BROWN & BURKE
ATTORNEYS AT LAW
152 Spring Street- P. O. BOX 7530
PORTLAND, MAINE 04112
TELEPHONE: 207-775-0265

RUFUS E. BROWN
M. THOMASINE BURKE

EMAIL: RBROWN@BROWNBURKELAW.COM
EMAIL: TBURKE@BROWNBURKELAW.COM

September 11, 2014

HAND DELIVERED
Matthew E. Pollack
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street, RM 139
Portland, ME 04101-4125

Re: Fox Islands Wind Neighbors v. Department of Environmental Protection, Dkt No. Ken-14-137

Dear Matt:

I am enclosing for filing the original and nine copies of the Reply Brief of Petitioners-Cross-Appellees Fox Islands Wind Neighbors.

Thank you for your assistance.

Sincerely

Rufus E. Brown

REB/
cc. Gerald D. Reid, AAG, with attachments
Catherine R. Connors, Esq. with attachments
David Webbert, Esq. with attachments
Zachery Heiden, Esq., with attachments

STATE OF MAINE, ss

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. KEN-14-137

FOX ISLANDS WIND NEIGHBORS, et al.,

Petitioners- Appellees/Cross-Appellants

v.

MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents-Appellants/Cross-Appellees

and

FOX ISLANDS WIND, LLC

Party-in-Interest- Appellant/Cross Appellee

REPLY BRIEF OF APPELLEES FOX ISLANDS WIND NEIGHBORS, et al.

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

Rufus E. Brown, Esq.
Bar No. 1898
BROWN & BURKE
152 Spring Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775-0265
rbrown@brownburkelaw.com

Attorney for Appellees
Fox Islands Wind Neighbors, et al.

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Fox Islands Wind Neighbors, et al. (the "Neighbors") reply to the arguments of Respondents Maine Department of Environmental Protection (the "DEP") and Fox Islands Wind, LLC ("FIW") on the cross- appeal made in their respective Reply Briefs at 10-20 and 16-20, as follows:

ARGUMENT

I. THE SUPERIOR COURT ERRED IN DISMISSING THE NEIGHBORS' SECTION 1983 CLAIM AS BEING DUPLICATIVE OF STATE LAW REMEDIES.

A. Petitioners did not Waive their Section 1983 First Amendment Retaliation Claim.

The DEP Reply Brief asserts, albeit in a footnote, at 10, N. 5, that the Neighbors waived their Section 1983 First Amendment retaliation claim by not raising it at the administrative level. *See also*, FIW Reply Brief at 16-17.

This argument disregards the administrative record relating to this issue which makes clear that there was no opportunity for the Neighbors to raise the issue with Acting Commissioner Aho before she issued the Condition Compliance Order (the "CCO"). The CCO at issue in this appeal was promulgated on June 30, 2011. JA 89. 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. JA 257. The Neighbors' counsel was not informed of the possibility that a CCO might be issued without "Appendix A" until June 22, 2011. *See*, email from James Cassida to the Neighbors' counsel dated June 22, 2011. JA 259. *See also*, email from counsel to James Cassida on June 20, 2011. JA 258 ("where do we stand on Vinalhaven?"). The Neighbors' counsel immediately contacted the DEP project manager, Daniel Courtemanch, to inquire as to

who would make the final decision on the CCO and he could not say for certain. *See,* emails of the Neighbors' counsel to Daniel Courtemanch dated June 22-23, 2011. JA 261. The Neighbors' counsel tried to schedule a meeting with Acting Commissioner Aho before the CCO was issued. *See id.* and JA 263, 264, and 279. Acting Commissioner Aho never responded. Neither she nor anyone in the DEP sent the Neighbors' 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 the Neighbors' failed to preserve their Section 1983 First Amendment constitutional claims, hardly seems credible.

Moreover, the DEP's waiver claim is based on the failure to exhaust their administrative remedies. *New England Whitewater Center v. Dep't Inland Fisheries and Wildlife*, 550 A.2d 56, 59-60 (Me. 1988) (the waiver rule is "premised on the exhaustion of administrative remedies"). However, the Supreme Court long ago declared that in non-procedural Due Process cases 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*.).

B. A Section 1983 Action for First Amendment Retaliation is not Precluded by the Adequacy of Available State Court Remedies.

Recognizing that Supreme Court precedence clearly preserves the rights of litigants to proceed with Section 1983 cases regardless of the availability of state court remedies except in Procedural Due Process Claims, *see* the Neighbors' Red Brief at 41-4 and Amicus Brief, and that

this Court has allowed Section 1983 claims to proceed in a First Amendment case, regardless of remedies under Rule 80C, *Wyman v. Secretary of State,* 625 A.2d 307 (Me. 1983), both the DEP, in its Reply Brief at 11-12, 17-8, and FIW, in its Reply Brief at 17-19, re-characterize the Neighbors' First Amendment retaliation claim pled in Count III as a Procedural Due Process claim. The obvious problem with this argument is that Count III and the record and argument supporting it are based on the First Amendment, not Due Process. The only rationale for calling a First Amendment claim a Due Process claim in disguise is the reference to the Governor' Office in Count III, paragraph 97, JA 85, which the DEP and FIW take to mean bias which they say equates to Procedural Due Process. The logic of this equation is too attenuated to be credible. The role of the Governor's Office is completely superfluous to the essence of the retaliation claim in this case. If retaliation can be found, as it can, it makes no difference if it came from FIW with the aid of the Governor's Office or from FIW without the Governor's office or from the DEP alone. The right sought to be vindicated in Count III arises from the protections of the First Amendment to petition for the redress of grievances free of retaliation. This is a core protection of the Bill of Rights, *see* Red Brief at 44, and is not subsumed by state law remedies for bias or the procedural Due Process Clause.

Nor, despite the DEP claims to the contrary, are the remedies available to Petitioners under Rule 80C adequate. As explained in the Neighbors' Red Brief at 44, N. 41, Rule 80C relief is inadequate because it does not itself allow for an award of attorney's fees and because it does not allow for the exercise of plenary jurisdiction by the Superior Court. The latter point is critical because, under Section 1983, the state cannot limit the record to the administrative record. Under Section 1983, the Neighbors have the right, through discovery and testimony at trial, to persuade the Superior Court, as the fact finder, that the conduct of Acting Commissioner

Aho was substantially influenced by the motive to burden, if not prevent altogether, the Neighbors from persisting with their complaints of excessive noise. Even if the Rule 80C record does not adequately support retaliation, which it does, at this stage under Section 1983 all the Neighbors need to establish is that it has made a plausible claim for retaliation. Finally, the DEP's assertion that there is no constitutional significance to its claim that 35-A M.R.S.A. §3456(2) precludes the Neighbors from obtaining judicial review under Rule 80C, DEP Reply Brief at 11, N. 6, points to another reason why Rule 80C is not adequate. If the Neighbors' Rule 80C appeal were precluded by 35-A M.R.S.A. §3456(2), which it is not for reasons previously explained, a First Amendment retaliation claim would still be available under Section 1983.

II. THE SUPERIOR COURT ERRED IN RULING THAT THE NEIGHBORS FAILED TO ESTABLISH A FIRST AMENDMENT RETALIATION CLAIM UNDER RULE 80C.

The DEP Reply Brief makes various arguments in support of its position that the Superior Court correctly dismissed the Neighbors' Rule 80C claim for First Amendment retaliation at 12-17, *see also* FIW Reply Brief at 19-20, none of which are valid.

The parties agree to the three part test for establishing a First Amendment claim set forth in the DEP Reply Brief at 12 and that the Neighbors' have satisfied the first prong of it, asserting conduct protected by the First Amendment in the form of petitions to the DEP for the redress of grievances about excessive noise generated by FIW. DEP Brief at 14. So the issues in dispute are whether the Neighbors suffered "adverse action" from the CCO and whether the exercise by the Neighbors' of protected conduct was a "substantial factor" in motivating Acting Commissioner Aho' s adverse action. [1]

A. The Neighbors' Suffered Adverse Action.

[1] The DEP also claims in perfunctory terms that there was a "non-retaliatory basis" for the adverse action in dispute, which does not need comment as it points do not fairly address the actual basis for the retaliation claim.

The DEP Reply Brief at 12-13 asserts that the Neighbors cannot demonstrate adverse action without proof of "chill", citing *Creamer v. Sceviour*, 652 A.2d 110 (Me. 1995), asking this Court to ignore a string of Second Circuit cases, beginning with *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994), holding that in some limited contexts non-speech injuries are sufficient to show adverse action. In making this argument the DEP overlooks the fact that the principal First Circuit case it cites for the elements of a First Amendment retaliation in the context of a land use dispute, *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32 (1st Cir. 1992), did not require allegations of chill. *See also, Welsh v. Pacios*, 66 F.Supp.2d 138, 172 (D. Ma. 1999) (protracted delay in a land use case may "amount[] to a denial and therefore an adverse action"). At least in the context of a First Amendment land use case that is conduct based (petition for grievances), where there is other proof of "tangible ... concrete harm," the better rule is that standing should be satisfied for First Amendment retaliation cases without proof of chill. *Zherka v. Amicone*, 634 F.3d 642, 646 (2d Cir. 2011).

In any event, the Neighbors' First Amendment retaliation case does not turn on whether it is necessary to allege and prove chill because the Neighbors have done both. For reasons previously explained, the CCO issued by Acting Commissioner Aho granted FIW a *de facto* exemption from the Noise Rule. It did so by ordering corrective action only for those meteorological conditions that existed at the time of the complaint, without any requirement that FIW address other conditions likely to cause excessive noise. It did so by not requiring FIW to affirmatively demonstrate compliance with independently verifiable data while at the same time acceding to FIW's refusal to provide transparency in its operations with regard to noise. And it did so, by formally adopting a complaint protocol, of a kind never imposed on affected neighbors in any other wind project in the State, requiring the Neighbors to submit technical data and

analysis beyond their means to do, failing which the DEP will not investigate a complaint. JA 281. This regulatory structure constitutes an insurmountable barrier, "chill", to pursuit of future grievances initiated by the Neighbors. This is so not only because of the expense hiring an expert to analyze technical data, but also because of the futility of filing a complaint. The Neighbors do not have access to full, objectively verifiable, compliance data (sound, operational and meteorological data) necessary to make its case and the DEP has declared that it will not impose on FIW the requirement that it make such information fully available because of the expense to FIW, even though FIW is a utility that has the full resources of a ratepayer base.

The DEP's response to this demonstration of chill, DEP Reply Brief at 14-15, is to recast the administrative record as more benign, ceding adverse action to the extent that the Neighbors have fairly demonstrated the impact of the CCO on them. The DEP claims the CCO has no adverse impact on the Neighbors because it was "not an action taken against FIWN." DEP Brief at 14. *See also,* FIW Reply Brief at 19. This assertion ignores the reality that the CCO was designed by both the DEP and FIW to insulate the wind project from the expense to FIW of on-going accountability to a Noise Rule and that the CCO has the effect, if not the purpose, of depriving the Neighbors of the benefits of the Rule's purpose of protecting the health of the Neighbors. There would not have been a CCO in the first place but for the efforts of the Neighbors to demand protections of the law and, based on the response of the DEP to these complaints, there will not be another without the intervention of this Court.

B. The Exercise by the Neighbors of their First Amendment Rights was a Substantial Factor Motivating the Adverse Action.

The DEP Brief at 15-17 argues that the "substantial factor" prong of the Neighbors' retaliation claims fails because nothing more has been shown except for the Governor's interest in communicating his policy preferences and that the DEP took action that was unsatisfactory to

the Neighbors. Again, this response is meaningless unless this Court accepts the DEP's version of the entire dispute.

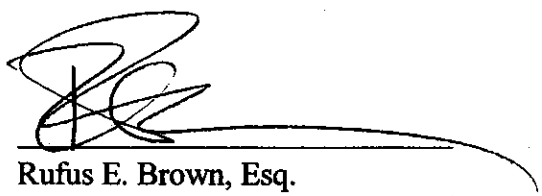
On the specific point of motivation, the record is clear. It starts with FIW, driven by its desire to silence the Neighbors who have "ceaselessly demanded" that FIW operate in compliance with the Noise Rule. With the new Administration, eventually leading to a "highly compromised" Acting Commissioner, FIW found a sympathetic ear. The result, as the DEP now concedes, was an *agreement*, DEP Reply Brief at 7, between Acting Commissioner Aho and FIW on the form of the CCO that was acceptable to FIW. It was FIW that persuaded former Commissioner Darryl Brown to agree to limit the corrective operations required of FIW to only those meteorological conditions prevailing during the July 2010 complaint, the Neighbors' Red Brief at 12, subsequently agreed to by Acting Commissioner Aho. It was FIW that obtained the agreement of Acting Commissioner Aho to incorporate the complaint protocol into the CCO, neutralizing any future complaints by the Neighbors, JA 129, a protocol never used for any other wind project in the State, and regarded by the DEP senior professional staff responsible for all wind projects as "patently unfair and inappropriate." JA 245. It was FIW which obtained the agreement of Acting Commissioner Aho to reject any version of "Appendix A" prepared by senior staff as critical to the regulation of FIW in light of the non-compliance and the belligerent refusal of FIW to cooperate in response to the finding of non-compliance. JA 159. It was FIW alone which had the opportunity to suggest wording changes personally to Acting Commissioner Aho on the draft CCO that it had agreed to. FIW AR 150, Pet. App. 344. In sum there was agreement between Acting Commissioner Aho and FIW on every single element of the governmental action challenged in this case. The motivation that drove the agreement infused the act itself. This direct evidence of motivation, together with the indirect indicia of retaliatory

motive described in the Neighbors' Red Brief at 48-9, easily satisfies the "substantial factor" element.[2]

CONCLUSION

For the reasons stated above, together with those set forth in the Neighbors' Red Brief at 41-9, the Neighbors respectfully request this Court to rule for the Neighbors on their Cross-Appeal and overturn the rulings of the Superior Court in this case dismissing the Neighbors' Section 1983 and Rule 80C claim for First Amendment retaliation.

Dated: September 11, 2014



Rufus E. Brown, Esq.
State Bar No. 1898
BROWN & BURKE
152 Spring Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775- 0265
rbrown@brownburkelaw.com
Attorney for the Fox Islands Wind Neighbors and the Individual Petitioners

[2] FIW argues in its reply Brief at 20 that the Neighbors did not allege that the DEP issued the CCO in relation for FIWN's complaints. This is not true. See Amended Complaint, JA 61, at paragraph 98.

CERTIFICATE OF SERVICE

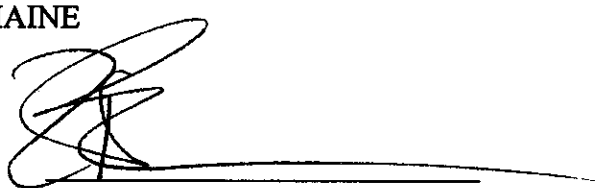
The undersigned, attorney for Petitioners-Appellees- Fox Islands Wind Neighbors, et al., does hereby certify that service of two copies of the foregoing Reply Brief was made on Respondent Maine Department of Environmental Protection, Party In Interest Fox Islands Wind, LLC and Amici by letter dated September 11, 2014, First Class Mail, postage prepaid, addressed as follows:

Respondent-Appellant/Cross-Appellee
Department of Environmental Protection
Gerald Reid, AAG
Office of the Attorney General
State House Station 6
Augusta, ME 04333

Respondent-Appellant/Cross-Appellee
Fox Islands Wind, LLC
Catherine R. Connors, Esq.
PIERCE ATWOOD
Merrill's Wharf
254 Commercial Street
Portland, ME 04101

David G. Webbert, Esq.
Roberta L. de Araujo, Esq.
JOHNSON, WEBBERT & YOUNG
P.O. Box 79
Augusta, ME 04332-0079

Zachary L. Heiden, Esq.
AMERICAN CIVIL LIBERTIES UNION OF MAINE
121 Middle Street, Suite 301
Portland, ME 04101



Rufus E. Brown, Esq.
State Bar No. 1898
BROWN & BURKE
152 Street - P.O. Box 7530
Portland, ME 04112-7530
(207) 775-0265
rbrown@brownburkelaw.com