

STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-11-42

MAR 23 2011

FOX ISLANDS WIND NEIGHBORS, et al.,
Petitioners

v.

ORDER ON
MOTION TO DISMISS

MAINE DEP'T OF ENVIRONMENTAL
PROTECTION,
Respondent

On July 28, 2011, Fox Islands Wind Neighbors and various individual residents of Vinalhaven filed a Rule 80C Petition to review the Condition Compliance Order (hereinafter, "CCO") issued on June 30, 2011 by the Commissioner of the Department of Environmental Protection. The CCO determined that Fox Islands Wind, LLC was in compliance with Condition No. 8 of Certification # L-24564-ES-A-N to operate a small scale wind energy project located on the island of Vinalhaven, Maine. The Petition alleges that the CCO was politically motivated, arbitrary and capricious, contrary to law, unsupported by substantial evidence, and the product of an abuse of discretion. Presently before the Court is Fox Islands Wind, LLC's¹ motion to dismiss the Petition for lack of

¹ Fox Islands Wind, LLC is not a named party in the Petition. However, its counsel filed a notice of appearance for the purpose of opposing the Petition pursuant to 5 M.R.S.A. § 11005. ("Within 20 days after the petition for review is filed, all parties to the agency proceeding who wish to participate in the review shall file a written appearance which

jurisdiction. The discrete issue is whether the Condition Compliance Order is reviewable by this Court, or whether review is specifically precluded under the language of 35-A M.R.S.A. § 3456.

Regulatory background

There are two categories of wind energy projects subject to regulation by the DEP. The first is a “grid-scale wind energy development,” meaning a project sizeable enough to bring it within the purview of the Site Location of Development provisions. 35-A M.R.S.A. § 3451(6). The second is a “smaller-scale wind energy development,” meaning any project other than a grid-scale wind energy development. *Id.* § 3456(1). The Project at issue is a smaller-scale wind energy development.

Project construction may not begin until “certification” is accomplished. *Id.* In order to obtain the necessary certification, smaller-scale projects must comply with the noise control rules adopted by the Board of Environmental Protection. *Id.* § 3456(1)(A). The noise control rules are currently contained in 06-096 C.M.R. ch. 375, § 10. The noise control rules establish Sound Level Limits depending on the nature of the site and surrounding property. *Id.* § 10(C). Applicable here:

When a proposed development is to be located in an area where the daytime pre-development ambient hourly sound level at a protected location is equal to or less than 45 dBA and/or the nighttime pre-development ambient hourly sound level at a protected location is equal to or less than 35 dBA, the hourly sound levels resulting from routine operation of the development and measured in accordance with the measurement procedures described in subsection H shall not exceed the following limits at that protected location:

shall state a position with respect to affirmance, vacation, reversal or modification of the decision under review.”)

55 dBA between 7:00 a.m. and 7:00 p.m.
(the "daytime hourly limit"), and
45 dBA between 7:00 p.m. and 7:00 a.m.
(the "nighttime hourly limit").

Id. § 10(C)(1)(a)(v). A "protected location" is defined by the rules to include a parcel of land containing a residence. *Id.* § 10(G)(16).

Specifically relevant to the present motion to dismiss, § 3456 further provides:

2. . . . Notwithstanding any other provision of law, the department's certification pursuant to this section regarding a development that does not otherwise require the department's approval pursuant to this Title is not itself subject to judicial review as final agency action or otherwise, except as an aspect of an appeal of a pertinent municipal land use decision.

3. Enforcement of standards. Following certification under this section and during construction and operation, the standards in subsection 1 for a wind energy development subject to certification under this section may be enforced by the municipality in which the generating facilities are located at the municipality's discretion pursuant to Title 30-A, section 4452. The department is not responsible for enforcement of this section.

35-A M.R.S.A. § 3456(2), (3) (emphasis added).

Facts

I. *FIW receives a § 3456 Certification to operate a smaller-scale wind energy project.*

On March 24, 2009, Fox Islands Wind, LLC (FIW) applied with the DEP to build and operate a smaller-scale wind energy development project (the Project) on Vinalhaven, Maine. (Petition 4.) On June 5, 2009, the DEP issued FIW a Certification pursuant to 35-A M.R.S.A. § 3456 approving the project, which was to consist of three 1.5-megawatt wind turbines and associated infrastructure. *Id.*

In Finding 3 of the Certification, the DEP pronounced a daytime sound limit of 55 dBA and a nighttime sound limit of 45 dBA, based on the pre-development ambient

sound levels applicable under chapter 375, § 10(C)(1)(a)(v). Finding 3 also recognized concerns raised by DEP contractor EnRad Consulting, mainly the potential for noise in excess of the applicable standard. Due to these concerns, the Certification contained two special conditions applicable to the Project. Condition No. 7 provided:

Prior to operation of the facility, the applicant shall submit to the Bureau of Land and Water Quality an operational compliance assessment methodology for review and approval. The plan shall be implemented upon commencement of operations, and shall enable compliance measurements to be determined under the most favorable conditions for sound propagation and maximum amplitude modulation as outlined in Section 9 of a document prepared by EnRad entitled, "Fox Islands Wind Power Project Noise Impact Assessment-Peer Review," dated June 1, 2009.

Condition No. 8 provided:

If the compliance data indicates that, under most favorable conditions for sound propagation and maximum amplitude modulation, the proposed project is not in compliance with Department standards as described in Finding 3, within 60 days of a determination of non-compliance by the Department, the applicant shall submit, for review and approval, a revised operation protocol that demonstrates that the project will be in compliance at all the protected locations surrounding the development.

In other words, Condition No. 8 provided that if FIW's turbines were to produce noise in excess of applicable standards, then it would be required to modify its noise-reduction operation plan to bring it into compliance using a "revised operation protocol."

On November 30, 2009, the DEP approved the Operational Sound Measurement Compliance Protocol (OSMCP) as required by Condition No. 7. (Pet. 6.) The OSMCP specified the conditions and procedures under which FIW would be required to measure sound and demonstrate compliance with the Certification. It additionally required that "[c]ompliance testing . . . must be submitted to the Department following any noise related complaints after the commencement of operations, with consideration for the

required weather, operations and seasonal constraints.” (Pet. 6-7.) FIW began operating the Project on October 30, 2009. (Pet. 7.)

In addition to obtaining the Certification from the DEP, FIW was also required to apply for a local permit, which the town of Vinalhaven issued on May 13, 2009. (DEP Br. 3.)² That permit was issued pursuant to Vinalhaven’s own land use ordinance, which requires any wind project to comply with the BEP’s noise control rules. Vinalhaven, Me., Land Use Ordinance § 20(F)(3) (Dec. 15, 2008).

II. *The Project is found to be in non-compliance and FIW submits a Revised Operation Protocol.*

Soon after the Project began operations, the Fox Islands Wind Neighbors and various nearby residents (the Neighbors) began to complain about noise generated by the turbines. The Neighbors hired an attorney and an acoustical consultant, who conducted sound measurements beginning in March 2010. (Pet. 8.) Starting at the end of April 2010, the Neighbors submitted numerous noise complaints to the DEP and requested that the DEP compel FIW to submit compliance assessment data as required in the November 2009 OSMCP. (Pet. 8-10.) FIW did not cooperate.

The DEP contacted the town of Vinalhaven to inquire whether it wished to take enforcement action against FIW. *See* 35-A M.R.S.A. § 3456(3) (providing that standards within § 3456 may be enforced by the municipality). By letter of November 22, 2010, the town declined to take enforcement action and instructed the DEP to “continue with enforcement.” (Neighbors’ Br. 4-5.) On November 23, 2010, the DEP issued a formal non-compliance letter to FIW based on one specific complaint the Neighbors had

² Citations referencing a party’s brief (“Br.”) refer to the parties’ filings in the motion to dismiss.

previously filed relating to noise infractions on July 17 and 18, 2010. (Pet. 13.) The letter found FIW to have exceeded the 45 dBA nighttime sound limit and instructed FIW to submit within 60 days a “Revised Operation Protocol,” as required by Condition No. 8 of the Certification. *Id.* The Revised Operation Protocol was required to “demonstrate[] that the development will be in compliance at all protected locations surrounding the development at all times” *Id.*

On April 11, 2011, FIW submitted a Revised Operation Protocol, which committed only to remedy the conditions complained of on July 17 and 18, 2010, the date of the complaint in question. (Pet. 15.) On April 28, 2011, DEP staff prepared a draft Condition Compliance Order which accepted FIW’s proposal but attached a separate “Appendix A” setting forth an “Operational Sound Measurement Compliance Assessment Plan.” It would have required FIW to affirmatively demonstrate compliance during regular compliance testing periods to take place between May 1 and August 31, 2011, again in 2015, and thereafter in 5-year increments. (Pet. 15-16.) The draft also required FIW to cease operations if compliance was not demonstrated and contained a revised “Complaint Response and Resolution Protocol,” which required FIW to post operational, sound, and meteorological data on its website for public review. *Id.* FIW objected to the addition and negotiations continued.

III. *Acting DEP Commissioner Patricia Aho issues the final Condition Compliance Order and the Neighbors petition this Court for review.*

On or about June 20, 2011, Patricia Aho took over as Acting Commissioner of the DEP. Aho began working at the DEP as Deputy Commissioner in early 2011 after working as a lobbyist for Pierce Atwood, the same firm representing FIW. (Pet. 17.) On June 30, 2011, Commissioner Aho issued the final CCO on appeal here, which found that

FIW “has complied with Special Condition #8 of [the Certification] with respect to the conditions present during the July 2010 complaint period.” (Pet. 18.) It accepted FIW’s Revised Operation Protocol, thus requiring implementation of certain noise reduction strategies when specific wind conditions occur.³ Commissioner Aho deleted Appendix A as drafted by DEP staff, thus, according to the Neighbors, “removing any requirement that FIW affirmatively prove ongoing compliance and [] putting substantial obstacles in the path of residents wishing to file noise complaints to the DEP, effectively insulating FIW from any further regulation.” (Pet. 20.)

On July 28, 2011, the Neighbors filed an 80C petition to review Commissioner Aho’s final Condition Compliance Order. The Neighbors assert that three acts of political intervention undermined the judgment of the DEP’s professional staff and consultants. (Pet. 19.) The Petition further argues that the Condition Compliance Order is in violation of statutory provisions requiring wind energy projects to be regulated to prevent excessive noise, in excess of statutory authority, unsupported by substantial evidence, arbitrary and capricious, and affected by abuse of discretion. (Pet. 21-22.) FIW filed the present motion to dismiss, arguing that the Court lacks jurisdiction to review the Condition Compliance Order under 35-A M.R.S.A. § 3456.

³ Specifically, the Revised Operation Protocol pledged to use a new “Noise Reduced Operations configuration” between 7:00 PM and 7:00 AM whenever the wind direction is between 200° and 250° and the wind shear measures a 10-minute average wind speed of 6 mph or lower (i.e., when the conditions of July 17 and 18, 2010 exist).

The parties' positions

To summarize, FIW and the DEP assert that the Condition Compliance Order is not reviewable in this Court under 35-A M.R.S.A. § 3456, subsections 2 and 3. Again, subsection 2 instructs that “the department’s certification . . . is not itself subject to judicial review as final agency action or otherwise” § 3456(2). FIW essentially treats the Condition Compliance Order as “the certification . . . itself.” (FIW Br. 3-4.) The DEP characterizes the Condition Compliance Order as a component of, or modification to, the Certification. (DEP Br. 6, 7.) Neither adequately addresses the obvious response that the Condition Compliance Order is something other than the “certification . . . itself,” as contemplated by the plain language of § 3456(2).

FIW argues alternatively that, even if the Condition Compliance Order was not certification, the DEP lacked power to enforce the certification under § 3456(3). Again, subsection 3 instructs that a certification “may be enforced by the municipality . . . [and t]he department is not responsible for enforcement of this section.” § 3456(3). FIW reads this to mean, “after issuance of a certification, any compliance issue lies within the exclusive province of the municipality where the project is located.” (FIW Br. 6.) The DEP departs from FIW on this point, maintaining that it does have enforcement power, but that there was no enforcement in this case. (DEP Br. 8.)

Lastly, FIW argues that, even if the DEP did have enforcement power, the Condition Compliance Order was a decision *not* to enforce, which is an unreviewable act of prosecutorial discretion under Maine Law. (FIW Br. 8.)

The Neighbors respond that the limitation in § 3456(2) is only applicable to the initial certification, whereas the DEP issued the Condition Compliance Order *following*

the initial certification.⁴ (Neighbors’ Br. 6-7.) They urge that the Condition Compliance Order is better characterized as enforcement, which the DEP is permitted to undertake. They argue that the language in subsection 3 – that standards “*may* be enforced by the municipality . . . at the municipality’s discretion” – indicates permissive, not mandatory, control by the town. (Neighbors’ Br. 9.) They also argue that the ensuing language – “[t]he department is not responsible for enforcement of this section” – indicates that the DEP has no duty to enforce the statute, but nothing prevents it from doing so. *Id.*

Discussion

Based on the parties’ briefs and oral argument, the Court considers the jurisdictional issue in terms of two sub issues: (1) whether the Condition Compliance Order is in the nature of certification or enforcement, and, relatedly, whether the DEP has enforcement power to begin with, and (2) whether the Condition Compliance Order was a decision *not* to enforce, as claimed by FIW.

I. *Certification or enforcement?*

Resolving the jurisdictional issue here depends on how we characterize the Condition Compliance Order. Considering the plain language of § 3456(2), it is plain

⁴ Put differently:

A certification is a determination by the Department *in advance* of construction and operations that the proposed project is expected to comply with the Noise Rule. Enforcement is any action taken *after certification* during the operation of a project where a determination is made that the project in fact is not operating in compliance with the standards of the previously issued certification and where corrective action is required to bring the project into compliance.

(Neighbors’ Br. 10.)

that the Condition Compliance Order is something other than the “certification . . . itself,” by virtue of the fact that it consists of an entirely separate document issued over two years after the initial Certification. The statutory scheme accordingly differentiates between the certification itself and post-certification action: Subsection 3 specifies that enforcement may be undertaken “[f]ollowing certification . . . and during construction and operation.”

The Court recognizes that elements of the Condition Compliance Order substitute for elements of the Certification and the OSMCP required by Condition No. 7, and, in that respect, may resemble a license or license modification. However, the intended purpose of a Condition Compliance Order is to enforce the BEP noise control rules as repeated in the Certification. In this case, the DEP built the enforcement mechanism directly into the Certification instead of relying on agency regulations.⁵

Admittedly, the mechanism here – embodied in Condition No. 8 – is unique and not easily comparable to more traditional proceedings or sanctions. The DEP determined that enforcement was best achieved through the process set out in Condition No. 8, by working with the licensee to modify compliance protocol. This began with a determination of non-compliance, followed by the licensee’s submission of a Revised Operation Protocol, and, finally, issuance of the Condition Compliance Order.

Functionally, the Condition Compliance Order approved the plan set forth in FIW’s Revised Operation Protocol. The practical effect was to require implementation of a “Noise Reduced Operations configuration” when certain wind conditions arose. *See*

⁵ *See* 06-096 C.M.R. ch 40. Chapter 40 governs the conduct of all enforcement proceedings involving “violations of any provisions of the laws or regulations which it administers, or of the terms or conditions of any of its orders or licenses.” *Id.* § 1.

supra note 3. Thus, for classification purposes, the Condition Compliance Order was enforcement in that it compelled FIW to do something for the purpose of bringing it into compliance with agency regulations and the Certification itself. At this stage, that fact is unchanged by the Neighbors' charges that the Condition Compliance Order is too lenient or otherwise infirm. Thus, the Court finds that the certification process ended with issuance of the Certification on June 5, 2009, and the Condition Compliance Order fell squarely within the realm of enforcement.

Having established that the Condition Compliance Order constitutes enforcement, the Court turns to the necessary issue of whether the DEP has enforcement power. The Court agrees with the Neighbors and the DEP that § 3456(3) confers discretionary enforcement power upon municipalities, while not precluding the DEP from undertaking enforcement. On this point, FIW overstates the legislative history placing emphasis on the role of the municipalities, as the final language of the statute makes it clear that towns are under no duty to enforce. DEP enforcement is particularly necessary when, as here, the town has expressly renounced responsibility for enforcement.

II. *Decision not to enforce?*

A related issue is whether or not the Condition Compliance Order was actually a decision *not* to enforce, which would be unreviewable as an act of prosecutorial discretion. *See Herrle v. Town of Waterboro*, 2001 ME 1, ¶ 10, 763 A.2d 1159 (municipal decision not reviewable when Board of Selectmen did not reach the enforcement stage because it determined no violation existed).

FIW argues that the Condition Compliance Order is only “an explanation of the DEP’s reasoning for its conclusion that FIW is in compliance and to take no further action.” (FIW Br. 8.) As explained, the Condition Compliance Order functionally does more than that. By virtue of issuing the Condition Compliance Order, Commissioner Aho was, in fact, purporting to enforce the Certification and the noise control rules embodied within. The Condition Compliance Order required FIW to take certain actions – that these obligations required FIW to do very little is immaterial to the fact that Commissioner Aho was taking action and was engaging in enforcement. It may well be that the enforcement decision she made will withstand judicial scrutiny, but that must be argued and considered at a later stage of these proceedings.

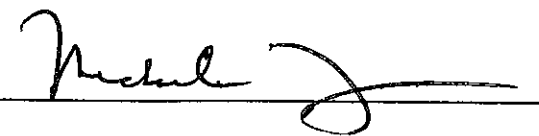
The analysis would potentially be different if the DEP chose not to issue the November 2010 non-compliance letter, but with that action, it found a violation to have occurred and effectively initiated enforcement proceedings. After that finding, submission of a Revised Operation Protocol and approval thereof (via Condition Compliance Order) was the mechanism agreed upon in Condition No. 8. By approving the Revised Operation Protocol, Commissioner Aho was enforcing the Certification.

The entry will be:

The Court DENIES FIW’s motion to dismiss.

3/20/12

DATE



SUPERIOR COURT JUSTICE