

HISTORY OF FOX ISLAND WIND COMPLIANCE ISSUES

1. The license for the Fox Islands Wind Project was issued to Fox Islands Wind (“FIW”), a subsidiary of Fox Islands Electric Cooperative (“FIEC”), by the Maine Department of Environmental Protection (the “DEP”) on June 5, 2009.

2. Prior to the issuance of the License, the DEP had serious concerns about whether the Project could comply with the Noise Rule Sound Level Limits. On May 18, 2009 Warren Brown of EnRad Consulting, an acoustical consultant to the DEP, expressed these concerns. He noted that “[s]ignificant vertical and directional wind shear in the Gulf of Mexico (islands included) is documented for elevations similar to the proposed turbine project” resulting in “sound levels far in excess of (10-12 dBA) of those predicted using standard methods (divergence, air absorption, ground, etc.) under these wind conditions.”

3. On June 1, 2009, Warren Brown issued a report, “Fox Islands Wind Power Noise Impact Assessment—Peer Review” stating these concerns about “significant vertical and directional wind shear”.

4. Based on these findings, the License issued by the Department on June 5, 2009 required FIW to submit to the Department operational compliance assessment methodology for review and approval and stipulated a process for demonstrating revised protocols to ensure that the project will be in compliance at all protected locations surrounding the development, including conditions of “significant vertical and directional wind shear.”

5. Immediately following the issuance of the License, FIW informed the DEP that it objected to several provisions in the License, especially application of the “quiet area” sound level limits. On June 25, 2009, George Baker, CEO of Fox Islands Wind, wrote to DEP Commissioner Littell about this issue, seeking the Commissioner’s political intervention with DEP staff, after Baker had contacted Maine House Speaker Hannah Pingree from nearby North Haven. Commissioner Littell wrote back the next day, pointing out that the licensing was “done at breakneck speed” and that he had previously been involved to help resolve issues with DEP’s licensing staff “to get this permit done at the Speaker’s request”. The Commissioner chided Baker on his claims about noise limits, stating firmly that the Department was required to “apply [] our laws and rules ... based on the best scientific understanding and evidence.”

6. Thereafter Baker/FIW first appealed to the Board of Environmental Protection (BEP) the requirements in its License that the Project would comply with the “quiet area” sound level limits, later withdrawing their appeal when it was clear that the DEP would not be intimidated by the appeal, then filing an application to amend the License to allow the Project to operate with higher sound levels, then withdrawing that appeal when it was clear that the DEP was not going to accept it.

7. The Project began operations on October 30, 2009.

8. Immediately upon the commencement of operations, the Aggrieved Parties, loosely organized as Fox Islands Wind Neighbors (“FIWN”), were subjected to excessive noise

from the Project, notwithstanding the pre-operational assurances given by George Baker, CEO of FIW, that the nearby residents would not hear noise from the Project during normal operations because of masking from ambient background noise.

9. FIWN initially made complaints to FIW and FIEC about excessive noise from the Project.

10. When FIW and FIEC failed to take action to quiet the turbines of the Project, FIWN hired an attorney, Rufus E. Brown Esq., and an acoustical consultant, Rick James, to assist it in bringing the Project in compliance with the DEP Noise Rule and the license of FIW.

11. Upon learning of the engagement of an attorney, FIW stated that it would thereafter refuse to cooperate with FIWN on the issue of compliance. On March 24, 2010, the Chairman of FIEC stated in a letter to a member of FIWN that it would support the decision of FIW not to allow access to sound operations and meteorological data related to the Project because FIWN had hired an attorney.

12. With the assistance of its acoustical engineer, FIWN took sound measurements of noise from the Project on its own and at its expense on March 15-19, 2010. On April 2, 2010, FIWN submitted preliminary findings to the DEP on measurements for the evening of March 18-19, 2010, where readings showed noise exceeding the DEP Noise Rule limits. In connection with this filing, FIWN asked the DEP for assistance in getting meteorological and power output information from FIW. The requested information was never received.

13. On April 30, 2010, FIWN submitted formal complaints about excessive noise from the Project for the evenings of March 18 (complaint # 1), April 23 (complaint # 2) and April 29, 2010 (complaint # 3) together with a request that the DEP require FIW to submit compliance assessment data for the proxy compliance site to ML-A (at the Webster property) as required by paragraph f of the Project's Operational Sound Measurement Compliance Protocol, revised 11/25/09.

14. On May 4, 2010 FIWN submitted complaints for the evenings of April 30 (complaint # 4) and May 2, 2010 (complaint # 5), again requesting compliance assessment data from FIW.

15. On May 4, FIWN submitted additional complaints for April 23 (complaint # 6), April 29 (complaint # 7), April 30 (complaint # 8), May 1 (complaint # 9), May 3 at 5 .00 AM (complaint #10), May 3 at 6:00 AM (complaint # 11), May 4 at 8:00 PM (complaint # 12) and another for May 4 at midnight (complaint # 13). On May 6, 2010, FIWN filed a complaint for May 5, 2010 (complaint # 14). At this point, the DEP asked FIWN to refrain from filing additional complaints pending resolution of those submitted and FIWN complied with this request.

16. In the meantime, FIW resisted requests from the DEP for compliance assessment data, claiming it had "no legal obligation to produce" such data. On May 3, 2010, the DEP made a formal demand for the requested data, threatening enforcement action if FIW remained

noncompliant. A copy of the DEP's May 3, 2010 demand which is attached hereto as *Exhibit A*.

17. On May 10, 2010, FIW's attorneys responded to the DEP demand for compliance data by formulating the position that FIW was not required to submit monitoring data outside of the compliance measurements required by its license for the period May 1 to August 31. FIW claimed that it was "confused" by the request which it understood to have been instigated by a complaint about noise and that it was "not familiar with any requirement" that it submit monitoring data except for the four months identified in its license. Nevertheless, FIW promised to comply to the request in the near future. A copy of FIW's May 10, 2010 letter is attached hereto as *Exhibit B*.

18. On May 13, 2010, FIW sent the DEP compliance assessment data that was so incomplete as to be useless except for one day, April 29, 2010, which confirmed noise in excess of regulatory limits. FIW claimed that the data sent in was contaminated by ambient noise. It also was disclosed that George Baker, a business school professor, was overseeing the data collection, rather than an acoustical expert, in order to "save money."

19. On May 25, 2010, FIWN submitted two additional complaints, concerning noise levels on May 17, 2010 (complaint # 18) and May 24, 2010 (complaint # 19), which were different from previous complaints because they were taken from different locations and had audio to support them.

20. FIWN learned on May 28, 2010 from the DEP that FIW had submitted additional compliance assessment data that was still not in a format that could be analyzed and that the DEP's noise consultant, Warren Brown, was formulating protocols for both citizen complaints as well as for licensee responses to complaints requiring data to be submitted through acoustical engineers.

21. The proposed Complaint Protocols were issued June 23, 2010 and revised on July 8, 2010 after a meeting on July 1, 2010 with the DEP attended to by representatives of FIWN and FIW and Warren Brown. A copy of the Complaint Protocols, as amended on July 8, 2010.

22. FIWN submitted its first complaint under the new Complaint Protocol on July 27, 2010 for the evening of July 17-18, 2010.

23. Under the new Complaint Protocol, FIW was required to submit monitoring data to the DEP within 1 week of the filing of this complaint, but FIW completely ignored the complaint and the newly formulated Protocols involving complaints and then it disputed the requirements in the Protocols for when FIW was supposed to respond to a complaint under the Protocols, requiring still another clarification of the Protocols of August 11, 2010. It took 3 weeks for FIW to submit *partial* data to the DEP in response to the July 17-18 complaint, instead of 1 week which was the clear requirement of the original Protocols.

24. On August 19, 2010, FIWN wrote to the DEP expressing concern and frustration that, after filing 21 complaints over a five month period, FIW had still not given complete compliance assessment data on a *single complaint*, that the FIW turbines were operating as usual

out of compliance with the license conditions and that no enforcement action had been taken by the DEP. FIWN wrote:

If there are to be unlimited delays while FIW refuses or cannot supply information that it is obligated to supply on a timely basis, FIWN asks that the turbines be shut off in the evenings until FIW fulfills its duties. As matters stand, my clients are being asked to suffer complaints, night after night, without any relief and FIW is being allowed to operate outside the law, month after month, with no adverse consequences whatsoever. This is clearly not right or fair to the affected citizens of Vinalhaven.

See *Exhibit C*

25. Finally, on September 8, 2010, six months after FIWN began filing complaints and ten months after FIW began operations with excessive noise, DEP consultant Warren Brown determined that the data from the July 17-18, 2010 complaint demonstrated “a significant body of consistent meteorological and sound data indicating sound levels greater than applicable limits.” He concluded that “[s]ubstantial changes are recommended for FIW nighttime operations, limiting WTG sound levels at ML-A to 45 dBA.” See *Exhibit D*.

26. Thereafter, for the rest of September, 2010, and all of October 2010 and most of November, 2010, the DEP worked to bring FIW into compliance with its permit without success.

27. During this period, on October 21, 2010 and November 15, 2010, FIW made submissions to the DEP purporting to demonstrate compliance with its license conditions by submitting twelve 10-minute measurement intervals between May 1 and August 31 during the inversion period at the approved monitoring site on Vinalhaven for the Project during operating/test conditions identified in the Operational Sound Measurement Compliance Protocol dated November 25, 2009. Since making these submissions, FIW has claimed that it should be deemed in compliance with its license *regardless of the validity of complaints about compliance*. FIW’s position is that if it can show compliance under the conditions specified in its license, it does not have to respond to any complaints that it is not in compliance during other times or conditions. The DEP has never accepted this argument, taking the position that a license must always be in compliance with the Sound Level Limits of the DEP Noise Rule regardless of what the license says about the mechanism for the licensee making submissions to show compliance.

28. Because of the inability of the DEP to obtain the information requested from FIW informally, the Department sent a letter to FIW on November 23, 2010, attached hereto as *Exhibit E*, containing a determination that FIW was not in compliance for the period of July 17-18, 2010 and making a demand on FIW to submit a revised operating protocol that would demonstrate the ability of FIW to operate in compliance with its license conditions at all times.

29. On December 3, 2010, FIW responded to the DEP’s demand letter by contesting the DEP’s conclusion that there had been a showing of non-compliance during the night of July 17-18. However, to demonstrate “good faith,” FIW submitted a proposal to address the claimed

non-compliance by modifying its nighttime operating protocol to reduce sound levels by 2 dBA at the protected location nearest the Project, but only under the precise meteorological conditions that existed during the night when the July 17-18 complaint was made and no others. Also, this proposal was linked to another proposal by FIW to *increase* the sound levels for the Project when wind speeds are above 10 mph. See *Exhibit F*.

30. On December 22, 2010, the DEP requested additional data from FIW on the December 3 proposal of FIW for compliance. See *Exhibit G*. FIW never submitted the information requested by the Department.

31. In January 2011 Darryl Brown was appointed Commissioner of the Department. On January 10, 2011, FIW objected that the information requested by the DEP was not properly limited to data specific to the compliance conditions specified in its license, as to which it maintained it had already demonstrated compliance.

32. Then on January 21, 2011, FIW asked for a 60 day extension, until March 24, 2011, of the deadline for submission of a revised operating protocol to bring the Project into compliance with its license. See *Exhibit H*.

33. On January 26, 2011, the DEP agreed to the requested extension under conditions, including the requirement that FIW submit to the DEP by February 11, 2011 all of the data that the DEP had been requesting. See *Exhibit I*.

34. On February 10, 2011, FIW did not submit the DEP the data that had been requested since December, but rather complained that the DEP had not given enough detail on how it was going to analyze the requested data and complained that it needed more information on the cost of the DEP analysis. See *Exhibit J*.

35. The DEP responded to FIW's objections by email dated February 14, 2011, attached hereto as *Exhibit K*, to which FIW responded with a letter dated February 16, 2011 attached as *Exhibit L*, again objecting to the scope and manner of the DEP's proposed analysis and the cost thereof, demanding that these issues be resolved before it would give the data requested.

36. On February 18, 2011, FIWN's attorney requested a meeting with FIEC and FIW to discuss an interim agreement to turn down the wind turbines of the Project pending resolution of compliance issues between FIW and the DEP in view of the high annoyance and health problems that FIWN members have been experiencing from excessive noise from the Project. Both entities stated that they had no interest in discussing such relief.

37. On March 7, 2011, in an internal email attached hereto as *Exhibit M*, DEP regulators concluded it was "fruitless to continue discussions with [FIW] about submitting data to us for further analysis.

38. On March 9, 2011 the DEP wrote FIW expressing regret about the refusal of FIW to cooperate in supplying data that would allow the DEP to work with FIW to formulate an

appropriate revised protocol to address vertical and directional wind shear to bring the Project in compliance with its license. The letter stated that the DEP would allow FIW to submit its proposed revised protocol without the benefit of the DEP input, but warned that the DEP had determined that the reason FIW was out of compliance on July 17-18, 2010 was the presence of vertical and directional wind shear and that data must be produced by FIW to assess how FIW should respond to such conditions to assure compliance. The DEP letter also clearly staked out the position of the DEP that FIW was required to be in compliance at all times, not just for certain conditions specified in its license as those which the licensee was required to address in a compliance report. See *Exhibit N*.

39. On March 21, 2011, FIWN representatives and their attorney travelled to Augusta for a scheduled meeting with then DEP Commissioner Darryl Brown. Commissioner Brown did not appear for the meeting, but later met with FIW and their attorneys on March 24, 2011. At that meeting, then Commissioner Brown overrode the position of the DEP's professional staff and expert consultant and stated that the DEP would accept a revised protocol that was limited to the specific conditions giving rise to the July 2010 complaint without addressing non-compliance caused by wind shear in other conditions. This position was set forth in a letter from the DEP to FIW dated March 25, 2011, attached hereto as *Exhibit O*. In this letter the DERP stated that FIW must submit a revised protocol by April 11, 2011.

40. On April 11, 2011 FIW submitted the same revised protocol that had been rejected by the DEP in December 2010. See *Exhibit P*.

41. In response, the DEP sent a Draft Order dated April 28, 2011 setting forth revised protocols that the DEP considered necessary to address non-compliance by FIW. See *Exhibit Q*. The DEP Draft Order contained an Appendix A setting forth a Operational Sound Measurement Assessment Plan determined by DEP staff to be necessary to ensure that future operation of the facility were conducted in a manner that was compliant with the permit and the DEP noise rules.

42. On or about April 27, 2011 Darryl Brown resigned as Commissioner of DEP and was replaced by Acting Commissioner James Brooks.

43. On May 2, 2011 FIW met with Acting Commissioner Brooks and staff, expressing displeasure with Appendix A, claiming it was unreasonable. FIW informed the DEP that the DEP Draft Order is "unworkable" and it did not intend to agree to it. Acting Commissioner Brooks decided that he needed time to understand the issues and deferred action.

44. On May 13, 2011 FIWN's counsel met with Acting Commissioner Brooks to review the course of the contentious conduct of FIW in its refusal to cooperate on noise compliance issues and to urge the Acting Commissioner to resist FIW's attempts to seek political interference with DEP's professional staff on compliance issues.

45. On May 23, 2011, FIW informed the DEP that it rejected in its entirety the draft Assessment Plan and the draft Complaint Protocol prepared by DEP staff.

46. Shortly thereafter, Acting Commissioner Brooks informed staff he had discussed

the matter with the Governor's Office and based on guidance he received, he directed DEP staff to review the plan to remove shutdown provisions and make the draft more palatable to FIW. (Affidavit by James Cassida, page 5). Staff reworked Appendix A and the Condition Compliance Order "without sacrificing the requirement that FIW effectively demonstrate future compliance through procedures that would allow the Department to meaningfully assess compliance."

47. On June 3, 2011 FIWN's attorney wrote Acting Commissioner Brooks, complaining about these changes and stating that "[i]t appears that changes were made to the Draft Order, including the elimination of the critical shutdown provisions, as a result of FIW's approach to the Governor asking for political intervention, the very risk I anticipated when we met on May 13."

48. On June 9, FIW met again with Acting Commissioner Brooks and staff to discuss the compliance provisions. FIW steadfastly refused the compromise document and stated it was directly contrary to the arrangement they had made with former Commissioner Darryl Brown. During the meeting, Acting Commissioner Brooks pulled George Baker, FIW, into a private meeting to discuss the impasse. After the private session the full meeting was adjourned and Acting Commissioner Brooks notified the group that he would be making a ruling within the next several days.

49. Shortly after this meeting, on or about June 20, 2011, Acting Commissioner Brooks resigned from the Department after more than two decades of service with the DEP and was replaced by Acting Commissioner Patty Aho, who had joined the LePage Administration only a few months earlier as Deputy Commissioner after working as a lobbyist for the law firm Pierce Atwood, the same law firm representing FIW.

50. In June, 2011 FIW commenced installing turbine blade "modifications" at Vinalhaven.

51. On June 17, a DEP staff by memo "strongly encourage[d]" Acting DEP Commissioner Aho to authorize the issuance of Appendix A drafted by DEP staff in its entirety.

52. On June 30, 2011, over the objection of DEP professional staff, and in direct contradiction of the findings in the November Determination of Non-Compliance Letter, Acting Commissioner Aho issued a Compliance Order limited to only corrective actions for conditions that existed on July 17-18 2010 and accepted FIW's limited modifications to the existing Compliance Assessment Plan and Compliant Protocol twice earlier rejected by the DEP as insufficient to assure compliance in the future. Staff considered "this proposed action an abdication of the Department's responsibilities with regard to compliance by FIW with the terms of its License and the DEP Noise Rule and "patently unfair to the citizens of Vinalhaven who had raised legitimate concern about noise compliance."

53. On July 28 2011, Fox Islands Wind Neighbors petitioned the Superior Court to review the Compliance Order issued by Acting Commissioner Aho alleging that the Order was politically motivated and issued over strong objections of the Department's professional staff.

Individual petitioners are Barbara Santa Coloma, Alan Farago, Arthur Farnham, William Haible, William Haley, Art Lindgren and Cheryl Lindgren.

54. On August 16, 2011, FIW filed with the court to dismiss the Petition for Review for lack of jurisdiction.

55. On March 8, 2012 the Motion to Dismiss will be heard by Judge Michaela Murphy in Kennebec Superior Court at 9 AM.