8711



MC 1 and MC 6 Scenic Lakes

1 in = 16 miles

