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RUFUS E. BROWN  
M. THOMASINE BURKE

April 18, 2012

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

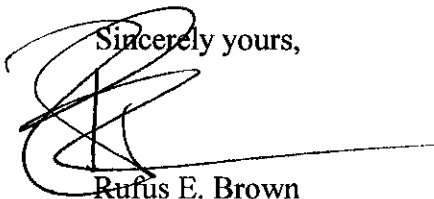
*Re: Fox Islands Wind Neighbors v. Maine Department of Environmental Protection  
Civil Docket No. AP-11-42*

Dear Michele:

Enclosed for filing is Petitioners' Objection to Respondent's Motion for Reconsideration.

Thank you for your assistance.

Sincerely yours,



Rufus E. Brown

REB/encl.

cc. Amy Mills, AAG  
Catherine Connors, Esq.

STATE OF MAINE  
KENNEBEC, ss

SUPERIOR COURT  
CIVIL ACTION  
Docket No. AP-2011-42

FOX ISLANDS WIND NEIGHBORS, et al.,	)	
	)	
PETITIONERS	)	
	)	<b>PETITIONERS' OBJECTION</b>
v.	)	<b>TO RESPONDENT'S</b>
	)	<b>MOTION FOR</b>
MAINE DEPARTMENT OF ENVIRONMENTAL	)	<b>RECONSIDERATION</b>
PROTECTION,	)	
	)	
RESPONDENT	)	

Petitioners object to Respondent Department of Environmental Protection's Motion for Reconsideration of this Court's March 20, 2012 Order denying the Motion to Dismiss in this case. The basis for the Motion for Reconsideration is that Petitioners lack standing to seek judicial review of the Condition Compliance Order at issue. For this proposition, the DEP relies on a one page opinion in *Great Hill Fill & Gravel v. Board of Environmental Protection*, 641 A.2d 184 (Me. 1994). The Petitioners in this case, unlike the appellant in *Great Hill*, clearly have standing.

In *Great Hill*, an adjoining commercial property owner sought to appeal a consent agreement between the Department of Environmental Protection and the operator of a sand and gravel pit that did not have a license required for this activity. The basis for the objection was that the consent agreement did not require any reclamation. The decision does not reveal that Great Hill would be affected in any way by the absence of a requirement for reclamation. Accordingly, the Law Court concluded that Great Hill did not have standing because "at most [it was] only indirectly affected" by the consent agreement between Shapleigh, the person who operated a sand and gravel pit without a permit, and the DEP that was the subject of the appeal.

*Great Hill, supra*, 641 A.2d at 184. According to the Law Court, Great Hill’s “rights and responsibilities were unchanged by the Board’s decision.” The Law Court stated that a person must have a “particularized injury” to have standing affecting a person’s “property, pecuniary or personal rights,” as opposed to a mere “abstract injury.” *Id.*<sup>1</sup>

The principal case cited in *Great Hill* for the requirement of “particularized injury” is *Anderson v. Swanson*, 534 A.2d 1286 (Me. 1987). In *Anderson*, the Court explained that “[i]t is well established that this Court has ‘not required a high degree of proof of particularized injury,’” quoting from *Grand Beach Ass’n v. Old Orchard Beach*, 516 A.2d 551, 553 (Me. 1986). This low threshold is especially applicable to abutting property owners. *Anderson* explained that “[w]hile we have not as yet declared that any abutting property owner has a potential for injury sufficient to confer standing, we have on many occasions found such a relationship sufficient in combination with an additional allegation of injury.” *Id.* at 1288, citing, inter alia, *Singal v. City of Bangor*, 440 A.2d 1048, 1051 (Me. 1982) (“neighborhood resident had standing because of potential noise and depreciation of property value”). *Id.* See also, *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶18, 973 A.2d 735, 740-41, stating that “we have held that in the context of disputes involving an abutting landowner, the threshold for demonstrating a particularized injury is minimal,” citing *Roop v. City of Belfast*, 2007 ME 32, ¶8, 915 A.2d 966, 968. All that is required is that the abutter claims an injury or harm distinct from the public at large. *Nergaard, supra*, 2009 ME at ¶18, 973 A.2d at 740. *Accord, Nelson v.*

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<sup>1</sup> The Respondent Department appears to be taking the position that *Great Hill* also required that Petitioners allege a “direct, legal relationship” with Party in Interest Fox Islands Wind in addition to particularized injury in order to have standing. If this indeed is Respondent’s position, it is unwarranted. Standing could ride on such a relationship, but it is not a prerequisite if particularized injury is otherwise alleged. The Supreme Court case cited in *Great Hill* in connection with the Law Court’s reference to legal relationships, *Aetna Life Ins. Corp. v. Haworth*, 300 U.S. 227, 240-42 (1937), discusses the requirement for a justiciable “case or controversy” in order for a court to exercise jurisdiction as opposed to hypothetical questions. The Law Court in *Great Hill* was simply making the point that it would not adjudicate an “abstract injury,” namely one where no particularized injury is alleged.

*Bayroot*, 2008 ME 91, ¶10, 953 A.2d 378, 382; *Proctor v. County of Penobscot*, 651 A.2d 355, 357 (Me. 1994).

There is nothing in *Great Hill*, any case cited in *Great Hill* or in any case cited by the Respondent Department or by Party in Interest Fox Islands Wind that suggests that the standing requirement with regard to consent agreements or other forms of compliance actions are measured by a different requirement. To the contrary, earlier in these proceedings the Respondent Department represented to this Court that, but for the limitations in the small-scale certification statute, 35-A M.R.S.A. §3456, the Condition Compliance Order at issue here would have been subject to judicial review, citing *Friends of Lincoln Lakes v. Department of Environmental Protection*, Maine Supreme Judicial Court, Mem. Dec. Docket No. BEP-10-655 (June 6, 2001) (attached hereto as Exhibit A). Department's Memorandum in Response to Motion to Dismiss, dated September 23, 2011, at N. 6 at 6 and N.7 at 7. The Department's oversight of the certification statute, according to Respondent, is why Petitioners were notified of their appeal rights when the Condition Compliance Order was issued. *Id.* The Department's arguments now pressed to this Court in its Motion for Reconsideration are squarely contradicted by its earlier position and should not now be entertained by this Court.

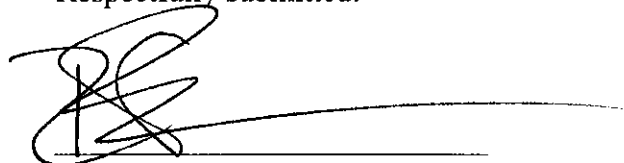
In any event, in this case, Petitioners are abutters and have claimed "particularized injury" from the Condition Compliance Order under review. They are aggrieved in a substantial and real world sense. To begin with, the Order specifically targets them, by directly imposing on them expensive, technical requirements before any of their noise complaints will be processed by the DEP. This Order robs Petitioners of rights possessed by all other citizens of this State living near wind projects. Further, the Order insulates the FIW wind project from compliance with the provisions of the BEP Noise Rule, incorporated into the small scale certification statute,

designed specifically to protect Petitioners, their health and their enjoyment of their property and the value of their properties. The record in this case will reveal that Petitioners have suffered from the operations of the FIW project out of compliance with the law, causing serious health problems, annoyance and loss of property value. The terms of the Condition Compliance Order are designed to assure FIW that it can continue to operate free of accountability for compliance with the noise regulations, at the expense of Petitioners, and indeed was created for the specific purpose of protecting FIW from future complaints of the Petitioners. It is difficult to understand how much more particularized an injury needs to be than that present in this case for purposes of standing.

Petitioners urge the Court to deny the Motion for Reconsideration because petitioners clearly have standing to bring this case.

Dated: April 18, 2012

Respectfully submitted.



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